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WAIVER OF JURY TRIALS IN FEDERAL CRIMINAL CASES: A REASSESSMENT OF THE "PROSECUTORIAL VETO"

INTRODUCTION

The jury trial guarantee¹ carefully guards the constitutional rights of the accused.² Nonetheless, in certain circumstances, a jury might be "positively detrimental to the defendant."³ Jurors may be prejudiced against the defendant by massive pretrial publicity,⁴ the particularly heinous nature of the crime charged,⁵ or by characteristics of the defendant such as race, religion or prior criminal record.⁶ Voir dire

1. The defendant in a criminal prosecution has a constitutional right to a trial by jury. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."). The right to a trial by jury, however, does not extend to "petty offences." *Schick v. United States*, 195 U.S. 65, 68 (1904); see 2 C. Wright, *Federal Practice and Procedure* § 371, at 294 (2d ed. 1982). The sixth amendment right to a jury trial has been incorporated in the fourteenth amendment, and thus must be provided by the states. *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

The defendant in a federal prosecution also has the right to procedural due process, guaranteed by the fifth amendment. U.S. Const. amend. V; see L. Tribe, *American Constitutional Law* § 10-7, at 501-02 (1978). States must also provide procedural due process. U.S. Const. amend. XIV, § 1. See generally L. Tribe, *supra*, § 10.7, at 501-02 (discussion of scope of fourteenth amendment right to due process). The Supreme Court has stated that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). If the defendant's request to waive his right to a jury trial is denied and the ensuing trial is unfair, the defendant's right to due process will have been violated. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). In analyzing whether a denial of a requested waiver would violate the defendant's right to due process, this Note refers to the defendant's right to a fair trial.

2. See *Duncan v. Louisiana*, 391 U.S. 145, 149, 155-56 (1968); *Irvin v. Dowd*, 366 U.S. 717, 721 (1961). See generally 5 J. Moore, *Federal Practice* ¶ 38.02, at 38-14 to 38-15 (2d ed. 1982) (discussion of the role of the jury in our justice system).

3. Oppenheim, *Waiver of Trial by Jury In Criminal Cases*, 25 Mich. L. Rev. 695, 696 (1927).

4. See *infra* notes 19-20 and accompanying text.

5. See *infra* note 23 and accompanying text.

6. See, e.g., *United States v. Ceja*, 451 F.2d 399, 400 (1st Cir. 1971) (per curiam) (ethnic prejudice); *State v. Kilburn*, 304 Minn. 217, 232-33, 231 N.W.2d 61, 69 (1975) (Otis, J., dissenting) (racial prejudice); Brief for Appellant at 25-27, *United States v. Moon*, No. 82-1275 (2d Cir.) (religious prejudice); Comment, *Jury Trial in Minnesota—Right or Obligation?*, 60 Minn. L. Rev. 759, 762-63 (1976) (arguing that a defendant should have an absolute right to waive his jury trial right in situations involving inherent racial bias); 26 Ill. L. Rev. 85, 85-86 (1931) (jury prejudice based on "race, color and religion"). Many waivers have been requested on the basis that disclosure of the defendant's prior criminal record would prejudice the jury against the defendant. See, e.g., *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972) (inherent nature of crime charged, instigation of prison riot, indicated that defendant was convicted felon), *cert. denied* at 409 U.S. 888 (1972) and at 410 U.S. 912 (1973); *United States v. Harris*, 314 F. Supp. 437, 437 (D. Minn. 1970) (long

has proven to be an ineffective means of rooting out all juror bias.⁷ Moreover, the factual and legal intricacies of a particular case may render a jury incapable of providing a fair trial.⁸ A jury trial may also impose inordinate time and expense for both the defendant and the public.⁹ Consequently, a defendant should be permitted to waive his right to a jury trial in certain situations.

Rule 23(a) of the Federal Rules of Criminal Procedure (FRCP) provides that "[c]ases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."¹⁰ In upholding the

criminal record, including conviction for manslaughter; also, defendant was wanted in other states for same type of crime as in principal case); *United States v. Schipani*, 44 F.R.D. 461, 462-63 (E.D.N.Y. 1968) (waiver granted to avoid prejudicial effect of disclosing defendant's prior criminal record), *aff'd on other grounds*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Physical and mental problems of the defendant may also prejudice the jury. *See United States v. Harris*, 314 F. Supp. 437, 437 (D. Minn. 1970) (drug addiction); *State v. Linder*, 304 N.W.2d 902, 904 (Minn. 1981) (paranoid schizophrenia).

7. Donnelly, *The Defendant's Right to Waive Jury Trial In Criminal Cases*, 9 U. Fla. L. Rev. 247, 248 (1956); Note, *Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure*, 65 Yale L.J. 1032, 1037 (1956) [hereinafter cited as *Government Consent to Waiver*]. *See infra* notes 36-43 and accompanying text.

8. *United States v. Braunstein*, 474 F. Supp. 1, 14 (D.N.J. 1979); *see Duncan v. Louisiana*, 391 U.S. 145, 188-89 (1968) (Harlan, J., dissenting); *United States v. Panteleakis*, 422 F. Supp. 247, 249 (D.R.I. 1976). *See infra* notes 21-22 and accompanying text. In complex federal civil cases, many courts have held that a party is not entitled to a jury trial, based on different rationales. In *Ross v. Bernhard*, 396 U.S. 531 (1970), the Supreme Court stated in a footnote that in determining whether an action is legal or equitable, "the practical abilities and limitations of juries" should be considered. *Id.* at 538 n.10. It follows from this footnote that complexity may render a case equitable, making the seventh amendment right to a jury trial inapplicable. *See Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59, 67-71 (S.D.N.Y. 1978). For a discussion of the proper weight to be afforded the *Ross* footnote, *see C. Wright, The Law of Federal Courts* § 92, at 614-16 (4th ed. 1983). In *In re Japanese Elec. Prod. Antitrust Litig.*, 631 F.2d 1069 (3d Cir. 1980), the court ruled that due process objections to a jury trial must be weighed against the seventh amendment right to a jury trial of the party requesting it. *Id.* at 1086. A commentator has suggested that the seventh amendment right to a jury trial should not apply to complex civil cases. *See Kirkham, Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 207-09 (1976). *But see In re United States Fin. Sec. Litig.*, 609 F.2d 411, 431 (9th Cir. 1979) (no complexity exception to seventh amendment right to jury trial), *cert. denied*, 446 U.S. 929 (1980); *Kian v. Mirro Aluminum Co.*, 88 F.R.D. 351 *passim* (E.D. Mich. 1980) (same).

9. *See infra* notes 89-94, 115-20 and accompanying text.

10. Fed. R. Crim. P. 23(a). Many states also require consent of the prosecutor and the court. *See Note, Criminal Jury Trials in Iowa: A Time for Revision*, 31 Drake L. Rev. 187, 208-14 app. (1981) [hereinafter cited as *Criminal Jury Trials in Iowa*]; *see, e.g.*, Ind. Code Ann. § 35-37-1-2 (Burns Supp. 1982); Tex. Code Crim. Proc. Ann. art. 1.13 (Vernon 1977); Wis. Stat. Ann § 972.02 (West 1971 & Supp. 1982). Many states have adopted a less restrictive approach than the federal rule. *See Criminal Jury Trials in Iowa, supra*, at 208-14 app. (survey of state rules for jury trial

validity of this Rule in *Singer v. United States*,¹¹ the Supreme Court rejected the claim that the defendant has a right to a trial before a judge.¹² Additionally, the Court, relying on the integrity of the prosecutor as a "servant of the law," did not require the prosecutor to articulate his reasons for withholding consent to a defendant's requested waiver.¹³

The Court did note, however, that in some situations "a defendant's reasons for wanting to be tried by a judge alone [might be] so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial."¹⁴ Most lower federal courts have interpreted this dicta as allowing a court¹⁵ to override a

waivers). Some states permit the defendant to choose between a bench and jury trial. Colo. Rev. Stat. § 18-1-406 (1973) (defendant has absolute right to waive except in capital cases); Conn. Gen. Stat. § 54-82 (1981) (defendant has absolute right to waive; three-judge panel will try cases involving a possible death penalty or life sentence); Ill. Ann. Stat. ch. 38, ¶ 103-6 (Smith-Hurd 1980) (only requirement is that the defendant "understandingly" waive jury trial in open court); La. Code Crim. Proc. Ann. art. 780 (West 1981) (defendant has absolute right to waive in non-capital cases if knowingly and intelligently made); Mich. Comp. Laws Ann. § 763.3 (West 1982) (absolute right to waive, must be in writing except in minor offenses); N.H. Rev. Stat. Ann. § 606:7 (1974) (defendant has absolute right to waive in non-capital cases if in writing and if any other defendants also waive before jury is impaneled); Iowa R. Crim. P. 16.1 (defendant has absolute right to waive provided he does so within thirty days of arraignment; thereafter, consent of the prosecutor is required); Md. R. Crim. P. 735 (defendant has absolute right to waive any time before trial if knowingly and voluntarily made); Ohio R. Crim. P. 23 (defendant has absolute right to waive if intelligently, knowingly and voluntarily made before trial; thereafter consent of court and prosecutor is required). Additionally, many other states make waiver contingent solely on court approval. Hawaii Rev. Stat. § 806-61 (1976); N.Y. Crim. Proc. Law § 320.10 (McKinney 1982); Or. Rev. Stat. § 136.001(2) (1981); Me. R. Crim. P. 23(a); Mass. R. Crim. P. 19; Minn. R. Crim. P. 26.01(2); Mo. R. Crim. P. 27.01(b). Pennsylvania requires that waivers be approved by the defendant's attorney as well as by the court, and that waivers be knowingly and intelligently made. Penn. R. Crim. P. 1101. Nebraska, by case law, has adopted a court-only approval standard. *See State v. Godfrey*, 155 N.W.2d 438, 442-43 (Neb.), *cert. denied*, 392 U.S. 937 (1968). For a discussion of the varying degrees of discretion afforded courts in deciding whether to approve a requested waiver, see *infra* pt. III(B).

11. 380 U.S. 24, 37 (1965).

12. *Id.* at 26, 34-35.

13. *Id.* at 37. See *infra* notes 69-70 and accompanying text.

14. 380 U.S. at 37. The American Bar Association adopted the requirement of prosecutorial consent to jury waivers. 3 Standards for Criminal Justice 15-1.2 (2d ed. 1980) [hereinafter cited as 3 ABA Standards]. See *generally id.* commentary at 15-16-15-23 (discussion of arguments for and against requiring prosecutorial consent to waivers of a jury trial).

15. The Federal Magistrate Act of 1979, 18 U.S.C. § 3401 (Supp. V 1981), amended the Magistrates Act of 1968, 18 U.S.C. § 3401 (1976), by expanding the jurisdiction of magistrates from petty offenses to misdemeanors, and by authorizing magistrates to conduct jury trials. *Id.* Prior to this amendment, many defendants would choose not to be tried by a magistrate because the right to trial by jury had to be waived. See S. Rep. No. 74, 96th Cong., 1st Sess. 5-6, *reprinted in* 1979 U.S. Code

prosecutor's withholding of consent only if forcing a jury trial upon the defendant would result in a denial of his right to a fair trial.¹⁶ Moreover, these courts have held the defendant to a high standard in proving that his constitutional right would be violated.¹⁷ Because defendants have rarely been able to meet the stringent burdens of proof, the prosecutor has essentially been granted a veto power.¹⁸

Part I of this Note argues that requiring the defendant to show concrete evidence that a jury would be unfair impermissibly endangers his constitutional right to a fair trial. Rather, a court should override the prosecutor's "veto" of a waiver whenever the defendant shows a reasonable likelihood that an impartial jury could not be impaneled. Part II examines the genesis of Rule 23(a) and concludes that it was not intended to be applied in its present, rigid form. After analyzing the rationales offered for the prosecutorial veto, this Note argues that the veto power should be eliminated. Part III examines alternative standards to strike a proper balance between the interests of the defendant and the prosecutor. Finally, in Part IV, this Note proposes an approach that permits the flexibility that all the federal criminal rules were designed to ensure.

I. PROTECTION OF THE DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

A. *Jury Prejudice or Inability to Understand Complex Issues*

A defendant in a criminal case may request to waive his right to a jury trial because he believes a jury would be prejudiced against him. The inability of a jury to provide a fair trial may occur for various reasons. For example, a jury can be affected by adverse pretrial

Cong. & Ad. News 1496; *McCabe, The Federal Magistrate Act of 1979*, 16 Harv. J. on Leg. 343, 391 (1979).

16. *E.g.*, *United States v. Ceja*, 451 F.2d 399, 401-02 (1st Cir. 1971); *United States v. Harris*, 314 F. Supp. 437, 439 (D. Minn. 1970); *United States v. Daniels*, 282 F. Supp. 360, 361 (N.D. Ill. 1968). See *supra* note 1.

17. See *infra* notes 24-27 and accompanying text.

18. There have been only three reported cases in which the defendant was able to override the prosecutorial "veto." *United States v. Braunstein*, 474 F. Supp. 1, 12-14 (D.N.J. 1979) (complex issues creating high risk of prejudice and would result in ordinate delay and expense if trial was by jury); *United States v. Panteleakis*, 422 F. Supp. 247, 248-50 (D.R.I. 1976) (waiver granted over prosecutor's objection because issues of law and accounting were complex, multiple defendants created a substantial risk of attributing evidence applicable to only one defendant to other defendants, and articles in local newspapers were inflammatory and prejudicial); *United States v. Schipani*, 44 F.R.D. 461, 463-64 (E.D.N.Y. 1968) (waiver granted over objection of prosecutor, who had originally consented to waiver; prejudice may have resulted from disclosure of defendant's financial history and prior criminal record, which created a danger of linking the defendant with organized crime), *aff'd on other grounds*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970).

publicity.¹⁹ One state rule specifically requires the judge to grant a waiver "if there is reason to believe that as a result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial."²⁰ The defendant's right to a fair trial may also be threatened by forcing a jury upon him if the correct resolution of a case requires command of a difficult subject matter beyond the knowledge of the average layman.²¹ Even with the guidance of experts, the jury may be incapable of rendering a fair and reasoned verdict.²² Furthermore, if the defendant is charged with a

19. *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961). Waivers of jury trials have often been requested on grounds of pretrial publicity. *E.g.*, *United States v. Wright*, 491 F.2d 942, 945 (6th Cir.), *cert. denied*, 419 U.S. 862 (1974); *United States v. Panteleakis*, 422 F. Supp. 247, 249 (D.R.I. 1976); *United States v. Daniels*, 282 F. Supp. 360, 361 (N.D. Ill. 1968). One commentator has contended that the increased difficulties in finding a fair and impartial jury due to the dissemination of prejudicial news articles are an unavoidable by-product of a society that abhors censorship of the press. 26 U. Pitt. L. Rev. 867, 868 (1965); *accord* *Irvin v. Dowd*, 366 U.S. 717, 729-30 (Frankfurter, J., concurring). The Supreme Court has stated, however, that "the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more," *id.* at 723, is not sufficient to render a juror partial "if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Id.* See generally Note, *Copying and Broadcasting Video and Audio Tape Evidence: A Threat to the Fair Trial Right*, 50 Fordham L. Rev. 551, 562-66 (1982) (discussion of impact of excessive publicity on the defendant's right to a fair trial).

20. Minn. R. Crim. P. 26.01(1)(2)(b). The waiver must be knowingly and voluntarily made. *Id.*

21. *United States v. Braunstein*, 474 F. Supp. 1, 13-14 (D.N.J. 1979); see *Duncan v. Louisiana*, 391 U.S. 145, 188-89 (1968) (Harlan, J., dissenting). The mere fact that a case is complicated has not been sufficient to justify overriding a prosecutor's withholding of consent to a requested waiver. *United States v. Simon*, 425 F.2d 796, 799 n.1 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); *United States v. Panteleakis*, 422 F. Supp. 247, 249 (D.R.I. 1976); see *United States v. Caldarazzo*, 444 F.2d 1046, 1050 (7th Cir.), *cert. denied*, 404 U.S. 958 (1971). It appears that factual issues must go beyond the normal range of difficulty of criminal prosecutions to justify a waiver. See, *e.g.*, *United States v. Wright*, 491 F.2d 942, 945 (6th Cir.) (entrapment defense not too complicated for the jury), *cert. denied*, 419 U.S. 862 (1974); *United States v. Mayr*, 350 F. Supp. 1291, 1294 (S.D. Fla. 1972) (novel conspiracy charge well within province of jury capability), *aff'd*, 487 F.2d 67 (5th Cir. 1973), *cert. denied*, 417 U.S. 914 (1974). A defendant may request waiver in complicated cases, however, because "the judge's greater experience is expected to enable him to perceive a weakness . . . which might escape the perception of a jury." Bond, *The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries*, 11 A.B.A. J. 699, 702 (1925). This Note assumes that the judge would be able to understand complex issues which a jury could not be expected to comprehend. For a discussion of the right to a jury trial in complicated federal civil cases, see *supra* note 8.

22. In Brief for Appellant, *United States v. Moon*, No. 82-1275 (2d Cir.), the appellant argues that he was forced to choose between knowledgeable jurors who would be prejudiced against him, and those who were not prejudiced against him but who were ill-equipped to decide the case, the issues being complicated. *Id.* at 21-24, 27-29.

particularly heinous crime, a jury may not be able to decide the case without bringing preconceived notions into consideration.²³

Many federal courts, however, have required the defendant to prove actual jury prejudice to override the prosecutorial veto on constitutional grounds. For example, some courts have required the defendant to establish that "the selection of a fair and impartial jury is foreclosed"²⁴ or to prove "the actual existence of [a biased] opinion in the mind of [a] juror."²⁵ Others have denied requests for waiver because the defendant failed to produce concrete evidence that a fair trial could not be obtained.²⁶ Many other courts have summarily dismissed the defendant's request for a bench trial once the prosecutor withheld consent.²⁷

Such a stringent standard of proof prevents adequate protection of the defendant's constitutional right to a fair trial because a jury may in fact be biased although the defendant cannot prove it. The Supreme Court in *Irvin v. Dowd*²⁸ recognized this when it reversed a conviction on the ground that the jury did not provide the defendant with a fair trial,²⁹ even though "each juror was sincere when he said

23. See *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); Bond, *supra* note 21, at 702; see, e.g., *State v. Hoskins*, 292 Minn. 111, 114-16, 193 N.W.2d 802, 806-08 (1972); *People v. Bishop*, 46 Misc. 2d 213, 213, 258 N.Y.S.2d 950, 951 (N.Y. Sup. Ct. 1965); cf. *Donnelly*, *supra* note 7, at 254-55 (waivers are desirable in prosecutions under the Smith Act, 18 U.S.C. § 2385 (1976), because juries are potentially hostile); *Government Consent to Waiver*, *supra* note 7, at 1037-38 (same).

24. *United States v. Daniels*, 282 F. Supp. 360, 362 (N.D. Ill. 1968) (citation omitted); *accord* *United States v. Stone*, 444 F. Supp. 1254, 1257 (E.D. Wis.), *aff'd mem.*, 588 F.2d 834 (7th Cir. 1978); *United States v. Harris*, 314 F. Supp. 437, 439 (D. Minn. 1970).

25. *United States v. Ceja*, 451 F.2d 399, 401 (1st Cir. 1971) (per curiam) (quoting *Reynolds v. United States*, 98 U.S. 145, 157 (1878)); *accord* *United States v. Morlang*, 531 F.2d 183, 187 (4th Cir. 1975).

26. See *United States v. Caldarazzo*, 444 F.2d 1046, 1050 (7th Cir.), *cert. denied*, 404 U.S. 958 (1971); *State v. Kilburn*, 304 Minn. 217, 225-26, 231 N.W.2d 61, 65-66 (1975). In *Kilburn*, the defendant, a black man charged with murdering a fifteen-year old white girl during a sexual encounter, sought to waive his right to a jury on the ground that a jury would be biased against him. *Id.* at 231-33, 231 N.W.2d at 69. The trial judge acknowledged that it was unlikely that any prospective jurors would be black. *Id.* at 221, 231 N.W.2d at 63. In addition, there was considerable publicity concerning the crime in local newspapers and on television. *Id.* The defendant's request for a waiver was denied, however, because there was no concrete evidence indicating that a fair trial could not be obtained. *Id.* at 226, 231 N.W.2d at 66.

27. E.g., *United States v. Wright*, 491 F.2d 942, 945 (6th Cir.), *cert. denied*, 419 U.S. 862 (1974); *United States v. Farries*, 459 F.2d 1057, 1060-61 (3d Cir. 1972), *cert. denied* at 409 U.S. 888 (1972) and at 410 U.S. 912 (1973); *United States v. Hilbrich*, 341 F.2d 555, 558 (7th Cir.), *cert. denied*, 381 U.S. 941 (1965); *United States v. Barber*, 297 F. Supp. 917, 923 (D. Del. 1969).

28. 366 U.S. 717 (1961).

29. *Id.* at 727-29.

that he would be fair and impartial.”³⁰ The Court, however, has generally relied on the procedural devices available to the trial judge to overcome any juror prejudice.³¹

B. *Inadequate Safeguards of Jury Impartiality*

In *Singer v. United States*,³² the Supreme Court acknowledged that “trial by jury has its weaknesses and the potential for misuse.”³³ On the other hand, the Court relied on the availability of voir dire to detect prejudice³⁴ and the right to change venue when voir dire is insufficient to eliminate prejudice.³⁵ Although these procedural mechanisms enhance the likelihood of fairness of a jury trial, their availability does not justify the denial of a requested waiver if a reasonable likelihood of jury bias would remain.

The effectiveness of voir dire depends on many factors, such as the ability of the attorney³⁶ to elicit prejudice.³⁷ Additionally, veniremen

30. *Id.* at 728. In *Irvin*, the defendant was convicted of murder and sentenced to death. *Id.* at 718. He requested a change of venue, contending that the massive prejudicial publicity foreclosed the impaneling of an impartial jury. *Id.* at 719-20. The lower court had denied the defendant's request because one change in venue from the county where the offense was allegedly committed had already been granted and the state permitted only one such change. *Id.* at 720. The defendant's motions for continuances had also been denied. *Id.*

31. See *infra* notes 34-35 and accompanying text.

32. 380 U.S. 24 (1965).

33. *Id.* at 35; *accord* *Duncan v. Louisiana*, 391 U.S. 145, 188-89 (1968) (Harlan, J., dissenting).

34. See 380 U.S. at 35. Rule 24 governs voir dire. Voir dire may be conducted by “the defendant or his attorney and the attorney for the government.” Fed. R. Crim. P. 24(a). If the court conducts the examination, “the court shall permit the [counsel for both sides] to supplement the examination by . . . further inquiry.” *Id.* A juror who either fails to meet the statutory qualifications in 28 U.S.C. § 1865(b)(1976 & Supp. V 1981), or is found to be biased, will be excused. 2 C. Wright, *supra* note 1, § 383, at 361. Peremptory challenges are governed by Rule 24(b). Fed. R. Crim. P. 24(b).

35. See 380 U.S. at 35. As provided in Fed. R. Crim. P. 21(a), the district court judge must grant a defendant's request for a change in venue when “there exists . . . so great a prejudice against the defendant that he cannot obtain a fair and impartial trial.” A change of venue is also permitted in the court's discretion under Fed. R. Crim. P. 21(b) if it would facilitate the convenience of the parties and witnesses and serve the interests of justice. *United States v. McGregor*, 503 F.2d 1167, 1169 (8th Cir. 1974), *cert. denied*, 420 U.S. 926 (1975); *United States v. Phillips*, 433 F.2d 1364, 1368 (8th Cir. 1970), *cert. denied*, 401 U.S. 917 (1971).

The defendant may also seek a continuance. Continuances, however, are only effective if the bias against the defendant will abate. See *Groppi v. Wisconsin*, 400 U.S. 505 (1971). Continuances are contrary to the defendant's right to a speedy trial. *Id.* See *supra* note 1.

36. Voir dire might be conducted by the judge alone. See *United States v. Morlang*, 531 F.2d 183, 187 (4th Cir. 1975). See *supra* note 34.

37. *Government Consent to Waiver*, *supra* note 7, at 1037; see Abramovsky, *Juror Safety: The Presumption of Innocence and Meaningful Voir Dire in Federal Criminal Prosecutions—Are They Endangered Species?*, 50 Fordham L. Rev. 30, 47 (1981).

may not admit conscious prejudices,³⁸ and unconscious bias is difficult to detect.³⁹ Moreover, a growing recognition of the privacy rights of veniremen⁴⁰ has restricted the permissible scope of voir dire inquiry,⁴¹ thus further limiting the ability of counsel to elicit prejudice.⁴² Therefore, evidence of jury bias may well escape the voir dire efforts of the defendant's attorney.⁴³

38. *Dennis v. United States*, 339 U.S. 162, 176 (1950) (Black, J., dissenting); Note, *Singer v. United States*, 380 U.S. 24 (1965)—*Inability to Waive Jury Trial in the Federal Courts*, 60 Nw. U.L. Rev. 722, 728 (1965) [hereinafter cited as *Inability to Waive*]; *Government Consent to Waiver*, *supra* note 7, at 1037; Hunt, *Putting Juries on the Couch*, N.Y. Times, Nov. 28, 1982, § 6 (Magazine), at 82, cols. 3-4; see *United States v. Abbott Labs.*, 505 F.2d 565, 572 (4th Cir. 1974), *cert. denied*, 420 U.S. 990 (1975); *State v. Kilburn*, 304 Minn. 217, 232, 231 N.W.2d 61, 69 (1975) (Otis, J., dissenting).

39. Donnelly, *supra* note 7, at 248; *Inability to Waive*, *supra* note 38, at 728; *Government Consent to Waiver*, *supra* note 7, at 1037; see *Estelle v. Williams*, 425 U.S. 501, 518-19 (1976) (Brennan, J., dissenting). In *Crawford v. United States*, 212 U.S. 183 (1909), the Supreme Court stated: "Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one . . . who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence." *Id.* at 196.

40. See *United States v. Barnes*, 604 F.2d 121, 140 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980); *id.* at 168 n.4 (Meskill, J., dissenting). In *Barnes*, the Second Circuit upheld the trial judge's decision to prohibit inquiry into the names, addresses and ethnic backgrounds of the prospective jurors to avoid violation of their right to privacy. *Id.* at 140-41. *But see* *Lehman v. City of San Francisco*, 80 Cal. App. 3d 309, 313-14, 145 Cal. Rptr. 493, 494-95 (1978) (disclosure of venireman's identity does not violate federal or state constitutional right to privacy). See generally *The Defendant's Right to an Impartial Jury and the Rights of Prospective Jurors*, 48 U. Cinn. L. Rev. 985 (1979) (discussion whether sophisticated voir dire techniques and pretrial investigations violate the privacy rights of prospective jurors). One commentator has stated that cases prior to *Barnes* do not support the establishment of a right to jury privacy, but rather "stand for the proposition that voir dire should be limited to questions which are reasonably related to the issues in the case." Abramovsky, *supra* note 37, at 56.

41. See *United States v. Barnes*, 604 F.2d 121, 143 (2d Cir. 1979), *cert. denied*, 446 U.S. 907 (1980).

42. *Id.* at 171-74 (Meskill, J., dissenting); see Abramovsky, *supra* note 37, at 54-55. In addition, certain limitations on the interrogator's questions during voir dire may actually enhance juror bias by impliedly depicting the defendant as a notorious individual who is so dangerous that anonymity is required to protect the jurors and their families. *Id.* at 35.

43. *But see* *Frazier v. United States*, 335 U.S. 497, 511-12 (1948) (suggesting that bias escapes detection during voir dire only in rare circumstances). In determining whether a lower court erred in finding no jury prejudice, some courts have limited their scope of inquiry to responses actually made during voir dire. See *United States v. Morlang*, 531 F.2d 183, 187 (4th Cir. 1975) (determination whether juror partiality resulted from pretrial publicity made by looking solely at voir dire record); *United States v. Ceja*, 451 F.2d 399, 402 (1st Cir. 1971) (based on voir dire record, request for waiver denied despite the existence of conflicting evidence). *But see* *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (Court reversed conviction due to jury prejudice even though each juror had said he would be impartial).

Similarly, a change in venue⁴⁴ increases the likelihood of a fair jury trial only in limited circumstances.⁴⁵ While a venue change may be sufficient if bias is limited to a particular locality,⁴⁶ it would not be sufficient to counter widespread prejudice⁴⁷ or prejudice that is not geographically based.⁴⁸ Even when a change in venue would ensure a fair trial, a bench trial may be preferable. The venire from which the jury will be picked will not be a "cross-section of the community" in which the offense was allegedly committed.⁴⁹ It may be more fair for the defendant to be tried by the judge rather than by a jury that does not have the same social values as the members of the community where the offense was allegedly committed.⁵⁰ Moreover, changing

44. A defendant seeking a change in venue waives his constitutional right provided in U.S. Const. art. III, § 2, cl.3, to be tried in the state where the offense was committed. See Ranney, *Remedies for Prejudicial Publicity: A Brief Review*, 21 Vill. L. Rev. 819, 829-30 (1976).

45. Moreover, courts have been extremely reluctant to grant motions for a change in venue. *United States v. Means*, 409 F. Supp. 115, 117 (D.N.D. 1976); *United States v. Marcello*, 280 F. Supp. 510, 515 (E.D. La. 1968), *aff'd*, 423 F.2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970); 2 C. Wright, *supra* note 1, § 341, at 244; *Government Consent to Waiver*, *supra* note 7, at 1035 n.26. For a criticism of the courts' reluctance to grant such motions, see Note, *The Efficacy of a Change of Venue in Protecting a Defendant's Right to an Impartial Jury*, 42 Notre Dame Law. 925, 942 (1967) [hereinafter cited as *Efficacy of a Change of Venue*].

46. See *Rideau v. Louisiana*, 373 U.S. 723, 726-27 (1963); *Irvin v. Dowd*, 366 U.S. 717, 727-28 (1961); *Pamplin v. Mason*, 364 F.2d 1, 4-5 (5th Cir. 1966); *United States v. Marcello*, 280 F. Supp. 510, 515 (E.D. La. 1968), *aff'd*, 423 F.2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970); *United States v. Hoffa*, 205 F. Supp. 710, 722 (S.D. Fla.), *cert. denied*, 371 U.S. 892 (1962).

47. *United States v. Dennis*, 183 F.2d 201, 226 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951); *Donnelly*, *supra* note 7, at 248; see *United States v. Mitchell*, 372 F. Supp. 1239, 1261-62 (S.D.N.Y. 1973) (change of venue denied in light of the nationwide impact of the Watergate conspiracy), *appeal dismissed*, 485 F.2d 1290 (2d Cir. 1973). For an example of pretrial publicity creating national notoriety, see *Estes v. Texas*, 381 U.S. 532, 535-36 (1965).

48. See Ranney, *supra* note 44, at 829; *Government Consent to Waiver*, *supra* note 7, at 1036.

49. The Supreme Court has recognized the importance that the venire represent a cross-section of the community where the offense was committed. E.g., *Smith v. Phillips*, 455 U.S. 209, 226 (1982) (Marshall, J., dissenting); *Ballard v. United States*, 329 U.S. 187, 191 (1946) (citing *Glasser v. United States*, 315 U.S. 60, 86 (1942)). A commentator has suggested that the jury selection process currently employed results in juries that do not represent a "cross-section" of the community because they fail to adequately represent various groups within the community. Abramovsky, *supra* note 37, at 43-47.

50. Moreover, any public interest in the fairness that a jury trial affords, see *infra* pt. II(C), is less compelling when the jury does not represent members of the community most concerned about the case. See *Duncan v. Louisiana*, 391 U.S. 145, 187 (1968) (Harlan, J., dissenting) (noting that jury trials foster community involvement, responsibility and confidence in the judicial system); *United States v. Means*, 409 F. Supp. 115, 117 (D.N.D. 1976) ("The interest of a community that those charged with violations of its laws, be tried in that community, is not a matter to be

venue entails added costs and inconveniences that can be avoided by waiver.⁵¹

The Supreme Court has stated that "our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial."⁵² Because these safeguards may not adequately protect a defendant from jury prejudice, waivers should be granted more readily. If the defendant shows a reasonable likelihood that a jury could not be fair, he should be permitted to waive his right to a jury trial.⁵³

II. PROSECUTORIAL VETO

A literal interpretation of Rule 23(a) indicates that the defendant cannot waive his right to a jury trial without the express consent of the prosecutor.⁵⁴ This Rule, however, was not designed to give the prosecutor the power to veto such requests. The Rule, which was enacted in 1946,⁵⁵ is an embodiment of the then-existing practice endorsed by the Supreme Court in *Patton v. United States*.⁵⁶ In upholding the consti-

cast aside lightly."); *Efficacy of a Change of Venue*, *supra* note 45, at 942 ("[A]dministration of criminal law is primarily the concern of the community in which the crime is committed.").

51. *Efficacy of a Change of Venue*, *supra* note 45, at 942.

52. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379 n.6 (1979). The Court was referring to closure of pretrial proceedings when the defendant's right to a fair trial is endangered by adverse publicity. *Id.* at 378-79. The Court reasoned that because reversal of a conviction is such an extreme remedy, trial judges should act to ensure that the defendant receives a fair trial. *Id.* at 379 n.6.

53. *See* Reply Brief for Appellant at 5, *United States v. Moon*, No. 82-1275 (2d Cir.); *cf.* *People v. Diaz*, 10 A.D.2d 80, 92, 198 N.Y.S.2d 27, 39 ("[I]t is quite appropriate to grant a waiver against the possible infection of a jury by public outrage and clamor in the midst of a wave of crime or other inflammatory stimuli . . .") (emphasis added), *aff'd*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960). It has been held that a showing of a reasonable likelihood of jury prejudice entitles the defendant to a change of venue to protect his constitutional right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333, 362-63 (1966); *United States v. Crow Dog*, 532 F.2d 1182, 1187 (8th Cir. 1976), *cert. denied*, 430 U.S. 929 (1977); *see* *Irvin v. Dowd*, 366 U.S. 717, 721 (1961); *United States v. Farries*, 459 F.2d 1057, 1060-61 (3d Cir. 1972), *cert. denied* at 409 U.S. 888 (1972) and at 410 U.S. 912 (1973); *United States v. Marcello*, 280 F. Supp. 510, 513-14 (E.D. La. 1968), *aff'd*, 423 F.2d 993 (5th Cir.), *cert. denied*, 398 U.S. 959 (1970).

54. Brief for Appellee at 61-63, *United States v. Moon*, No. 82-1275 (2d Cir.).

55. 6 New York University School of Law Institute, Federal Rules of Criminal Procedure iii (1946) [hereinafter cited as Institute Proceedings].

56. 281 U.S. 276, 312 (1930); *see* Fed. R. Crim. P. 23(a) comment. Prior to *Patton*, the defendant was not permitted to waive because the jurisdiction of a court depended on a verdict being rendered by a jury. *See* *Thompson v. Utah*, 170 U.S. 343, 353-55 (1898); *cf.* *Cancemi v. People*, 18 N.Y. 128, 135-39 (1858) (state court jurisdiction conditioned on jury trial). The defendant in *Patton* sought to waive his right to a 12-person jury when one juror became ill and could not continue to serve. 281 U.S. at 286. Although the defendant would be tried by a jury, albeit an 11-

tutionality of jury waivers, the *Patton* decision focused on the defendant's right to waive a jury trial—not the prosecutorial consent requirement.⁵⁷ The Court added, however, that to safeguard the interests of the defendant⁵⁸ and the public,⁵⁹ the consent of both the prosecutor and the court shall be required.⁶⁰ The Court, however, emphasized the role of the judge in guarding these interests.⁶¹

Rule 23(a) does include *Patton's* reference to prosecutorial consent to requested waivers, and the Rule was upheld in 1965 by the Supreme Court in *Singer v. United States*.⁶² The *Singer* Court noted that there is no constitutional infirmity in requiring such consent if the defendant receives a fair trial.⁶³ But because this veto power severely reduces the defendant's ability to waive his right to a jury trial,⁶⁴ the justifications advanced for this power warrant examination.

A. *The Absence of a Right to Waive at Common Law*

The *Singer* Court relied on the absence of a historical right to choose between a bench and jury trial to justify the limitations on jury waivers.⁶⁵ The absence of a historical right, however, does not war-

person jury, the Court viewed waiver of one juror as waiver of the right to a jury trial. *Id.* at 292. In *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942), the Court cited *Patton* with approval and upheld the constitutionality of jury waivers by *pro se* defendants. *Id.* at 277-78, 280-81.

57. See *Patton v. United States*, 281 U.S. 276 (1930). The prosecutor in *Patton* had in fact consented to waiver of a 12-person jury. *Id.* at 286.

58. See *id.* at 312; see also *Inability to Waive*, *supra* note 38, at 724 (“the requirement of obtaining the government’s consent was only to protect an *uniformed* defendant from waiving his right to a trial by jury”) (emphasis in original); Comment, *The Government’s Interest as a Party Litigant in Federal Criminal Proceedings*, 26 U. Pitt. L. Rev. 767, 771 (1965) (“[n]othing in the [*Patton*] opinion indicates that the Government has an interest in the jury other than in protecting the defendant”) [hereinafter cited as *Government’s Interest as a Party Litigant*]. The importance of protecting the accused at the time of *Patton* was magnified by the fact that *Johnson v. Zerbst*, 304 U.S. 458 (1938), which held that the sixth amendment requires a court to appoint counsel for the accused, *id.* at 462-63, had not yet been decided. Thus, the government’s attorney might be the only counsel present to protect the defendant from unwise waivers. *Inability to Waive*, *supra* note 38, at 724 n.11.

59. See 281 U.S. at 312. See *infra* pt. II(C). However, the *Patton* Court rejected the argument that public policy should be grounds to deny the defendant the *power* to waive. 281 U.S. at 308.

60. 281 U.S. at 312.

61. See *id.* at 312-13.

62. 380 U.S. 24 (1965).

63. *Id.* at 36.

64. See *supra* note 18.

65. *Singer v. United States*, 380 U.S. 24, 26 (1965). But see Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 Va. L. Rev. 655, 660 (1934) (evidence of jury waivers is traceable to the period prior to the American Revolution).

rant a severe limitation on waivers. As the *Singer* Court recognized, no rational alternatives to jury trials were available at early common law.⁶⁶ Moreover, the right to a jury trial both at early common law and under the Constitution existed only for the benefit of the defendant, to protect him against arbitrary prosecutions.⁶⁷ The traditional basis of the right to a jury trial does not support the view that waivers should rarely be granted. Indeed, the fact that this right was designed to benefit the defendant⁶⁸ lends support to the adoption of a standard that provides for waivers more readily.

66. See 380 U.S. at 27 ("At its inception, [trial by jury] was an alternative to . . . trial by compurgation, ordeal or battle."); *People v. Scornavache*, 347 Ill. 403, 405-06, 179 N.E. 909, 910 (1932), *overruled on other grounds*, *People v. Spegal*, 5 Ill. 2d 211, 125 N.E.2d 468 (1955); Oppenheim, *supra* note 3, at 697; *Criminal Jury Trials in Iowa*, *supra* note 10, at 188. In trial by compurgation, or trial by wager of law, the defendant was required to obtain sworn testimony of his trustworthiness from eleven of his neighbors or be convicted. Black's Law Dictionary 1349 (rev. 5th ed. 1979). In trial by ordeal, an accused was tortured until there was "supernatural intervention," the belief being that an innocent person would be rescued while a guilty one would not. *Id.* at 988. In trial by wager of battle, the accused and accuser would fight and it was believed that Heaven would give the victory to the one in the right. *Id.* at 1416.

Moreover, the absence of such a historical right does not support limiting waivers because, as the *Singer* Court noted, "[t]he origin of trial by jury in England is not altogether clear." 380 U.S. at 27; *accord* *Commonwealth v. Rowe*, 257 Mass. 172, 176, 153 N.E. 537, 539 (1926). Also, trial by the court was "the very thing that the accused did not want, [and thus] it is not the least helpful to look for evidence supporting such a right in the history." Hall, *Has the State a Right to Trial by Jury in Criminal Cases?*, 18 A.B.A. J. 226, 227 (1932).

67. *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968); *Patton v. United States*, 281 U.S. 276, 296-97 (1930); Hall, *supra* note 66, at 227; Oppenheim, *supra* note 3, at 702; *Government Consent to Waiver*, *supra* note 7, at 1043; 13 U.C.L.A. L. Rev. 189, 193 (1965); see *Dickinson v. United States*, 159 F. 801, 821 (1st Cir. 1908), *cert. dismissed*, 213 U.S. 92 (1909); *Commonwealth v. Rowe*, 257 Mass. 172, 176, 153 N.E. 537, 539 (1926); Note, *The Petty Offense Exception and the Right to a Jury Trial*, 48 Fordham L. Rev. 205, 209 & n.39 (1979) [hereinafter cited as *Petty Offense Exception*].

68. The right to trial by jury has often been referred to as the defendant's privilege. *Patton v. United States*, 281 U.S. 276, 296-97 (1930); *Commonwealth v. Rowe*, 257 Mass. 172, 174, 153 N.E. 537, 538 (1926); *People v. Diaz*, 10 A.D.2d 80, 92, 198 N.Y.S.2d 27, 39, *aff'd*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960); Griswold, *supra* note 65, at 656-57; Hall, *supra* note 66, at 226; Oppenheim, *supra* note 3, at 701-07; see Kuhlman, Pontikes & Stevens, *Jury Trial, Progress, and Democracy*, 14 J. Mar. L. Rev. 679, 698 (1980); 26 Ill. L. Rev. 85, 87 (1931). Absent overriding policy considerations, a person should be able to waive any right that is in the nature of a privilege. *Schick v. United States*, 195 U.S. 65, 72 (1904); *Dickinson v. United States*, 159 F. 801, 819 (1st Cir. 1908) (quoting *Schick v. United States*, 195 U.S. 65 (1904)); *Scott v. McCaffrey*, 12 Misc. 2d 671, 676, 172 N.Y.S.2d 954, 960 (Sup. Ct. 1958); *Hoffman v. State*, 98 Ohio St. 137, 146-47, 120 N.E. 234, 236 (1918). The defendant may waive many other constitutional safeguards without government consent. 3 Orfield *Criminal Procedure Under The Federal Rules* § 23:41, at 65 (1966); see, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464-65 (1938) (sixth amendment right to counsel); *United States v. Murdock*, 284 U.S. 141, 148 (1931) (fifth

B. *The Integrity of the Prosecutor*

In *Singer*, the requirement of prosecutorial consent was also upheld on the ground that the government, as a litigant, has an interest in having cases tried before a jury because "the Constitution regards [the jury] as most likely to produce a fair result."⁶⁹ The Court stated that the prosecutor is not required to set forth his reasons for withholding consent, relying on his integrity as a "servant of the law."⁷⁰

Although the prosecutor indeed has a special duty to protect the rights of the accused and to ensure that fair verdicts are reached,⁷¹ he is nonetheless an adversary.⁷² The Supreme Court has consistently acknowledged that the adversary system protects the public interest in the administration of justice.⁷³ Although both the prosecutor and the defendant have an interest in the mode of trial, the requirement of prosecutorial consent accords the prosecutor the final say over whether a requested waiver will be granted. Granting the prosecution this power without requiring him to justify his position is contrary to the adversary system. Although the prosecutor may have a legitimate interest in having cases tried before a jury,⁷⁴ this interest does not

amendment protection against self-incrimination), *overruled on other grounds sub nom.*, *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964); *Trono v. United States*, 199 U.S. 521, 533-34 (1905) (fifth amendment right to protection against double jeopardy); *Worthington v. United States*, 1 F.2d 154, 154 (7th Cir. 1924) (sixth amendment right to a speedy trial). *See generally* *Oppenheim*, *supra* note 3, at 702-03 (constitutional safeguards may be unilaterally waived because they exist to protect the person seeking waiver).

69. *Singer v. United States*, 380 U.S. 24, 36 (1965). The defendant's constitutional right to a fair trial is not violated if he is forced to have a jury trial, provided it is a fair one. *See id.*; *Bruton v. United States*, 391 U.S. 123, 135 (1968) ("[a] defendant is entitled to a fair trial but not a perfect one") (quoting *Lutwak v. United States*, 344 U.S. 609, 619 (1953)).

70. 380 U.S. at 37 (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935)).

71. *Berger v. United States*, 295 U.S. 78, 88 (1935); accord 1 ABA Standards, *supra* note 14, 3-1.1 ("The duty of the prosecutor is to seek justice, not merely to convict."). The prosecutor's duty extends to protecting the rights of the accused, National District Attorneys Ass'n, National Prosecution Standards 26.1 (1977), and the interests of the community, *see* F. Miller, *Prosecution: The Decision to Charge a Suspect with a Crime* 4 (1969). *See generally* D. Nissman & E. Hagen, *The Prosecution Function* (1982) (discussion on the prosecutor's function in the legal system).

72. *Blackledge v. Perry*, 417 U.S. 21, 32 (1974) (Rehnquist, J., dissenting); *see Inability to Waive*, *supra* note 38, at 728; *Government's Interest as a Party Litigant*, *supra* note 58, at 770.

73. *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979); *Singer v. United States*, 380 U.S. 24, 36 (1965); *see Lassiter v. Department of Soc. Servs.*, 452 U.S. 18, 28 (1981). The Supreme Court, however, has also recognized that the adversary system is not perfect. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 328 (1979) ("neither judges, the parties, nor the adversary system performs perfectly in all cases") (quoting *Blonder-Tongue Labs. v. University Found.*, 402 U.S. 313, 329 (1971)).

74. *Singer v. United States*, 380 U.S. 24, 36 (1965). *But see* *Hall*, *supra* note 66, at 227 (no right or interest in jury trial exists apart from protection of accused). *States*

justify granting him an absolute veto power. Both the defendant and the prosecutor should instead be required to set forth their reasons for seeking a particular mode of trial before the judge, thus making the judge, rather than the prosecutor, the ultimate arbiter.

C. The Public Interest Theory

In *Patton v. United States*,⁷⁵ the Supreme Court stated that the maintenance of the jury in criminal cases is of "such importance and has such a place in our traditions" that before the defendant can waive his right to a jury trial, the prosecutor must consent.⁷⁶ Conversely, some states view this public interest as requiring only that waivers are knowingly and intelligently made,⁷⁷ thereby providing the defendant with the opportunity for a jury trial⁷⁸ without imposing it upon him.⁷⁹

Trial by jury is undoubtedly a "security in which the public at large as well as the individual have a concern."⁸⁰ Because juries resolve "factual issues by group deliberation rather than by the decision of a single judge,"⁸¹ trial by jury arguably increases the chances for a correct verdict.⁸² The public may have more confidence in the criminal justice system when cases are decided by a jury.⁸³ Because the jury system may protect the accused from an unjustified conviction,⁸⁴ the public "has an interest in protecting its citizens, even in cases where

that have adopted a unilateral approach to jury trials have not recognized any prosecutorial interest in jury trials. See, e.g., Ill. Ann. Stat. ch. 38, ¶ 103-6 (Smith-Hurd 1980) (defendant has right to waive in open court "understandingly"); La. Code Crim. Proc. Ann. art. 780 (West 1980) (absolute right to waive in non-capital cases, provided waiver is knowingly and intelligently made).

75. 281 U.S. 276 (1930).

76. *Id.* at 312. The Supreme Court did not discuss this public interest in *Singer v. United States*, 380 U.S. 24 (1965). The belief that this public interest may justify imposing a jury trial on the defendant is not universally held. See *People v. Spegal*, 5 Ill. 2d 211, 222, 125 N.E.2d 468, 473 (1955) ("That the custom of trying criminal cases by jury gave rise to a right in the People to object to a trial by the court upon waiver of a jury trial by the accused may well be doubted."). See *infra* notes 77-79 and accompanying text, pt. III(A).

77. E.g., Ill. Ann. Stat. ch. 38, ¶ 103-6 (Smith-Hurd 1980); La. Code Crim. Proc. Ann. art. 780 (West 1981); see *Donnelly*, *supra* note 7, at 255. See *supra* note 10.

78. See *supra* note 1.

79. See *infra* pt. III(A).

80. *Oppenheim*, *supra* note 3, at 708.

81. *Petty Offense Exception*, *supra* note 67, at 210 & n.41.

82. Broeder, *The Functions of the Jury: Facts or Fictions?*, 21 U. Chi. L. Rev. 386, 389 (1954); Joiner, *From the Bench*, in *The Jury System in America* 146-47 (R. Simon ed. 1975); see *Sparf v. United States*, 156 U.S. 51, 103-06 (1895).

83. *Duncan v. Louisiana*, 391 U.S. 145, 187-88 (1968) (Harlan, J., dissenting); *Petty Offense Exception*, *supra* note 67, at 210-11; see *State v. Kilburn*, 304 Minn. 217, 229-31, 231 N.W.2d 61, 67-68 (1975) (Otis, J., dissenting).

84. See *Sparf v. United States*, 156 U.S. 51, 106-07 (1895).

the individual refuses that protection."⁸⁵ As the Court in *Patton* recognized, this public interest must be guarded "jealously."⁸⁶ This interest may, however, be outweighed by other public interests.⁸⁷ For example, although a guilty plea involves a waiver of the right to trial by jury, the Supreme Court has recognized that the interest in trying cases before a jury is outweighed by the benefits provided by such pleas.⁸⁸

The prosecutorial veto may prevent the furtherance of other important public interests. Delay in the disposition of cases has long been a major problem in the court system.⁸⁹ A case tried before a jury generally takes much longer than one tried before a judge.⁹⁰ Also, when the defendant asserts that an impartial jury could not be found, the impaneling of a jury may require a substantial amount of time.⁹¹ Trials by the court may eliminate many time-consuming rulings on

85. 3 ABA Standards, *supra* note 14, 15-1.2(a) commentary at 15-19; *see People ex rel. Rohrlich v. Follette*, 20 N.Y.2d 297, 300-02, 229 N.E.2d 419, 420-22, 282 N.Y.S.2d 729, 731-33 (1967); *Inability to Waive, supra* note 38, at 728; *Government's Interest as a Party Litigant, supra* note 58, at 771.

86. 281 U.S. at 312.

87. Although there are policy concerns that may be furthered by a waiver, they do not justify limiting the accused's right to a jury trial. *See supra* note 1. Rather, they weaken the argument that jury trials are always in the public interest.

88. *See Adams v. United States ex rel. McCann*, 317 U.S. 269, 276 (1942); *Patton v. United States*, 281 U.S. 276, 305-06 (1930). The Supreme Court has recognized the benefits of plea bargaining. *See Santobello v. New York*, 404 U.S. 257, 261 (1971).

89. *Williams v. Florida*, 399 U.S. 78, 134-35 (1970) (Harlan, J., concurring); *see Duncan v. Louisiana*, 391 U.S. 145, 188 (1968) (Harlan, J., dissenting). The Supreme Court has stated that "[t]he public . . . has a definite and concrete interest in seeing that justice is swiftly and fairly administered." *Gannett Co. v. DePasquale*, 443 U.S. 368, 383 (1979) (citing *Barker v. Wingo*, 407 U.S. 514, 519 (1972)). The jury has been criticized as an "expensive, cumbersome, and time-wasting institution." *Donnelly, supra* note 7, at 256; *accord Duncan v. Louisiana*, 391 U.S. 145, 189 & n.39 (1968) (Harlan, J., dissenting); Note, *Waiver of Jury Trials in Felony Cases*, 20 Cal. L. Rev. 132, 132 (1932); *Petty Offense Exception, supra* note 67, at 208.

In 1974, Congress passed the Speedy Trial Act, Pub. L. No. 93-619, 18 U.S.C. §§ 3161-3174 (1976 & Supp. V 1981), making time considerations a major factor in judicial decision-making. The Act requires that trials be commenced within seventy days of arraignment or the case must be dismissed. *Id.* §§ 3161(c)(1), 3162(2). In *United States v. Braunstein*, 474 F. Supp. 1 (D.N.J. 1979), the court viewed this Act as encouraging bench trials. *See id.* at 14. The court reasoned that if it takes longer to try a case before a jury than before the court, "in a substantial sense [a trial by jury] necessarily affects adversely the rights of other defendants and of the public, to have other cases tried within the limits set by the Act." *Id.* (emphasis in original); *see United States v. Engleman*, 489 F. Supp. 48, 50 (E.D. Mo. 1980), *aff'd in part, rev'd in part on other grounds*, 648 F.2d 473 (8th Cir. 1981).

90. *United States v. Braunstein* 474 F. Supp. 1, 14 (D.N.J. 1979); *see Bond, supra* note 21, at 702; Oppenheim, *supra* note 3, at 737; *First Report of the Judicial Council of Massachusetts*, 11 Mass. L.Q. 7, 24 (1925) [hereinafter cited as *Judicial Council of Massachusetts*].

91. *See Irvin v. Dowd*, 366 U.S. 717, 720 (1961) (four weeks); Brief for Appellant at 21 n.30, *United States v. Moon*, No. 82-1275 (2d Cir.) (seven days).

the admissibility of evidence that would be potentially prejudicial if heard by a jury.⁹² Reducing the length of a trial will lower the costs of court security, legal services and support personnel.⁹³ Expenses resulting from hung juries and mistrials can also be avoided.⁹⁴

Trial by jury "should at all times function in harmony with newer and ever changing social interests."⁹⁵ To allow accommodation of all interests affected by waiver—not only those guarded by the prosecutor—the prosecutorial veto power should be eliminated. Rather, the judge should consider the relevant interests of the defendant, the prosecutor and the public, and should be able to override a prosecutor's refusal to consent to a requested waiver even if the defendant's right to a fair trial is not endangered.

III. ALTERNATIVE PRACTICES

The few federal courts that have granted a requested waiver over the prosecutor's refusal to consent⁹⁶ are dissatisfied with the current stringent standard for waiver. One court has stated that the prosecutor's refusal to consent may be overridden even though the defendant's right to a fair trial is not violated.⁹⁷ Two other federal courts have suggested that a prosecutor's refusal to consent should be upheld only if reasonable.⁹⁸ Furthermore, many states do not require prosecutorial

92. 26 Ill. L. Rev. 85, 88 (1931); see Bond, *supra* note 21, at 703.

93. See *Judicial Council of Massachusetts*, *supra* note 90, at 25-26; *Cost of Jury Trials*, 130 New L.J. 412, 412-13 (1980); New York Judicial Council, *Recommendation of the Judicial Council to Permit Waiver of Jury Trials in Criminal Non-Capital Cases*, in 2d Annual Report 95, 101 (1936) [hereinafter cited as N.Y. Judicial Council]. In determining whether a bench trial would further public interests, cost considerations are very significant in "today's high cost, inflationary economy." *United States v. Braunstein*, 474 F. Supp. 1, 13 (D.N.J. 1979).

94. N.Y. Judicial Council, *supra* note 93, at 101. It has also been suggested that jury waivers reduce the number of appeals. *Id.*

95. Oppenheim, *supra* note 3, at 712.

96. See *supra* note 18.

97. *United States v. Braunstein*, 474 F. Supp. 1, 12, 14 (D.N.J. 1979).

98. See *United States v. Panteleakis*, 422 F. Supp. 247, 250 (D.R.I. 1976); *United States v. Schipani*, 44 F.R.D. 461, 463 (E.D.N.Y. 1968) *aff'd on other grounds*, 414 F.2d 1262 (2d Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). Another court has suggested that evidence of bad faith may be sufficient grounds to override the prosecutor's refusal to consent to waiver. *United States v. Mayr*, 350 F. Supp. 1291, 1294 (S.D. Fla. 1972), *aff'd*, 487 F.2d 67 (5th Cir. 1973), *cert. denied*, 417 U.S. 914 (1974). In *Schipani*, the government had originally consented to the defendant's waiver of the jury. 44 F.R.D. at 461. On appeal of the defendant's conviction, the Supreme Court vacated the judgment and remanded the case for a new trial. *Schipani v. United States*, 385 U.S. 372 (1966) (*per curiam*). Upon commencement of the second trial, the prosecution sought to withdraw its consent to the waiver. 44 F.R.D. at 462. The court denied the request, holding that the refusal was "unreasonable" without stating whether its denial was based on the dicta in *Singer v. United States*, 380 U.S. 24, 37-38 (1965), see *supra* note 14 and accompanying text, or because the prosecution had originally consented, see 44 F.R.D. at 463. The notion that the prosecutor should be held to a reasonableness standard in withholding

consent to waivers,⁹⁹ rejecting the asserted justifications for the requirement.¹⁰⁰ Some states permit the defendant to waive a jury trial unilaterally without setting forth any reasons,¹⁰¹ while other states permit waiver only upon court approval.¹⁰² Analysis of these approaches suggests a standard that satisfies the objections to the federal rule.

A. Unilateral Waiver by the Defendant

States that permit the defendant to choose between a bench and jury trial rely on the assumption that the right to a jury trial exists solely for the protection of the accused.¹⁰³ The only public interest recognized is ensuring that waivers are knowingly and voluntarily made.¹⁰⁴ Jury trials, however, generally further other legitimate public interests.¹⁰⁵ The unilateral waiver approach should not be adopted in the federal courts because it fails to recognize that legitimate public interests may justify overriding requested waivers. Furthermore, the unilateral approach gives the defendant a procedural advantage¹⁰⁶ by not recognizing that the prosecutor has a legitimate interest in the mode of trial and is also entitled to have his interests considered.

B. Waiver upon Court Approval

Waiver has also been conditioned upon court approval.¹⁰⁷ Many states give the court wide discretion in determining whether to grant a

consent to a defendant's requested waiver of a jury is not novel. *See* 8A J. Moore, *supra* note 2, § 23.03(2), at 23-18; Donnelly, *supra* note 7, at 255; *Government Consent to Waiver*, *supra* note 7, at 1040.

99. *See supra* note 10.

100. *See id.* Some courts have expressly rejected the justifications for the requirement of prosecutorial consent. *People v. Spegal*, 5 Ill. 2d 211, 218, 125 N.E.2d 468, 471 (1955) (citations omitted); *see Scott v. McCaffrey*, 12 Misc. 2d 671, 677, 172 N.Y.S.2d 954, 961-62 (Sup. Ct. 1958).

101. *See supra* note 10, *infra* pt. III(A).

102. *See infra* pt. III(B).

103. *See People v. Spegal*, 5 Ill. 2d 211, 218, 125 N.E.2d 468, 471 (1955); 3 ABA Standards, *supra* note 14, 15-1.2 commentary at 15-21. *See supra* note 10. In 1918, the Supreme Court of Ohio stated: "If [the defendant] regards it . . . as a burden, a hardship, a prejudice to a fair trial, why in the name of reason should he not be permitted to waive it . . . ?" *Hoffman v. State*, 98 Ohio St. 137, 146-47, 120 N.E. 234, 236 (1918).

104. *See Cole v. State*, 569 P.2d 470, 472 (Okla. Crim. App. 1977) (per curiam); *see, e.g., Colo. Rev. Stat. § 18-1-406* (1973); *Ill. Ann. Stat. ch. 38, ¶ 103-6* (Smith-Hurd 1980); *Md. R. Crim. P. 735*.

105. *See supra* pt. II(C).

106. *Criminal Jury Trials in Iowa*, *supra* note 10, at 201. Adoption of a unilateral waiver approach in federal cases would effectively overrule *Singer*, which held that a mere desire to save time does not itself constitute a sufficient reason for justifying a waiver. *See Singer v. United States*, 380 U.S. 24, 37-38 (1965).

107. *See State v. Godfrey*, 182 Neb. 451, 458, 155 N.W.2d 438, 443 (waiver should be granted by the court if "fair, reasonable, and efficient administration of

requested waiver,¹⁰⁸ allowing consideration of all interests affected by a waiver. One state has instead limited the court's discretion by requiring that a waiver be accepted unless "it is tendered as a stratagem to procure an otherwise impermissible procedural advantage."¹⁰⁹ Although this rule recognizes that in certain circumstances waivers should be denied on public policy grounds,¹¹⁰ it fails to recognize that other public interests are served by jury trials.¹¹¹ In certain circumstances, waivers should be denied even though not tendered for an improper purpose.¹¹² This rule also fails to recognize that the prosecutor as a litigant may have legitimate reasons for seeking a jury trial.¹¹³ This rule is therefore not much different from the unilateral approach.

To allow protection of these interests, the prosecutor should continue to have a voice in determining whether a requested waiver

justice" will be promoted), *cert. denied*, 392 U.S. 937 (1968); N.Y. Crim. Proc. Law § 320.10(2) (McKinney 1982) (waiver must be granted unless "tendered as a stratagem to procure an otherwise impermissible procedural advantage"); Minn. R. Crim. P. 26.01(2) (decision solely within court discretion if waiver is made knowingly and voluntarily; if case involves potentially prejudicial pretrial publicity, waiver will be granted if required to ensure likelihood of fair trial). In Massachusetts, waivers may be granted by the court only if requested before jury impaneling begins. Mass. Ann. Laws ch. 263, § 6 (Michie/Law. Co-op. 1980). If there is more than one defendant, all must waive or the court in its discretion may sever the case, and denial is permitted for "any good and sufficient reason," which must be set forth in the record. Mass. R. Crim. P. 19.

108. The following statutes and rules do not provide specific guidelines to be followed by the court in deciding whether to grant a requested waiver. Hawaii Rev. Stat. § 806-61 (1979); Or. Rev. Stat. § 136.001(2) (1981); R.I. Gen. Laws § 12-17-3 (1981); Me. R. Crim. P. 23(a); Mo. R. Crim. P. 27.01(b).

109. N.Y. Crim. Proc. Law § 320.10(2) (McKinney 1982). It has been held that under this rule, the defendant's request for a waiver should be denied in multi-defendant actions if waiver would result in a severance of the case. *See* *People v. Duchin*, 12 N.Y.2d 351, 353, 190 N.E.2d 17, 17-18, 239 N.Y.S.2d 670, 671 (1963); *People v. Diaz*, 10 A.D.2d 80, 90-91, 198 N.Y.S.2d 27, 38, *aff'd mem.*, 8 N.Y.2d 1061, 170 N.E.2d 411, 207 N.Y.S.2d 278 (1960). *But see* *People v. Pasaro*, 79 Misc. 2d 504, 509, 358 N.Y.S.2d 827, 832 (Crim. Ct. 1974) (waiver granted despite resulting severance); *Scott v. McCaffrey*, 12 Misc. 2d 671, 676, 172 N.Y.S.2d 954, 960 (Sup. Ct. 1958) (waiver should not be denied simply because defendant would obtain "the severance which, in the discretion of the court, had been denied him").

110. In addition to guarding against the use of waivers to obtain an impermissible procedural advantage, see *supra* note 109 and accompanying text, waivers will be denied if not knowingly and intelligently made. N.Y. Crim. Proc. Law § 320.10(2) (McKinney 1982); *see* *People v. Davis*, 49 N.Y.2d 114, 119, 400 N.E.2d 313, 316, 424 N.Y.S.2d 372, 375 (1979); *People ex rel. Rohrlisch v. Follette*, 20 N.Y.2d 297, 300-01, 229 N.E.2d 419, 421, 282 N.Y.S.2d 729, 731-32 (1967); *People v. Duchin*, 12 N.Y.2d 351, 353, 190 N.E.2d 17, 18, 239 N.Y.S.2d 670, 671 (1963).

111. See *supra* pt. II(C).

112. See *infra* pt. IV.

113. See *Singer v. United States*, 380 U.S. 24, 36 (1965). See *supra* pt. II(B).

should be granted, and the judge should be afforded sufficient discretion to consider all interests affected by a waiver.

IV. PROCEDURAL APPROACH

If the defendant shows a reasonable likelihood that a jury could not provide a fair trial, he should have an absolute right to waive his right to a jury trial.¹¹⁴ In such circumstances, the general public interest in having trials by jury, as well as any burdens imposed on the public or the prosecutor by a bench trial, cannot justify denial of a requested waiver. Moreover, even if the defendant does not assert that a jury trial would be unfair, the judge should not be required to deny a requested waiver merely because the prosecutor refuses to consent. Rather, the judge should weigh the hardships that a jury trial would impose on the defendant against the interests set forth by the prosecutor.

In *United States v. Braunstein*,¹¹⁵ a federal district court held that it was not necessary to decide the case on constitutional grounds,¹¹⁶ and granted the defendant's motion to waive the jury over the prosecutor's refusal to consent.¹¹⁷ The court found that because the issues involved were so complex, a jury would not be able to understand the intricacies involved without ongoing guidance, thereby resulting in inordinate delay and expense.¹¹⁸ The court held that based on the "totality of the circumstances," the waiver should be granted *as a matter of procedural fairness*.¹¹⁹ The prosecutor's failure to set forth any reasons for refusing to consent also influenced the court.¹²⁰

114. See *supra* pt. I.

115. 474 F. Supp. 1 (D.N.J. 1979).

116. *Id.* at 14. At least two cases before *Braunstein* suggested that waiver might be granted over prosecutorial objection even though the defendant's constitutional right to a fair trial would not be violated by a jury trial. See *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972), *cert. denied* at 409 U.S. 888 (1972) and at 410 U.S. 912 (1973); *United States v. Mayr*, 350 F. Supp. 1291, 1294 (S.D. Fla. 1972), *aff'd*, 487 F.2d 67 (5th Cir. 1973), *cert. denied*, 417 U.S. 914 (1974).

117. 474 F. Supp. at 14. In a supplemental memorandum, the *Braunstein* court noted that the case was assigned to another court, which set the case for a jury trial. *Id.* at 21. The defendants, however, pleaded guilty before trial began. *Id.* at 22.

118. *Id.* at 13-14. The defendant was charged with income tax evasion and medicaid fraud. *Id.* at 13. The court noted that a jury trial would require independent experts to guide the jury, complicated jury instructions on separate federal and state laws and potentially confusing rulings on the admissibility of evidence as to particular defendants. *Id.* at 13-14. Also, the prosecution planned to introduce numerous witnesses and intricate exhibits. *Id.* at 14.

119. *Id.* at 17.

120. See *id.* at 14. ("It is the government's right, as recognized in *Singer* . . . to withhold consent without explanation. However . . . the government [placed] noth-

The federal courts should adopt the *Braunstein* approach. In determining whether to grant a requested waiver, the judge should consider the specific reasons offered by both parties in favor of or against waiver. If the defendant offers no reason for seeking a waiver,¹²¹ waiver should be denied. The general public interest in preserving the jury trial is thereby furthered. When the defendant asserts legitimate reasons for seeking waiver, such as inordinate delay and expense, however, the court should balance the defendant's interests against the prosecutor's reasons for withholding consent.

The court should consider the effects waiver will have on public interests.¹²² For example, in multi-defendant cases, if fewer than all the defendants seek waiver, the case may have to be severed if waiver is granted.¹²³ The court is then faced with the additional determination whether the benefits of waiver to the defendant justify the resulting additional expense, delay and security problems.¹²⁴

The court should also consider whether a jury has already been selected. The public interest in avoiding unnecessary time and expenditures will not be served by waiver if the jury has already been selected.¹²⁵ Also, the prosecutor must be able to anticipate the mode of trial when preparing his case; it may be unfair to him as a litigant to grant a waiver after he has prepared for trial.¹²⁶ A waiver early in the

ing in the balance other than good reputation and motive to weigh against the overwhelming showing of sound reasons presented by defendants.").

121. If the defendant merely asserts that he seeks a more simple procedure, waiver should be denied. Even though Rule 2 of the FRCP directs that the federal rules "be construed to secure simplicity in procedure," Fed. R. Crim. P. 2, the public interest in maintaining the jury trial overrides the defendant's desire for a more simple procedure.

122. See *supra* pt. II(C).

123. See *United States v. Alpern*, 564 F.2d 755, 758 (7th Cir. 1977); *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972), *cert. denied* at 409 U.S. 888 (1972) and at 410 U.S. 912 (1973); *United States v. Tyler*, 332 F. Supp. 856, 857-58 (E.D. Wis. 1971).

124. *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972), *cert. denied* at 409 U.S. 888 (1972) and at 410 U.S. 912 (1973). *But see* *United States v. Jackson*, 549 F.2d 517, 526 (8th Cir.) (defendant argued that security problems at trial could have been prevented had case been severed), *cert. denied* at 430 U.S. 985 and at 431 U.S. 923, 968 (1977).

125. Unlike certain state rules, see *infra* note 127, the federal rule does not require that waivers be requested at any particular stage of the criminal proceedings. Fed. R. Crim. P. 23(a). In *United States v. Ceja*, 451 F.2d 399 (1st Cir. 1971), the court noted that to promote judicial efficiency, waivers should be required to be made before trial begins. *Id.* at 402 n.2.

126. *Criminal Jury Trials in Iowa*, *supra* note 10, at 201. The Federal Rules were designed to give neither party an undue advantage over the other. Institute Proceedings, *supra* note 55, at iv ("The new Rules are designed to safeguard both the government and the defendant against expense and delay. They protect both the accused and society, but give to neither an undue advantage over the other."). *But see* *People v. Caldwell*, 107 Misc. 2d 62, 65-66, 437 N.Y.S.2d 829, 832 (Sup. Ct.

proceeding, however, allows the prosecutor to prepare his case accordingly.¹²⁷

If the defendant requests a waiver solely on the ground of saving the time and expense required for a jury trial, the court should determine the extent of the burdens on the defendant. Jury trials generally entail more time and expense than bench trials.¹²⁸ The general public interest in this mode of trial, however, justifies such burdens. A waiver should be granted only if the public interest in having jury trials is outweighed by unusual burdens on the defendant.¹²⁹ In certain circumstances, the expense and delay resulting from a jury trial will be so great that absent overriding public or prosecutorial interests, waiver should be granted. For example, certain crimes involve issues so complex that a jury could not make an informed decision without ongoing expert guidance.¹³⁰ The expense and delay imposed on the defendant in such cases may outweigh the general public interest in having the issues resolved by a jury. The defendant's financial resources should be considered in making this determination.¹³¹

1980) (fact that waiver was sought during trial did not affect determination of whether waiver would create unfair procedural advantage).

127. Some state waiver rules expressly include consideration of the timeliness of a request for waiver. *See* Mass. Ann. Laws ch. 263, § 6 (Michie/Law. Co-op. 1980) (defendant may be tried by court if court approves and jury has not been impaneled); N.H. Rev. Stat. Ann. § 606.7 (1974) (unilateral waiver if prior to impaneling jury); Iowa R. Crim. P. 16 (1981) (unilateral waiver if requested within 30 days of arraignment; thereafter, consent of the prosecutor is required); Ohio R. Crim. P. 23(a) (unilateral waiver if requested before trial; thereafter, need consent of both court and the prosecutor).

128. *See supra* note 90 and accompanying text.

129. Rule 2 of the FRCP counsels that the federal rules be construed to prevent "unjustifiable expense and delay." Fed. R. Crim. P. 2 (emphasis added); *see* H.R. Rep. No. 2492, 76th Cong. 3d Sess. 2 (1940); S. Rep. No. 1934, 76th Cong. 3d Sess. 2 (1940); Institute Proceedings, *supra* note 55, at iv.

130. *See* Duncan v. Louisiana, 391 U.S. 145, 188-89 (1968) (Harlan, J., dissenting); United States v. Braunstein, 474 F. Supp. 1, 13 (D.N.J. 1979); United States v. Panteleakis, 422 F. Supp. 247, 249 (D.R.I. 1976).

131. The Criminal Justice Act of 1964, 18 U.S.C. § 3006A (1976 & Supp. V 1981) mandates that district courts devise plans for the appointing of counsel for persons "financially unable to obtain adequate representation." *Id.*; *see* United States v. Dangdee, 608 F.2d 807, 809 (9th Cir. 1979); United States v. Gipson, 517 F. Supp. 230, 231 (W.D. Mich. 1981). A district court judge is afforded considerable discretion in appointing counsel. United States v. Deutsch, 599 F.2d 46, 49 n.5 (5th Cir.), *cert. denied*, 444 U.S. 935 (1979); Jones v. Morris, 590 F.2d 684, 687 (7th Cir.) (*per curiam*), *cert. denied*, 440 U.S. 965 (1979); Wood v. United States, 373 F.2d 894, 900 (5th Cir. 1967); *see* United States v. Gipson, 517 F. Supp. 230, 231 (W.D. Mich. 1981). Even if a defendant is not "financially unable" to pay for counsel, however, the legal costs may impose a severe hardship that is magnified by the imposition of a longer trial. *Cf. id.* at 231 (fact that defendant had pleaded guilty was relevant in determining whether he could afford counsel).

The standard for determining whether to grant the defendant's requested waiver must be flexible. As the Supreme Court has stated, "procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities."¹³² Given the precept of Rule 2 of the FRCP that all the federal rules "be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay,"¹³³ if the burdens imposed on the defendant are not overridden by public or prosecutorial interests in having a jury trial, waiver should be granted.

CONCLUSION

The current rule governing the defendant's ability to waive his constitutional right to a jury trial in federal criminal cases should be reexamined. The prosecutor has been given virtually absolute power to veto requested waivers. This is inconsistent with notions of fair play and may undermine important interests of the defendant and the general public. The judge should be the ultimate decision-maker in determining whether a waiver will be granted.

If the defendant asserts that a jury trial would violate his constitutional right to a fair trial, a waiver should be granted if there is a reasonable likelihood that a jury would be unable to provide a fair trial. Because the traditional mechanisms to ensure fairness have not always been effective, the defendant should not be required to show actual proof of bias. Moreover, an approach that allows consideration of all legitimate interests affected by a waiver should be adopted. A less rigid approach to jury waivers will further the interests of both the defendant and the public.

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132. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). The Court noted that "procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of 'life, liberty or property.'" *Id.* at 276.

133. Fed. R. Crim. P. 2; see H.R. Rep. No. 2942, 76th Cong. 3d Sess. 2 (1940) ("[T]he enactment of this legislation will promote the uniformity, simplicity, and flexibility of criminal pleadings, practice, and procedure, and eliminate technicalities and delays in criminal cases.").