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The Right to Counsel: Collateral Issues Affecting Due Process

Joseph D. Grano*

I. INTRODUCTION

In recent years, the right of defendants, rich and poor, to have the assistance of counsel has been established as a fundamental right in the American administration of criminal justice.[1] This right was won after years of struggle and ardent debate during which many defendants were forced to rely on their own ingenuity in order to obtain a fair trial.[2] With the struggle finally over, at least in felony cases,[3] it is now possible to turn to collateral issues which, of necessity, were generally ignored during the years of debate. Three significant issues involve the defendant's right and ability to conduct the entire defense by himself, the waiver of objections to unconstitutional government conduct and the claim of ineffective assistance of counsel.

A. Defendant's Right to Conduct the Entire Defense

This issue may arise when a mentally competent defendant decides to waive counsel but the judge refuses to accept the waiver.[4] The judge may do this for one of many reasons, in-

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1. *See, e.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963).

2. For a significant contribution to the debate, see Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialoque on "The Most Pervasive Right" of an Accused*, 30 U. Chi. L. Rev. 1 (1962).

3. In Patterson v. Warden, 372 U.S. 776 (1963), the Supreme Court in a per curiam decision reversed and remanded, for further consideration in light of *Gideon*, a misdemeanor conviction involving several years imprisonment. Nevertheless, the Supreme Court has subsequently denied certiorari in cases where trial counsel was denied to a misdemeanant. *See* Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364, *cert. denied*, 385 U.S. 907 (1966); DeJoseph v. Connecticut, 3 Conn. 624, 222 A.2d 752, *cert. denied*, 385 U.S. 982 (1966). For a discussion of this new battleground, see Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685 (1968); Katz, *Municipal Courts—Another Urban Ill*, 20 Case Res. L. Rev. 87 (1968).

4. United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, DiBlasi v. McMann, 384 U.S. 1007 (1966).

cluding a concern that the defendant cannot adequately defend himself. In such a case the defendant might argue on appeal that he was denied a constitutional right to proceed *pro se*. The issue may also arise when a defendant accepts appointed counsel at the outset but during trial becomes disenchanted with counsel's tactics and asks to have him discharged.[5] It may be unclear to the trial judge whether the accused wants counsel discharged so that he may proceed *pro se* or so that another attorney may be appointed. A new appointment is unlikely in the vast majority of cases and the trial judge must decide whether he will discharge counsel or force the accused to remain with counsel he no longer wants. If the judge discharges counsel and permits the defendant to conduct his own defense, the defendant is likely to argue on appeal that he never unequivocally waived the right to counsel. On the other hand, if the trial judge is not satisfied that the defendant has waived counsel and therefore refuses to grant a discharge, the defendant is likely to argue that he was denied his right to proceed *pro se*.[6]

An inquiry into whether there is or should be a *right* to waive counsel necessarily leads to the question why waiver of counsel is even *permitted*. If it is concluded that certain circumstances can justify forcing representation on the accused, might not the accused argue that the same circumstances require forced representation? One might conclude that the solution to all of these problems is mandatory assistance of counsel for all defendants. Such a contention merits examination.

B. Waiving Objections to Unconstitutional Government Conduct

Regardless of whether counsel should never, sometimes or always be forced on an accused, a second salient problem for courts is the effect of representation on other constitutional rights. Suppose the defendant is on trial for a serious crime. Trial counsel, knowing or suspecting that discrimination existed in jury impaneling, foregoes objecting because he believes that an objection would increase the hostility and ill will toward his client.[7] Furthermore, during trial the prosecutor intro-

5. In the recent, greatly publicized trial of the "Chicago Eight," a defendant, Seale, insisted that counsel of record was not his lawyer and that he had a constitutional right to proceed *pro se*. The judge denied the request.

6. *See* notes 62-64 *infra*.

7. *See* Whitus v. Balkcom, 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964).

duces a confession which counsel thinks is coerced, but counsel fails to object for tactical reasons, such as a desire to get exculpatory statements in the confession before the jury. Or suppose counsel makes a futile objection to the confession at trial but decides not to appeal, or not to raise the objection on appeal. Assuming that objections in each of the above instances would be valid, a conviction in the absence of an objection would be tainted by unconstitutional government conduct. Yet, if the defendant tried to assert these objections in post-trial proceedings, he most likely would be told that his rights were waived. Many defendants argue, however, that acceptance of counsel's assistance should not entail the risk that such fundamental constitutional rights may be forfeited.[8] The argument is that a waiver should not be valid unless the accused personally consented to it.

Even if counsel is empowered to make waiver decisions, other problems confront the post-trial judiciary. The accused may assert that counsel did not "deliberately"[9] waive a "known right or privilege."[10] In most cases, the trial record cannot resolve the issue; at most, it indicates the fact that counsel did not object but supplies no reasons for counsel's omission. Must the post-trial court hold a hearing to determine whether a valid waiver was made?[11] An affirmative answer places a great burden on the judiciary; a negative answer leaves the issue to be resolved by speculation.

These issues revolve around the right to counsel. Nevertheless, it is not difficult to conclude that the waiver doctrine is the source of the problem. Hence, one cannot examine the effect of the right to counsel on the accused's other constitutional rights without reconsidering the waiver doctrine. One solution is to adopt a rule prohibiting the waiver of objections to unconstitutional government conduct and to require a pre-trial hearing to determine whether any of the prosecution's evidence was unconstitutionally obtained; this course of action too warrants consideration.

C. The Claim of Ineffective Assistance of Counsel

A third perplexing issue involves the claim of ineffective

8. For purposes of analysis, constitutional rights that involve objections to unconstitutional government conduct are distinguished from constitutional rights that do not. The nature of and the reasons for the distinction are discussed in section III *infra*.

9. *See* Fay v. Noia, 372 U.S. 391, 439 (1963).

10. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

11. *See* Townsend v. Sain, 372 U.S. 293 (1963).

assistance of counsel.[12] The accused may claim that an appointment of counsel on the eve of trial did not afford counsel sufficient time to prepare; or, the accused may assert that counsel did not adequately use the time he had to prepare. The accused may also assert that counsel was ineffective because he failed to consult the accused before making decisions. Finally, counsel's actual handling of the case may be attacked. The last assertion often becomes intertwined with the waiver issue; if counsel admits that he deliberately waived a certain right for tactical purposes, the accused may assert that counsel's choice of tactics was egregious. The law resolving these disputes should be compatible with the law governing the right to proceed *pro se*; the law should not force counsel on the accused and then abandon the accused to inadequate representation.

D. Prelude

In considering these problems several considerations served as points of departure. It was presumed that the best system is one which maximizes fairness and that fairness is maximized when the defendant is enabled to present his best defense to the charges against him.[13] As an absolute, the latter objective is impossible to achieve because the system depends on human beings. Therefore, the goal must be a system that maximizes the likelihood that the defendant's best defense will be presented.

It also was recognized that the volume of post-trial claims emanating from these problem areas is placing an intolerable burden on the post-trial judiciary. Questions of fundamental importance are being left for resolution by this judiciary, which, being far removed from trial, must struggle to separate the frivolous claims from the meritorious.

It must also be conceded that there is a growing reluctance to increase fairness at the expense of the orderly administration of criminal justice. Therefore, the goal to maximize fairness cannot be achieved unless the rules which are implemented for that purpose lend themselves to new procedures consistent with an orderly and smoothly functioning system. The goal, then, is to maximize fairness while minimizing the opportunity to make frivolous claims.

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12. *See* section IV *infra*.
13. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942).

II. DEFENDANT'S RIGHT TO CONDUCT THE ENTIRE DEFENSE

A. THE SCOPE OF THE RIGHT TO PROCEED *Pro Se*

1. *When the Choice is Made Before Trial*

Although dicta long ago suggested the validity of trials in which the defendant had elected to proceed without counsel,[14] it was not until 1938 in *Johnson v. Zerbst*[15] that the issue was faced directly. There the Supreme Court, relying on the sixth amendment, held that an indigent defendant in a federal court cannot be deprived of his life or liberty "unless he *has or waives* the assistance of counsel."[16] The waiver, said the Court, must be intentionally and knowingly made.[17] But it is one thing to say that a trial is constitutionally valid when there is a proper waiver of counsel and quite another to say that a criminal defendant has a constitutional right to waive counsel. Dicta supporting the latter proposition were not long in coming. In *Adams v. United States ex rel. McCann*,[18] the Court stated: "The right to assistance of counsel and the *correlative right* to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law."[19]

The issue before the Court, however, was not whether one has a right to waive the assistance of counsel but whether a conviction can be valid if a defendant who is proceeding *pro se* does not have the assistance of counsel at the time he decides to waive his right to a jury trial. Nevertheless, the language was ideal for a defendant seeking to overturn unfavorable proceedings when a waiver of counsel had not been permitted. Such a situation was presented in the Second Circuit case of *United States v. Plattner*.[20] The district court had denied the defendant's request to be his own lawyer because it felt that he, being unschooled in the law, would not be able to handle the trial proceedings. The court of appeals reversed the conviction, finding a denial of the sixth amendment right to waive counsel and proceed *pro se*. The court recognized that the

14. *See* Schick v. United States, 195 U.S. 65, 72 (1904).
15. 304 U.S. 458 (1938).
16. *Id.* at 463 (emphasis added).
17. *Id.* at 464.
18. 317 U.S. 269 (1942). *Accord*, Carter v. Illinois, 329 U.S. 173, 174 (1946); Moore v. Michigan, 355 U.S. 155, 161 (1957).
19. 317 U.S. at 279 (emphasis added).
20. 330 F.2d 271 (2d Cir. 1964).

right to counsel is designed to protect defendants not sufficiently learned in the law, but it also recognized a "primary right," implied in the sixth amendment, to conduct one's own defense. The court noted that the Judiciary Act of 1789,[21] which gives the parties in federal courts the right to manage their own causes, had become law just one day before the sixth amendment was proposed in Congress. If Congress had intended to repeal the right it had given by statute, it would have stated so expressly. The only logical conclusion, said the court, was that the sixth amendment preserved the right to proceed *pro se*. Additional support was found in the dicta in *Adams*[22] and in 37 state constitutions that specifically grant the accused a right to be heard by himself.[23]

The Second Circuit had another opportunity to explain its position in *United States ex rel. Maldonado v. Denno*,[24] when it made it clear that the right was equally applicable to the states. The court, quoting from the *Adams* opinion, stated that the right to proceed *pro se* is intended to assure the accused "the means of presenting his best defense."[25] To this end, reasoned the court, the defendant should not be forced to accept counsel in whom he has no confidence.

The Second Circuit, therefore, has two different reasons for finding a constitutional right to proceed *pro se*. First, the court is convinced that history supports such an interpretation of the sixth amendment. Second, the court is convinced that it is not fair to force a defendant to trial with a lawyer he does not want. The court, however, recognizes two types of fairness. The first is the fairness of the trial, since the accused must be able to present his best defense. The second, however, is assigned a higher value: the accused must be permitted to make his worst defense, since "respect for individual autonomy re-

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21. Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92:

> [I]n all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.

Similar language is found today in 28 U.S.C. § 1654 (1964). *See also* FED. R. CRIM. P. 44 (1968).

22. *See* text accompanying note 19 *supra*.

23. Citations to the state constitutions are found in 330 F.2d at 275. *See also* W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 237 (1955).

24. 348 F.2d 12 (2d Cir. 1965), *cert. denied*, DiBlasi v. McMann, 384 U.S. 1007 (1966).

25. *Id.* at 15, *quoting from* Adams v. United States *ex rel.* McCann. 317 U.S. 269, 279 (1942).

quires that he be allowed to go to jail under his own banner if he so desires . . . ."[26]

Whatever the reason relied on, a defendant who makes it clear before trial that he does not want counsel and that he would prefer to proceed *pro se* has an absolute right in courts following the Second Circuit to have his wishes respected.[27]

2. *When the Choice Is Made After Trial Has Begun*

Often the post-trial complaint of the defendant is not that he was denied the right to proceed *pro se* when he was told of his right to counsel, but that he was denied the right to dismiss counsel and proceed *pro se* after dissatisfaction had arisen. This claim is not met as generously as the claim that counsel was forced on the defendant from the outset. If the accused brings his dissatisfaction to the attention of the trial court and requests another attorney, he may be told that he is not entitled to appointed counsel with whom he can agree.[28] If he asks for a continuance to retain counsel, he may be told that a continuance

26. 348 F.2d at 15. *Accord*, Coleman v. Smyth, 166 F. Supp. 934 (E.D. Va.), *appeal dismissed*, 260 F.2d 518 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959) (inherent right to defend oneself); People v. Crovedi, 65 Cal. 2d 199, 205, 417 P.2d 868, 872, 53 Cal. Rptr. 284, 288 (1966). *Cf.* Carter v. Illinois, 329 U.S. 173, 174 (1946): "Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself . . . ."

27. *See* the cases cited in note 26 *supra*. Some federal cases treat the right to proceed *pro se* as only statutory: Van Natton v. United States, 357 F.2d 161, 163-64 (10th Cir. 1966); Butler V. United States, 317 F.2d 249, 258 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963); Brown v. United States, 264 F.2d 363, 365 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959). Of course, state cases supporting the right are more numerous because of specific provisions in their constitutions. *See, e.g.*, People v. Maddox, 67 Cal. 2d 647, 433 P.2d 163, 63 Cal. Rptr. 371 (1967); People v. Cooley, 11 Mich. App. 602, 162 N.W.2d 110 (1968).

28. *See, e.g.*, United States v. Burkeen, 355 F.2d 241, 245 (6th Cir.), *cert. denied*, Matlock v. United States, 384 U.S. 957 (1966); Arellanes v. United States, 326 F.2d 560, 561 (9th Cir. 1964), *cert. denied*, 385 U.S. 870 (1966); United States v. Birrel, 286 F. Supp. 885, 894 (S.D.N.Y. 1968) (but noting that a real conflict of interest calls for the court to remove the lawyer; *id.* at 897); Kruchten v. Eyman, 276 F. Supp. 858 (D. Ariz. 1967); People v. Foust, 267 Cal. App. 2d 222, 228, 72 Cal. Rptr. 675, 679 (1968). *Contra*, People v. Moss, 253 Cal. App. 2d 248, 251, 61 Cal. Rptr. 107, 110 (1967). *But cf.* People v. Maddox, 67 Cal. 2d 647, 654, 433 P.2d 163, 167, 63 Cal. Rptr. 371, 375 (1967) (expressing no opinion as to the statement in *Moss*). A good discussion supporting the proposition that counsel, and not the defendant, should be in charge of trial tactics is found in Nelson v. People, 346 F.2d 73, 81 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965), discussed at text accompanying notes 195-209 *infra*.

would disrupt the orderly processes of justice.[29] Not being entitled to another attorney unless he can give good reason for his dissatisfaction,[30] the defendant's original decision to accept counsel becomes a decision to relinquish control over the defense.

Even the Second Circuit, which finds an absolute right to proceed *pro se* when the election is made before trial, qualifies the right when the election is made after the trial has begun.[31] In the latter instance, another interest is said to compete with the right to conduct one's own defense—the interest in preventing disruption of the proceedings. The trial judge must weigh the competing interests and considerable weight is given to his assessment.[32]

Elsewhere it has been said that the following interests justify giving the court supervision over the choice once trial has begun: (1) the interest in assuring a fair trial to both the defendant and the state; (2) the interest in protecting the defendant against his own incompetence, and (3) the interest in granting the defendant every possible right while preserving the court's capacity to insure orderly procedure.[33]

The first interest can be disposed of quickly. If a fair trial is possible for a defendant who makes a knowing waiver of counsel in the first instance, it should be equally possible for a defendant who delays waiver until dissatisfaction arises. To the extent the *state* would be denied a fair trial because of the jury's sympathy for the hapless defendant, this sympathy would be no less when the defendant begins trial without counsel.[34] Fur-

29. Defendants who can afford to retain counsel are entitled to do so in order that they may have counsel of their own choice. *See* Crooker v. California, 357 U.S. 433, 439 (1958); Releford v. United States, 288 F.2d 298, 301-02 (9th Cir. 1961). Abuse of this right is not permitted. Attempting to discharge an appointed attorney and to retain counsel in order to postpone trial constitutes abuse. *See* McGill v. United States, 348 F.2d 791 (D.C. Cir. 1965) (request made four days before trial). Courts have even refused permission to discharge retained counsel. *See, e.g.*, Good v. United States, 378 F.2d 934 (9th Cir. 1967).

30. The "good reason" requirement may necessitate a showing that counsel is incompetent. *See* Arellanes v. United States, 326 F.2d 560, 561 (9th Cir. 1964), *cert. denied*, 385 U.S. 870 (1966).

31. *See* United States v. Catino, 403 F.2d 491 (2d Cir. 1968); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, DiBlasi v. McMann, 384 U.S. 1007 (1966).

32. *See* United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, DiBlasi v. McMann, 384 U.S. 1007 (1966).

33. *See* People v. Foust, 267 Cal. App. 2d 222, 72 Cal. Rptr. 675 (1968).

34. It has been suggested that this is one of the reasons why defendants elect to waive counsel. Note, *The Right of an Accused To Pro-*

thermore, in many cases the defendant's disruptive behavior makes it doubtful that the jury would give him undeserved sympathy.[35] If one argues that a fair trial for *either party* is impossible because of the disruption to the proceedings, one is really asserting the last interest. The first interest seems to carry no force on its own.

The interest in protecting the accused from his own incompetence likewise does not justify a distinction based on the time the right is asserted. If a defendant need not know as much law as an attorney to waive counsel in the first instance,[36] and if a defendant must be permitted to "venture into the unknown"[37] even if he will harm himself, the interest does not justify denying a right to discharge counsel.

The third interest is the one most frequently used to deny the accused the right to discharge counsel and proceed *pro se*.[38] Again, however, it is difficult to see why the proceedings are less orderly than when the right is asserted before trial.[39] There would be no delay, as there would be in a change of attorneys,

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ceed Without Counsel, 49 MINN. L. REV. 1133, 1134 (1965). It has also been reported that many prosecutors and judges feel the jury is prejudiced in favor of an unrepresented defendant. Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 585 (1963).

35. Hopefully, United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied*, Ormento v. United States, 375 U.S. 940 (1963) is not representative of the typical disorderly defendant case. Besides verbal abuse from the 13 defendants, the trial judge had to cope with physical attacks against the jurors and the hurling of a chair at the assistant attorney for the government.

36. People v. Ruiz, 263 Cal. App. 2d 216, 223, 69 Cal. Rptr. 473, 479 (1968); People v. Addison, 256 Cal. App. 2d 18, 24, 63 Cal. Rptr. 626, 629 (1967). It has been argued that the right to proceed *pro se* would be nullified by requiring the defendant to show some legal skill. Note, *The Right of an Accused*, *supra* note 34, at 1146-47. *But cf.* Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948).

37. United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, DiBlasi v. McMann, 384 U.S. 1007 (1966); People v. Addison, 256 Cal. App. 2d 18, 24, 63 Cal. Rptr. 626, 629 (1967).

38. *See, e.g.*, Sanchez v. United States, 311 F.2d 327, 332 (9th Cir. 1962), *cert. denied*, 373 U.S. 949 (1963); United States v. Birrell, 286 F. Supp. 885, 895 (S.D.N.Y. 1968); United States v. Foster, 9 F.R.D. 367, 371-72 (S.D.N.Y. 1949); People v. Nelson, 87 Ill. App. 2d 159, 231 N.E.2d 115 (1967), *rev'd in part*, 41 Ill. 2d 364, 243 N.E.2d 225 (1968); State v. Bullock, 71 Wash. 2d 886, 431 P.2d 195 (1967); and cases cited in note 31 *supra*.

39. It may appear, however, that delaying tactics are being used when the defendant does not move to discharge counsel until the jury is selected. *See* United States *ex rel.* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968).

if the defendant agreed to proceed without a continuance.[40] At most, a brief continuance might be required to enable the defendant to present evidence which counsel had refused, but the delay could be kept to a tolerable minimum.

When the defendant does not move to discharge counsel until the closing arguments to the jury, the fear is expressed that permitting discharge would enable the defendant to testify without being subject to cross-examination.[41] Nevertheless, this fear, if valid, would also justify forcing counsel on the accused in the first instance.

A third type of disruption is caused by a disorderly defendant or by one making a farce of the proceedings because of ignorance of the rules of procedure and evidence. This threat to orderly proceedings, however, can be as strong at the outset as it is during trial. Indeed, one court, holding the right to waive counsel always subject to judicial supervision, has upheld forcing counsel on a defendant whose lack of legal acumen became evident at the *voir dire* examination.[42] On the other hand, another court, holding the right to waive counsel always absolute, found a violation of the state constitution in the trial court's refusal to allow the accused to discharge counsel, even though the defendant had been unruly enough to require shackling.[43]

Differentiating between requests made before and during trial cannot, therefore, be justified. If any of the reasons supporting judicial supervision of the right are valid, they are equally valid before trial begins. The right should be either always absolute or never absolute; this is the fundamental issue that must be confronted.

3. *Proceeding* Pro Se *with Counsel*

To maintain some control over trial tactics without foregoing the assistance of counsel, defendants occasionally attempt to conduct part of their own defense while accepting representation. The attempt to proceed *pro se* while represented runs the gamut of possibilities. The defendant may seek to have the

40. The court in *Maldonado* considered the defendant's willingness to proceed immediately as strongly countering the state's argument that the trial would be delayed and disrupted, 348 F.2d at 16.

41. *See, e.g.*, People v. Von Latta, 258 Cal. App. 2d 329, 337, 65 Cal. Rptr. 651, 656 (1968); State v. Townley, 149 Minn. 5, 23, 182 N.W. 773, 781 (1921).

42. People v. Allen, 37 Ill. 2d 167, 226 N.E.2d 1, *cert. denied*, 389 U.S. 907 (1967).

43. People v. Henley, 2 Mich. App. 54, 138 N.W.2d 505 (1965).

attorney seated at his side while he conducts the entire case; he may merely wish to examine or cross-examine witnesses or to address the jury; or he may, in effect, let the attorney conduct the entire defense.

Although forcing advisory counsel on the defendant has been held not to violate the right to proceed *pro se*,[44] and although advisory counsel often has been permitted when wanted,[45] courts have not been sympathetic to the assertion that there is a *right* to counsel in an advisory capacity. It has been noted that the Judiciary Act gives the defendant a choice only between proceeding with counsel and personally managing the case,[46] and the act has been upheld against the assertion that it violates the sixth amendment.[47] Courts have also pointed out that the sixth amendment contains no language suggesting there is a hybrid of the two rights.[48]

Most frequently, however, courts justify denying the request by pointing to the interest in orderly trial proceedings.[49] Even in states whose constitutions grant the right to be heard by oneself *and* counsel, or the right to be heard by oneself, counsel or "both,"[50] the courts have permitted the trial judge to maintain order by prohibiting the defendant from participating in his defense.[51] If this can be done, it may be questioned whether there is any substance to the right to proceed *pro se*. The right may be low in the order of constitutional priorities.

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44. *See, e.g.*, Bayless v. United States, 381 F.2d 67 (9th Cir. 1967); Washington v. United States, 214 F.2d 876 (D.C. Cir. 1954); People v. Allen, 37 Ill. 2d 167, 226 N.E.2d 1, *cert. denied*, 389 U.S. 907 (1967); Hatten v. State, 83 Nev. 531, 435 P.2d 495 (1967); Harris v. State, 425 S.W.2d 642 (Tex. Crim. App. 1968).

45. *See, e.g.*, State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967).

46. *See* note 21 *supra*, for the act in its original form. The rights are also stated in the alternative in the present act.

47. Shelton v. United States, 205 F.2d 806 (5th Cir.), *petition for cert. dismissed on petitioner's motion*, 346 U.S. 892 (1953), *motion to vacate denied*, 349 U.S. 943 (1955).

48. *See, e.g.*, United States v. Foster, 9 F.R.D. 367, 372 (S.D.N.Y. 1949).

49. *See, e.g.*, *id.* at 372; People v. Northcott, 209 Cal. 639, 289 P. 634 (1930); Thompson v. State, 194 So. 2d 649 (Fla. Ct. App. 1967); Roberts v. State, 14 Ga. 18 (1853).

50. United States v. Plattner, 330 F.2d 271, 275 (2d Cir. 1964), cites 27 state constitutions using the conjunctive and six that specifically grant both rights.

51. *See, e.g.*, People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959) (denying hybrid of rights even though the constitution uses the conjunctive). The following cases are to the same effect even though the state constitutions granted both rights: Holloway v. State, 43 Ala. App. 153, 182 So. 2d 906 (1965) (refusing to permit defendant to join in ap-

B. Procedural Problems Affecting the Right

The classical definition of waiver is "an intentional relinquishment or abandonment of a known right or privilege."[52] When the right involved is fundamental in nature and constitutional in origin, courts are to indulge in every reasonable presumption that a waiver did not occur.[53] For example, the state must notify the defendant of his right to counsel before a valid waiver can be found to have been made.[54]

It might be argued that specifically informing a defendant of his right to counsel constitutes notice of his right to waive counsel. But if the right to proceed *pro se* is "correlative" to the right to proceed with counsel,[55] and if it is "inherent"[56] and "unqualified,"[57] then it would certainly seem that the defendant should have express notice. Implied notice of the right to waive counsel should suffice only if the right is inferior to the right to counsel.[58]

The Second Circuit, however, has indicated that the rights are of different magnitude by holding that notice is not constitutionally required.[59] It has, nevertheless, suggested that the following advice be given by trial judges: (1) that the defendant has a choice of proceeding with or without counsel; (2) that if the defendant desires the assistance of counsel, but cannot afford to retain one, the court will make an appointment; (3) that the defendant has a reasonable time to make the

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peal); Powell v. State, 206 So. 2d 47 (Fla. 1968); Leahy v. State, 111 Tex. Crim. 570, 13 S.W.2d 874 (1928) (refusing to permit defendants to cross examine witnesses); Ward v. State, 427 S.W.2d 876 (Tex. Crim. App. 1968) (refusing to permit defendant to argue to jury).

52. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

53. *Id.*

54. *See* Swenson v. Bosler, 386 U.S. 258 (1967); Doughty v. Maxwell, 376 U.S. 202 (1964), *rev'g per curiam*, 175 Ohio St. 46, 191 N.E.2d 727 (1963), on the basis of Gideon v. Wainwright, 372 U.S. 335 (1963), and Carnley v. Cochran, 369 U.S. 506 (1962). *See also* Miranda v. Arizona, 384 U.S. 436 (1966).

55. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942).

56. *See* Coleman v. Smyth, 166 F. Supp. 934, 937 (E.D. Va.), *appeal dismissed*, 260 F.2d 518 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959).

57. *See* United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, DiBlasi v. McMann, 384 U.S. 1007 (1966).

58. If the right to proceed *pro se* is not treated as having a constitutional basis, there is no problem in requiring the defendant to make a clear request and in denying him the right to notice. *E.g.*, Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959).

59. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

choice, and (4) that it is advisable to proceed with a lawyer because of his special skill and training.[60]

Since the warnings are not constitutionally required, the question arises why they should be given at all. One reason given is that notice helps to prevent defendants who are adept at manipulating the right to counsel in order to confuse trial records from claiming an infringement of their rights after conviction.[61] For example, a defendant may create a pre-trial record of disagreement and disaffection with counsel and assert after conviction that he was denied the right to proceed *pro se*.[62] Or, if a request to discharge counsel is granted, the defendant may claim that he was denied the assistance of counsel by being forced to proceed *pro se*.[63] This claim may succeed if in asking to discharge counsel the defendant never clearly expressed a desire to proceed *pro se*.[64]

These problems are not likely to be resolved by the warnings suggested in *Plattner*, however, since they are given prior to an appointment of counsel. The court seems to feel that notice of a choice between two alternatives would help clarify a record in which the defendant's desires are unclear,[65] but if this is so—and it is not clear why it should be so—the warnings would have to be repeated whenever disaffection with counsel is expressed,

60. *Id.* at 276. *See also* United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966).

61. 330 F.2d at 276. *See also* State v. Bullock, 71 Wash. 2d 886, 431 P.2d 195 (1967).

62. In United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966), the defendant accepted appointed counsel before pleading not guilty. He then retained his own counsel, but asked for and was granted a discharge of this lawyer before trial. He again retained counsel, and then wanted to discharge him. The trial judge relieved the attorney as retained counsel but immediately designated him appointed counsel and proceeded with trial.

63. In United States *ex rel.* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968), defendant discharged his retained counsel after the jury had been impaneled. After three continuances within one week in which defendant failed to retain other counsel while simultaneously declining appointed counsel, the defendant was ordered to trial without counsel.

64. *See id.* In United States *ex rel.* Higgins v. Fay, 364 F.2d 219 (2d Cir. 1966), the defendant, after the trial had begun, asked to discharge the legal aid attorney and be granted a continuance to hire an attorney. On being given the choice of continuing with the attorney or proceeding *pro se*, the defendant only insisted that he wanted another lawyer. The trial judge discharged the lawyer. The court held that the defendant had not waived the right to counsel.

65. *See, e.g.*, United States v. Abbamonte, discussed in note 62 *supra* where it was implied that defendant's intention would have been clearer if the *Plattner* procedure were followed.

and they would have to delineate a clear choice between following counsel's advice and proceeding *pro se.*

In some instances, the right to proceed *pro se* is denied even after a request.[66] This may result from a judge's fear that the defendant will later assert that he was denied counsel, especially if the defendant's statements and requests have been ambiguous. In such cases, some courts deny post-conviction relief if the defendant fails to show that he was prejudiced by being forced to proceed with counsel.[67] The Second Circuit has equivocated on the issue. In the *Plattner* case, relief was granted without requiring prejudice to be shown,[68] but in a subsequent case, where it was not clear that defendant wanted to proceed *pro se*, the court disposed of any doubts by noting that in any event the appointment had helped rather than hurt the defendant.[69]

At least one court has correctly seen that if prejudice must be a prerequisite to reversal, the right to proceed *pro se* is meaningless:

> It is difficult for a person trained in the law to conclude that one unschooled in the legal arts is better able to present his defense than could an able counsel. Even were we to concede that the exceptional defendant, unschooled in the broad spectrum of the law, could conduct as able a defense in his own behalf as qualified counsel could do, it nears if not reaches the unimaginable to say that a refusal to permit a lay defendant to proceed in propia persona would have prejudiced him.[70]

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66. Whenever counsel is denied to a defendant who does make a request, the conviction is reversed without requiring a showing of prejudice: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Glasser v. United States, 315 U.S. 60, 76 (1942).

67. *See, e.g.*, People v. Nelson, 87 Ill. App. 2d 159, 231 N.E.2d 115 (1967), *rev'd in part and aff'd in part*, 41 Ill. 2d 364, 243 N.E.2d 225 (1968) (right was asserted after trial had begun). *See also* Mayberry v. Weinrott, 255 F. Supp. 80 (E.D. Pa. 1966) (suit under Civil Rights Act to enjoin state trial judge from forcing attorney on defendant; *held*, there has been no denial of a fundamental right until prejudice is shown *after* the trial is over).

68. 330 F.2d at 273.

69. United States v. Abbamonte, discussed in note 62 *supra*. Again it should be seen that if the right is not considered to have a constitutional basis, there is no problem in requiring prejudice to be shown. *See* Butler v. United States, 317 F.2d 249 (8th Cir.), *cert. denied*, Benedec v. United States, 375 U.S. 836 (1963); Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959).

70. People v. Ruiz, 263 Cal. App. 2d 216, 226, 69 Cal. Rptr. 473, 479 (1968).

C. An Analogy to the Right to Waive Jury Trial

The foregoing discussion has shown that the right to proceed *pro se* is limited in scope and effect. Notice of the right is not required, and the right may be enjoyed only after a clear request. The right may be denied completely if it is not claimed before trial, and, in any event, denial may mandate reversal of a conviction only when prejudice is proved.

It is thus clear that the right is debilitated. It is time to ask why trial judges must continue to "navigate adroitly between the Scylla of denying a defendant the right to determine his own fate and the Charybdis of violating his right to counsel by acceptance of an ineffectual waiver . . . ."[71] It is time to question the necessity of burdening the criminal justice system with post-conviction proceedings growing out of the trial judge's lack of this navigational skill. The first inquiry must be into the right's constitutional underpinning, if any. The Supreme Court's decision on the right to waive a jury trial provides a useful starting point.

1. *The* Singer *Case*

In *Singer v. United States*,[72] the petitioner questioned the constitutional validity of rule 23(a) of the Federal Rules of Criminal Procedure, which permits a waiver of jury trial only with the acquiescence of the court and prosecutor. The Court rejected the petitioner's argument by concluding that "[t]he *ability* to waive a constitutional right does not ordinarily carry with it the *right* to insist upon the opposite of that right."[73] Hence, the petitioner had the ability to waive trial by jury,[74] but he did not have the right to do so.

More important than the holding itself is the reasoning of the Court. The petitioner had argued that the right to a jury trial under common law and in colonial practice encompassed a right of waiver. He had also argued that due process requires that a defendant be permitted to waive constitutional privileges that prove harmful to him. The Court reviewed common law and colonial practice and found that neither supported a right to waive trial by jury. In England, the defendant may have had such a right in a minor offense case, but the Court rejected the

71. People v. Carter, 66 Cal. 2d 666, 667, 427 P.2d 214, 216, 58 Cal. Rptr. 614, 616 (1967).
72. 380 U.S. 24 (1965).
73. *Id.* at 34-35 (emphasis added).
74. *See* Patton v. United States, 281 U.S. 276 (1930).

notion that the "obscure and insignificant procedure" in these cases established the proposition "that at common law defendants had the right to choose the method of trial in all criminal cases."[75] The Court also viewed any right of waiver that may have existed in the colonies as a clear departure from common law procedure.[76]

In disposing of the petitioner's due process argument, the Court noted the importance of the jury as a fact-finding body both in criminal cases and in American tradition in general.[77] Although acknowledging that trial by jury does have a potential for misuse which can work to the prejudice of the defendant, the Court carefully pointed out that procedural safeguards, such as a change of venue and *voir dire*, helped to negate any abuse.[78] In the case at hand, the petitioner had been given a trial by an impartial jury, the very thing that the Constitution guaranteed. With the defendant's interests so protected, the Court was able to respect the Government's interest in forcing a jury trial on the defendant: "[T]he government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."[79]

2. *The* Singer *Reasoning Applied*

a. The Common Law Practice

Unlike the "obscure and insignificant procedure" of jury waiver, there is no doubt that defendants were able to assume their own defense at common law. The importance of this factor, however, can be determined only after comparing common law with modern procedure.[80]

In sixteenth and early seventeenth century England, the defendant did not have the right to be assisted by counsel. The practice was for the accused to proceed alone.[81] The defendant

75. 380 U.S. at 28.
76. *Id.* at 26.
77. *Id.* at 34.
78. *Id.* at 35.
79. *Id.* at 36.
80. Although most of the existing records of criminal trials of the sixteenth and early seventeenth centuries are of political crimes, the procedure followed in those cases was probably typical of that in all criminal trials. *See* 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 345-50 (1883) [hereinafter cited as STEPHEN].
81. *See* W. BEANY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8-12 (1955); J. GRANT, OUR COMMON LAW CONSTITUTION 5-9 (1960) [hereinafter cited as BEANY and GRANT, respectively]; STEPHEN, *supra* note 80, at 341.

was often interrogated before trial, by torture if need be.[82] The trial began with the prosecutor's opening speech. The prisoner, who had to answer to the matters alleged in the speech, usually requested that he be allowed to answer separately to each matter as it was alleged. Thus, the trial involved a verbal battle between the prosecutor and the defendant. The prosecutor's statements often took the form of questions. If the prisoner denied any matter, the prosecutor had to prove it; when the proof consisted of the testimony of witnesses, the defendant was permitted to ask them questions and to follow their testimony with a statement of his own.[83] As the famous trial of Sir Walter Raleigh in 1603 reveals, however, the defendant had no right to call witnesses to testify on his behalf, even if their testimony might have acquitted him.[84] In short, the defendant's position was one of standing alone without counsel, books, the means of procuring evidence or the right to offer evidence which he did possess.[85]

The procedure started to change in the late seventeenth century. After a statute was passed allowing counsel in cases of treason,[86] courts began to permit counsel to represent accused felons.[87] During this period, the questioning of the accused at trial was reduced in significance and more reliance was placed on witnesses' testimony.[88] Nevertheless, the accused's only real hope of acquittal was his own persuasiveness; although given the right to present witnesses, he was not given the means to send for them.[89] Moreover, counsel were not yet adept at the art of cross-examination.[90]

While the practice of proceeding *pro se* existed at common law, it is difficult to state that such a *right* existed. Of course, the practice in the sixteenth and seventeenth centuries may have been tantamount to a right, for if the accused could not have defended himself, there would have been no adversary trial at

82. GRANT, *supra* note 81, at 10-14; STEPHEN, *supra* note 80, at 335.
83. STEPHEN, *supra* note 80, at 325-27.
84. GRANT, *supra* note 81, at 2-5; STEPHEN, *supra* note 80, at 335.
85. STEPHEN, *supra* note 80, at 350.
86. The statute, 7 & 8 Will. 3, c.3, was passed in 1695; *id.* at 416.
87. *Id.* at 424. Even as late as the 1750's, however, there was uncertainty as to what counsel could do; *see* GRANT, *supra* note 81, at 8. Prior to 1750, when counsel was permitted, his role was limited to handling purely legal questions. It is likely that counsel's expanded role in the eighteenth century grew out of an extended definition of the term "legal." BEANY, *supra* note 81, at 10.
88. STEPHEN, *supra* note 80, at 358, 377.
89. *Id.* at 388, 440.
90. *Id.* at 417.

all. The courts, however, never spoke of a right to proceed *pro se*.[91] This is not surprising since the right to retain counsel was not fixed by statute until 1836.[92]

In comparison with the common law practice whereby the defendant proceeded *pro se*, modern procedure is drastically different. Strict rules protect the defendant from convicting himself by involuntary pre-trial statements. The defendant goes to trial with a presumption of innocence[93] and he has a right to remain silent while the state attempts to meet the heavy burden of proof required for conviction. Counsel for the accused is armed with liberal rules to challenge evidence, is given process to send for witnesses, and is trained in the art of cross-examination. No longer does the trial revolve around the defendant; the defendant may, if he chooses, sit back and watch the trial unfold as he would a play, and he may be acquitted.

In light of today's procedure, what is the significance of the common law practice of proceeding *pro se*? Unlike the "obscure and insignificant" common law practice of jury waiver, the practice of proceeding *pro se* was clearly established. But the irrelevance of that practice to today's greatly changed and enlightened procedure is clear. Since none of the procedure with which the practice of proceeding *pro se* was so inextricably intertwined has survived, the practice at common law should not be determinative of the issue today.

b. Early American Experience

The early American practice adds no more to a solution of

91. It is interesting to note that the evidence from the nineteenth century indicates that if the accused retained counsel, his right to participate in conducting his defense was curtailed. *See* Rex v. Parkins, 171 Eng. Rep. 1311 (K.B. 1824); Rex v. White, 13 Rev. Rep. 765 (1811). The justification given for the limitation was the same as that used by American courts today: "I am afraid of the confusion and perplexity which would necessarily arise, if a cause were to be conducted at the same time both by counsel and by the party himself." Rex v. White, *supra*, at 766. *But cf.* Regina v. Doherty, 16 Cox Crim. Cas. 306, 310 (1887) where Stephen, as judge, asserted that the act permitting counsel was not intended to take away the defendant's right to address the jury.

92. The right to appointed counsel was not fixed by statute until 1903, BEANY, *supra* note 81, at 12. In Regina v. Yscuado, 6 Cox Crim. Cas. 386 (1854), the prosecutor suggested that counsel be appointed because of the "peculiar circumstances" of the case. The judge responded that he had no power to appoint counsel without the defendant's consent, *id.* at 387.

93. This presumption did not exist in early common law years. STEPHEN, *supra* note 80, at 355.

the issue than does the English practice. Due to a shortage of lawyers in the colonies, it is reasonable to conclude that most defendants represented themselves before the courts. The colonies did, however, seem to place more emphasis on the role of counsel. Several of the colonies established a statutory right to counsel and Connecticut developed the practice of appointing counsel.[94]

Some of the statutory provisions of the late seventeenth and early eighteenth centuries provided that a defendant could plead his case by counsel. Others were interpreted to mean that counsel's role was no greater than that in the earlier English practice and thus, in these colonies, counsel could only argue points of law. In any event, the studies made to date do not indicate the extent to which counsel was utilized by defendants.[95] After 1776, many state constitutions granted the right to counsel and many of these included the right of the accused to be heard by himself.[96] Subsequent state constitutions were similar.[97]

The first American cases dealing with the effect of counsel on the accused's right to conduct his defense arose, as in England, over the question of both the defendant and counsel participating. In the states, the problem was more acute because specific provisions in the constitutions granted the defendant the right to be heard by himself. The courts were not, however, to be deterred from maintaining order.[98] Perhaps the best statement interpreting such a provision is found in *Wilson v. State*:[99]

> That provision was founded upon a profound knowledge of human nature, and a close and careful observation of human transactions. An innocent person is sometimes entangled in a web of suspicion by a curious combination of facts, which no one else can explain but himself. . . . The skill or eloquence of his counsel can not reconcile the facts proven with the hypothesis of innocence. He alone may be possessed of the clue. He alone may be able by a simple explanation of circumstances . . . or by putting this and that fact together, to remove every shadow of suspicion from himself.[100]

The court held that although the defendant had no right to be

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94. BEANY, *supra* note 81, at 14-18.
95. *Id.*
96. *Id.* at 18-22.
97. *See* text accompanying note 23 *supra.*
98. *See, e.g.*, State v. McCall, 4 Ala. 643 (1848) (defendant not permitted to make statement of facts to the jury); Leahy v. State, 111 Tex. Crim. 570, 13 S.W.2d 874 (1928) (defendant not permitted to cross-examine witnesses although constitution gave right to be heard by himself or counsel or both).
99. 50 Tenn. 232 (1871).
100. *Id.* at 241.

sworn as a witness[101] or to *introduce* facts by an unsworn statement, the state constitution sought to guarantee "to every prisoner the right to *explain* the case made against him, in his own way."[102] In other words, the state constitution was aimed at insuring that the right to counsel did not deprive the accused of the right to explain the circumstances, because he, and no one else, might be best qualified for this task. The defendant was to be guaranteed what was vital to him at common law and in the colonies—the right to argue against the state's case.

The need for permitting the defendant to make a separate statement to the jury no longer exists because the defendant is now permitted to be a witness.[103] Not only can he explain the evidence produced by the prosecutor, but he may introduce new facts. Hence, it convincingly can be contended that permitting an accused to testify satisfies the concerns expressed by the early Americans who wrote the state constitutions. Likewise, permitting the accused to testify satisfies whatever the writers of the sixth amendment may have been taking for granted.[104] In any event, there is no evidence that anyone considered the issue of the accused being able to waive counsel and conduct his entire defense himself. The right to counsel itself received little attention from the constitution's authors.[105] It strains credulity to assert that a people who would have been shocked by *Johnson v. Zerbst* and *Gideon v. Wainwright* really considered the right to reject counsel.[106].

c. The Government Interest and Due Process

The *Singer* Court referred to the government's interest in having cases tried by the method most likely to produce a fair result. One basis of this interest is the responsibility of the government to procure convictions. A second vital basis, however, is its responsibility to see that its innocent citizens are not made

101. Until 1853, parties in England were incompetent as witnesses, but this was qualified in criminal cases because of the absence of counsel. STEPHEN, *supra* note 80, at 440. The *Wilson* case suggests that in the United States the rule was to protect the defendant from cross-examination which was thought to violate the privilege against self-incrimination.

102. 50 Tenn. at 242 (emphasis added).

103. *See, e.g.*, State v. Townley, 149 Minn. 5, 182 N.W. 773 (1921).

104. *See* text accompanying note 20 *supra*.

105. BEANY, *supra* note 81, at 22-24, 27.

106. *See* BEANY, *supra* note 81, at 27-36, arguing that the *Johnson* Court ignored history in finding that the sixth amendment required appointment of counsel.

to suffer.[107] Even though the criminal trial is an adversary proceeding, the government is not simply a combatant trying to win. When the government invokes its criminal process, it is utilizing its most powerful weapons against the citizen. It owes him the obligation of guaranteeing that this weaponry will not deprive him of his cherished rights and liberties until it is determined by a just and fair process that he has broken its valid law.[108]

There can be no doubt that for most, if not all, cases the fairest trial procedure is one in which counsel represents the accused. The long struggle from the old common law procedure to the overruling of *Betts v. Brady*[109] in *Gideon*[110] is testimony to this fact. Suffice it to repeat Justice Sutherland's classic statement:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.[111]

If the presence of counsel is deemed necessary to assure a fair trial in a particular case, the government (the court or the prosecutor) should have the power to reject a waiver of counsel even from a mentally competent defendant. This view, however, runs counter to the Second Circuit's reading of due process requiring that an accused be allowed to harm himself so that he can claim to have gone down under his own banner.[112] If the accused is to lose his freedom—or his life—perhaps it should be by the process that seems fairest to him. Such a subjective

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107. 380 U.S. at 36-37.

108. *Cf.* REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 9 (1963):

> When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of law but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty.

109. 316 U.S. 455 (1942).

110. Gideon v. Wainwright, 372 U.S. 335 (1963).

111. Powell v. Alabama, 287 U.S. 45, 69 (1932).

112. *See* text accompanying notes 23-25 *supra*.

approach might even be to society's interest in that it would make easier the rehabilitative goals of penology.

Nevertheless, it seems that there are government interests more important than the interest in protecting individual autonomy or in guaranteeing a trial that is subjectively fair. First, it should be remembered that Singer contended that a jury trial was not the most advantageous procedure for him, but the Supreme Court upheld the government's interest in utilizing the procedure deemed fairest by objective standards.[113] Second, the government has interests that extend beyond the accused. A strong and just government must supervise and restrict its own behavior to assure its continued strength and popular support, which depend, to some extent, on protecting the security of the rest of the members of the community. This security is maintained only if the community is convinced that the government will not deprive anyone of his rights except by methods objectively fair. Therefore, the government must have the right to demand that it not deviate from certain standards, even if the individual proceeded against would see no transgression.[114]

An issue of this nature can evoke strong sentiments on both sides and collateral considerations thus become relevant. One consideration is the interest of achieving finality in criminal adjudications. Needless post-conviction maneuvers are, of course, counterproductive. Under the existing rules, skillful defendants can manipulate the right to counsel and the right to proceed *pro se* in such a manner as to preserve a post-conviction attack regardless of the trial judge's decision.

The issue is not fully resolved, however. The Second Circuit recognized two due process arguments in support of a right to proceed *pro se*. Besides respecting the right of the accused to go down under his own banner, the court expressed the concern that the accused would not be able to present his best defense if he were forced to trial with counsel in whom he had no confidence.[115] Although it was argued above that a lawyer is

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113. 380 U.S. at 36.

114. *Cf.* REPORT OF THE ATTORNEY GENERAL, *supra* note 108, at 10:

> In the modern era it is not always fully understood that the adversary system performs a vital social function and is the product of long historical experience. The state trials in sixteenth- and seventeenth-century England demonstrated that a system of justice that provides inadequate opportunities to challenge official decisions is not only productive of injuries to individuals, but is itself a threat to the state's security and to the larger interests of the community.

115. *See* discussion at text accompanying notes 24-25 *supra*.

necessary to assure the presentation of the best defense available, a closer examination of this conclusion is necessary in situations involving appointed counsel or public defenders who have more cases than they can handle and who may spend little time preparing for trial. If, in general, this representation is of extremely poor quality, it is difficult to justify denying an indigent the opportunity to represent himself. Of course, one might argue that if the representation received is of poor quality, the solution is to remedy the defect rather than to allow the accused to try presenting a better defense on his own. Unfortunately, however, an immediate remedy is not available to correct inadequate representation on a large scale; at most, the legal remedy of reversal for ineffective assistance of counsel is workable only if such representation is the exception rather than the rule.[116]

All studies of appointed counsel rely largely on interviews with judges and prosecutors and on the analysis of results actually achieved by counsel. The conclusions vary, as should be expected from research methods based on subjective opinions and on "outcome" results which may be affected by a myriad of variables. On the one hand, it has been said: "Personal observations and interviews with several attorneys active in representing indigents confirm the fact that efforts of assigned counsel are occasionally perfunctory, often uninspired; lack of experience is widespread and cannot help but reduce the effectivensss of counsel in some measure."[117] It should be noted, however, that a major concern of the scholars is the frequency with which indigents with appointed lawyers plead guilty. There is evidence to suggest that such defendants plead guilty more frequently than defendants with retained counsel,[118] although it is also clear that those without attorneys are even more likely to plead guilty.[119] The issue here, however, is whether those *who go to trial* with appointed counsel get inadequate representation.

116. The *Singer* Court emphasized the presence of surrounding safeguards to counteract the potential for prejudice in cases involving mandatory jury trials. Similarly, safeguards must be established if forced representation is to be allowed. The doctrine of ineffective assistance of counsel, the major safeguard in this area, is discussed in section IV *infra.*

117. Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts,* 76 HARV. L. REV. 579, 613 (1963).

118. *Id.* at 588; L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 21 (1965).

119. Mazor, *The Right to be Provided Counsel: Variations on a Familiar Theme,* 9 UTAH L. REV. 50, 86 (1964).

There is evidence that cases with retained lawyers take a longer period of time, but there also is evidence that this represents dilatory tactics rather than greater work.[120] The statistics do show, however, that the conviction rate and the rate of conviction on the original charge, as opposed to a reduced charge, decrease in direct correlation to the increase in the time taken to complete a case.[121] There also is evidence to indicate that assigned counsel are younger and less experienced than most retained attorneys.[122] It also has been suggested that a position in the public defender's office is used to obtain experience for a more lucrative position.[123] Perhaps, however, the soundest and safest conclusion is the following:

> About all that can safely be said is that assigned counsel have a somewhat inferior record, but the difference is not so great that one can ascribe it to assigned counsel systems as such. Other factors may again be at work, such as the availability of funds for investigation, the method of selecting assigned counsel, and, most of all, the poverty of the defendant himself and his lack of standing in the community.[124]

Factors other than method of selection would also be present to hinder a defendant without counsel. Therefore, on the basis of studies so far made, it can be said that indigents may not get the quality of representation they should; but the quality is not poor enough to necessitate the conclusion that due process requires that an accused be given an absolute right to waive counsel.

D. THAT DUE PROCESS CAN REQUIRE FORCING AN ACCUSED TO BE REPRESENTED BY COUNSEL

Up to this point the only conclusion is that the approach of the Second Circuit and of other courts following its reasoning is incorrect, and that neither the sixth amendment nor due process is violated by forcing an accused to be represented by counsel. This conclusion nevertheless leaves the courts free to accept a waiver of counsel and to allow the accused to proceed *pro se*. The discussion, however, suggests the possibility that if particular circumstances justify the court's rejection of a waiver of counsel, the same circumstances may require forced representa-

120. Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 279-82 (1968).

121. *Id.* at 283-87.

122. Mazor, *supra* note 119, at 83; L. SILVERSTEIN, *supra* note 118, at 16.

123. L. SILVERSTEIN, *supra* note 118, at 44.

124. *Id.* at 28.

tion. A consideration of the pre-*Gideon* right to counsel cases can shed light on the contention that there are at least some circumstances in which the court must reject a waiver of counsel.

Betts v. Brady[125] established an approach to the right to counsel issue in state courts that was not abandoned for 20 years. *Betts* held that the sixth amendment right to counsel was not binding on the states, but it also stated that this right was a factor to consider in determining whether the defendant had been given due process: "the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and . . . want of counsel in a particular case may result in a conviction lacking in such fundamental fairness . . . ."[126] In the years following *Betts*, the Court had many opportunities to deal with the issue of what constituted "special circumstances" requiring counsel in a particular case. Some of the factors that played a significant role in many of the cases were summarized by the Court in *Wade v. Mayo*:[127] "There are some individuals who, by reason of age, ignorance or mental capacity are incapable of representing themselves adequately in a prosecution of a relatively simple nature."[128] In addition, the Court occasionally considered the complexity of the legal questions involved[129] and examined the trial record for significant injustices during trial.[130]

Although *Betts* and its progeny were concerned with the fourteenth amendment and not the sixth amendment,[131] it is clear that the Court was of the view that the deficiency in due process created by denying the right to counsel was cured by a

125. 316 U.S. 455 (1942).
126. *Id.* at 473.
127. 334 U.S. 672 (1948).
128. *Id.* at 684.
129. *See, e.g.*, Carnley v. Cochran, 369 U.S. 506 (1962) (statutory construction in crime of incestuous sexual intercourse); McNeal v. Culver, 365 U.S. 109 (1961) (possible lesser included offenses and question of admissibility of statement); Cash v. Culver, 358 U.S. 633 (1959) (right to cross-examine accomplice as to reasons for testifying); Moore v. Michigan, 355 U.S. 155 (1957) (technical difficulties in defenses to murder); Rice v. Olson, 324 U.S. 786 (1945) (question of jurisdiction on Indian reservations).
130. *See, e.g.*, Gibbs v. Burke, 337 U.S. 773, 781 (1949), where the court found that hearsay and other incompetent evidence was admitted without objection and that unnecessary and unfavorable court rulings resulted in defendant being "handicapped by lack of counsel to such an extent that his constitutional right to a fair trial was denied."
131. Bute v. Illinois, 333 U.S. 640, 660 (1948).

valid waiver.[132] It is not at all clear, however, why a waiver had this effect. The absurdity of the conclusion is highlighted by *McNeal v. Culver*[133] in which an indigent, ignorant and mentally ill defendant was charged with assault with intent to murder. State assault law was extremely complex and it was possible that the petitioner might have been guilty only of aggravated assault, a crime carrying 15 years less punishment. The trial record revealed that the petitioner was incapable of cross-examining witnesses or otherwise presenting his defense. The Court found special circumstances requiring the assistance of counsel: "These facts tend strongly to show that petitioner's ignorance, coupled with his mental illness and complete unfamiliarity with the law and court procedures, and the scant, if any, help he received from the court, made the trial fundamentally unfair."[134] It is hard to accept the view that a waiver of counsel renders these factors irrelevant. Had McNeal waived counsel, he still would have been ignorant, mentally ill and unable to manage his defense, and his trial would have been just as "fundamentally unfair."

In one case, the Supreme Court seems to have recognized that counsel's presence was absolutely necessary to a fair trial. In *Massey v. Moore*,[135] the petitioner asserted that he was denied due process because he was tried while of unsound mind and unassisted by counsel. The Court noted that a defendant might be capable of standing trial but incapable of proceeding without counsel:

> No trial can be fair that leaves the defense to a man who is insane, unaided by counsel, and who by reason of his mental condition stands helpless and alone before the court. Even the sane layman may have difficulty discovering in a particular case the defenses which the law allows. . . . Yet problems difficult for him are *impossible for the insane*.[136]

The words of the Court seem to refute the idea that a mentally incompetent defendant is prohibited from waiving counsel *merely* because of his inability to meet the strict waiver requirements of *Johnson v. Zerbst*;[137] rather, it is clear that a fair trial is

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132. Moore v. Michigan, 355 U.S. 155 (1957); Uveges v. Pennsylvania, 335 U.S. 437 (1948); Bute v. Illinois, 333 U.S. 640 (1948).
133. 365 U.S. 109 (1961).
134. *Id.* at 114.
135. 348 U.S. 105 (1954).
136. *Id.* at 108-09 (emphasis added).
137. 304 U.S. at 464. Waiver was defined as the "intentional relinquishment or abandonment of a known right or privilege."

impossible for an unrepresented defendant who is mentally incompetent.

It would appear to follow that if an accused's ignorance or lack of legal skill is extreme, a fair trial is closer to an impossibility than to an improbability and a waiver of counsel should not be permitted. McNeal's chances of obtaining a fair trial were no greater than Massey's; a waiver of counsel would not have prevented an unfair trial in either case.

Of course, it can be argued that since a defendant can plead guilty without a violation of the constitution,[138] there is nothing unconstitutional in permitting him to go to trial and do virtually nothing. It can also be argued, however, that if fairness is the criterion, it is not proper to accept a guilty plea. Neither objection is logically necessary. As to the first, the fact is that the defendant has pleaded not guilty. The government must prove guilt beyond a reasonable doubt and it should not be permitted to carry its burden with unfair methods. For some defendants, fundamental fairness cannot be achieved without counsel. A trial such as that in *McNeal* or *Massey* makes meaningless the traditional concept of a plea of not guilty.

The second objection poses a more serious problem. Would it necessarily follow, for example, that because McNeal had a chance of success at trial, the acceptance of a guilty plea would have been unfair? The answer must be no, provided the guilty plea process was fair. If this process is fair, it should not matter that it would have been fairer yet to go to trial. The problem in either mode of trial is only to assure that the proceedings are fair. This may mean that counsel's presence should be required before accepting a guilty plea[139] and it may mean that the guilty plea process should reveal that there is a factual basis for the plea.[140] Whatever is needed to assure a fair guilty plea process, the fact remains that certain trials without counsel simply are not fair determinations of guilt.

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138. In Patton v. United States, 281 U.S. 276, 305 (1930), the petitioner claimed that the right of jury trial was too basic to be waived. The Court stated:

> It is difficult to see why the fact . . . that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention; for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, *a fortiori* it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt.

139. *See* subsection E2 *infra*.

140. *See* section IV, subsection E *infra*.

The recommended approach would not seriously disturb other areas of the criminal process. For example, if it is unfair to try a defendant without bringing him into court, is it unfair to proceed when he voluntarily absents himself? The present doctrine that the trial may continue would remain good law, provided counsel is present.[141] When the accused with counsel stays away from trial, he denies himself the opportunity of being personally present; he does not deny himself a fair trial. The waiver doctrine is valid provided the process which determines guilt remains fair. In right to counsel cases, the time has come to recognize that fundamental unfairness results not only from being denied the opportunity to have counsel, but also from being found guilty in a waiver-of-counsel case in which the defendant is utterly lacking in legal acumen.

The Supreme Court, however, has not shown an inclination to adopt the rule that due process can require forcing an accused to be represented by counsel. *United States v. Wade* held that the sixth amendment right to counsel applies to pre-trial lineups by reasoning that counsel's presence is necessary to assure a fair trial: "In sum the principle of Powell v. Alabama and succeeding cases requires that we . . . determine whether the presence of his counsel is necessary to preserve the defendant's *basic right to a fair trial* . . . ."[142] Nevertheless, the Court stated that counsel could be waived.[143]

In view of the Supreme Court's continued support of a rule of waiver, the approach recommended here would require the Court to reconsider its reasoning. It should at least be plain that cases like *Wade* are really stating that the right to a fair trial can be waived.[144] If the Court is saying that due process only guarantees an *opportunity* to a fair trial, but not a fair trial itself, it should say so directly. It does not, however, seem

141. Although counsel's presence is not mentioned as a factor in the cases, the facts often reveal that counsel continued the trial after the accused remained away. *See, e.g.*, United States v. Grow, 394 F.2d 182 (3d Cir. 1968); Pearson v. United States, 325 F.2d 625 (D.C. Cir. 1963). Of course, if counsel was not present, the proceedings, under the recommended approach, would not be fair. If counsel's presence is required in *all* cases going to trial (*see* section E *infra*), no trial in progress could be frustrated by defendant's voluntary absence.

142. United States v. Wade, 388 U.S. 218 (1967).

143. *Id.* at 237.

144. *See also* O'Brien v. United States, 376 F.2d 538 (1st Cir. 1967), *vacated on other grounds*, 391 U.S. 367 (1968); Minor v. United States, 375 F.2d 170 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967) (waiver of counsel waives trial defects). *But cf.* Note, *The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 178 (1967).

that the Court would come to such a conclusion. The accused may as well be entitled to waive the entire judicial process and submit to punishment by his captors if he can validly submit himself to a trial completely devoid of fairness. The better approach is to recognize that constitutional rights are waivable only when a fair trial is possible without them.[145] A fair trial should not be waivable, and therefore, in *some* cases, like *McNeal,* due process should prohibit waiver of counsel.

At least one federal court has agreed that the due process right to counsel is distinguishable from the sixth amendment right. In *Juelich v. United States*[146] the Fifth Circuit held that due process required the appointment of counsel at a motion to vacate judgment even though the sixth amendment did not apply. The court then reacted to the claim of a right to proceed *pro se*: "In such Fifth Amendment cases, it can hardly be argued that there is any 'correlative right to dispense with a lawyer's help' for that would imply the *reductio ad absurdum* that a hearing *not* 'fair and meaningful' is a constitutionally protected right."[147] The court was, of course, dealing with a claimed *right* to proceed *pro se,* but it is almost as absurd to conclude that a hearing "not fair and meaningful" is constitutionally *permissible.* Of course, the court's reasoning is equally applicable to critical stages where the right to counsel does apply.

E. Adding the Coup de Grace to Waiver of Counsel

1. *At Trial*

Up to this point two conclusions have been reached: (1) a defendant has no right to demand that he proceed *pro se,* and (2) due process requires that some defendants be prohibited from waiving counsel. The consideration now is whether waiver of counsel should be prohibited in all cases going to trial.

The second of the two conclusions poses serious problems for the administration of criminal justice. Basically, it sets forth the *Betts* "special circumstances" test,[148] but in the context of prohibiting waiver of counsel rather than in the context of prohibiting the denial of the right to counsel. Therefore, it can be expected that the same procedural problems will accompany the

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145. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942).

146. 342 F.2d 29 (5th Cir. 1965).

147. *Id.* at 32.

148. *See* text accompanying notes 125-30 *supra.*

rule in the new context as were present in the old. First, it often is difficult for a trial judge to assess beforehand whether the defendant is capable of assuring himself a fair trial. Second, the final arbiter often is an appellate court. The long list of cases dealt with by the Supreme Court during the reign of *Betts* testifies to this problem.[149] One can predict, therefore, that the proposed rule would create a flood of post-trial attacks alleging that because of age, ignorance, mental disease or the complexity of the charges, waiver of counsel should not have been accepted.

The only way to avoid the problems associated with the special circumstances test is to insist that counsel be provided even in cases where the defendant could manage to procure a fair trial on his own. This would not place an intolerable burden on the courts. In the state courts it has been estimated that an average of 69 percent of all defendants plead guilty.[150] Thus, 31 percent of the cases are disposed of by a full trial, which in absolute numbers for the year 1962 would have been 93,000 cases.[151] But studies show that very few of these defendants are without counsel at the present time.[152] In many counties, between 90 and 100 percent of unrepresented defendants plead guilty,[153] thus leaving few full trials without counsel.

In the federal courts the burden would be even less. A plea of guilty or *nolo contendere* was entered in over 78 percent of all cases in 1968.[154] In absolute numbers, cases of 31,843 defendants were disposed of in the federal courts, and 25,334 of these were represented by appointed counsel.[155] Again, studies indicate that few of those pleading not guilty are without counsel.[156]

From the statistics, it can be seen that little added burden would be placed on the system by prohibiting waiver of counsel in all cases. Moreover, the added burden would be insignificant compared to the burden that would be caused by applying a special circumstances type test. And finally, interviews with federal judges and United States Attorneys reveal practically unan-

149. *See* text accompanying notes 125-36 and notes 129-30 *supra*.
150. L. SILVERSTEIN, *supra* note 118, at 9, reports that the figure varies from 33 to 93 percent depending on the county.
151. *Id.* at 7.
152. *Id.* at 91.
153. *Id.* at 98-99, Table 29.
154. 1968 REP. DIR. AD. OFF. U.S. CTS. 261. (Of this number over 50 percent were dismissed before a verdict).
155. *Id.* at 92, 261.
156. Note, *supra* note 117, at 585.

imous opinion that trials without counsel have no commendable features and often produce irrational results and error-filled records.[157] There is no reason, therefore, for not extending the rule to cover all cases going to trial.

2. *Before Pleading*

The statistics discussed above reveal that the vast majority of all criminal defendants plead guilty; they also show that an even greater majority of unrepresented defendants so plead. Although it is difficult to determine the exact number of defendants who are unrepresented, one study of 152 counties revealed that in 62 of them at least 11 percent of the defendants lacked counsel.[158] In smaller counties the number was considerably higher, surpassing 44 percent in counties with a median population of 45,000.[159] Therefore, it can be seen that in a system processing over 300,000 felony defendants a year,[160] a proposal not to accept a waiver of counsel in guilty plea cases would present a large problem in cost and manpower. Only weighty consideration could justify imposing such a burden on the system.

In terms of fairness, two interests weigh in favor of requiring counsel's presence: (1) enabling the defendant to present his best defense, and (2) enabling the defendant to benefit from plea bargaining. Considering the first, it cannot be doubted that only an attorney can discover and evaluate all of the defenses to the charges. The pre-arraignment issues are many and require the special skill only years of legal training can provide. For example, motions to attack the indictment must be considered and these can be based on reasons as divergent as improper selection of the grand jury and failure to charge an offense. Defenses that often are not obvious to the layman, such as the statute of limitations or double jeopardy, and motions to suppress evidence are always considerations.[161] Counsel must also assess the relative strength of the prosecution's case, taking into account the legal merits of its theory, the convincing nature of its evidence and the character of its witnesses. Circumstances which might prejudice a trier of fact, such as the nature of the

157. *Id.*
158. L. SILVERSTEIN, *supra* note 118, at 91.
159. *Id.* at 97, Table 28.
160. *Id.* at 7.
161. *See,* A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES §§ 172-84 (1967). At section 234 the authors list 16 investigative techniques that raise fourth amendment considerations.

defense, the status of the complainant, community attitudes and pre-trial publicity, must be made part of the picture.[162] All of these considerations are essential to an intelligent choice of pleas, but it is doubtful that even an intelligent layman could adequately assess their importance. The need for counsel is further highlighted by the fact that most defendants are not intelligent laymen.[163] In fact, counsel's task is often to save the accused from himself: "Counsel's appraisal of the case is probably far better than the defendant's, and often his difficult and painful job is to save the defendant from the defendant's ill-informed or ill-estimated choices."[164]

If the first interest—that of enabling the defendant to present his best defense—stood alone, it might yet be reasonable to conclude that guilty pleas should be acceptable after a waiver of counsel. It could be contended that a guilty defendant should be encouraged to confess his crime and repent rather than to attack the accusation with an armory of technicalities that bear little or no relation to actual guilt. A number of important values are served by guilty pleas: prompt and certain application of correctional measures, lessening of court congestion, and a manifestation by the defendant of a willingness to assume responsibility for his conduct.[165]

The argument in favor of waiver would have merit if the unrepresented defendant pleaded to the same offense as the defendant with counsel, but this is not the case. A second interest becomes relevant at this point. Plea bargaining must be recognized as an integral part of the criminal justice process in the United States,[166] and those without counsel are denied the benefits derived from it. One study showed that:

> Of those [unrepresented defendants] who pleaded guilty, the

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162. *Id.* at 202-04.

163. Potts, *Right to Counsel in Criminal Cases: Legal Aid or Public Defender*, 28 TEX. L. REV. 491 (1950); L. SILVERSTEIN, *supra* note 118, at 7 (half of the 300,000 felony defendants in the state courts are classified as indigents based on their inability to make bail).

164. A. AMSTERDAM, ET AL., *supra* note 161, § 201.

165. A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO GUILTY PLEAS 2 (Tentative Draft 1967).

166. *Id.* § 1.8, at 36-52. Since United States v. Jackson, 390 U.S. 570 (1968), there has been some concern that plea bargaining unnecessarily chills the fifth amendment right to plead not guilty. The *Jackson* case, however, did note that guilty pleas are necessary for the administration of the criminal process. For a discussion of the limited circumstances in which plea bargaining may be considered as not unnecessarily chilling the defendant's fifth amendment rights, see Scott v. United States, 4 Crim. L. Rptr. 3101 (D.C. Cir. 1969).

> overwhelming majority pleaded to the principle [*sic*] offense rather than to a lesser offense. This suggests the possibility that a defendant without counsel is in a poor position to bargain with the prosecutor for a plea to a lesser offense.[167]

The question presented by this fact is whether our system can tolerate the unequal justice afforded by permitting an accused to plead guilty without having had the benefit of counsel's advice and assistance. It does not seem fair for a system with a built-in mechanism of leniency to deny its benefits to an accused merely because he was too ignorant, arrogant or naive to appreciate the need for counsel. In fact, according to current ideology on differential sentencing, the accused who pleads guilty after rejecting counsel's aid should be more entitled to leniency than his represented counterpart, since the willingness to repent is clearer when no plea bargaining has taken place.[168] Yet the system apparently produces the opposite result.

To assure equal justice for all, therefore, the necessity of counsel's presence before pleading should be recognized. Of course, if the accused refuses to cooperate in any way with counsel, the system has done all it can do. This refusal, however, should be made in a private meeting between counsel and the defendant outside of the courtroom setting; a rejection at the time counsel is offered should not be accepted. This is the type of justice that should be characteristic of American jurisprudence and nothing less should be acceptable unless it is found to be *impossible* to overcome the cost and manpower problems that presently deny a more equitable approach.[169]

F. SUMMATION

Some courts argue that a constitutional right to proceed *pro se* is encompassed in the sixth amendment and in state constitutions which grant a criminal defendant a right to be heard by himself. The state constitutions, however, were probably di-

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167. L. SILVERSTEIN, *supra* note 118, at 91-93. *See also* Mazor, *supra* note 119, at 91-93.

168. *See* A.B.A. PROJECT, *supra* note 165, § 1.8, at 36-52 stating that a willingness to acknowledge guilt is a factor to consider in sentencing.

169. In some states a guilty plea cannot be accepted in the absence of counsel. *See, e.g.*, ALA. CODE tit. 15, § 262 (1959) (felonies); CAL. PENAL CODE § 1018 (West 1956) (felonies punishable by death or life without eligibility for parole); ILL. REV. STAT. C. 38, § 113-5 (1965) (persons under 18, unless punishable only by fine). *See also* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964), where the writer questions whether a defendant who pleads guilty should ever be permitted to waive counsel.

rected at enabling the accused to "tell his side of the story." In addition, neither the early state constitutions nor the common law practice lend credence to the idea that the writers of the sixth amendment intended a right to waive counsel. At any rate these courts have so limited the right that little, if anything, remains of it.

Furthermore, no due process underpinning to the "right" can be found. In fact, due process requires a rule prohibiting waiver in special circumstances. To avoid needless appellate adjudication, waiver should be prohibited in all cases going to trial. Finally, although the burden would be considerable, it is recommended that waiver of counsel be prohibited even in guilty plea cases so that equal justice can be provided by the criminal justice system.

III. WAIVING OBJECTIONS TO UNCONSTITUTIONAL GOVERNMENT CONDUCT

The concept of waiver is utilized in various contexts in the criminal justice process. Although defined as an intentional relinquishment or abandonment of a known right or privilege,[170] its real meaning varies with the particular right or privilege involved and the attendant circumstances.

The first application of the waiver doctrine involves the relinquishment of rights or privileges. The privileges that can be waived vary from right to counsel at trial to the right to cross-examine a particular witness. The ease of establishing a valid waiver varies with the privilege involved. The right to counsel cannot be waived without prior advice of its existence,[171] but the privilege to cross-examine a particular witness is waived by a failure to exercise it.[172] Although rarely discussed in terms of waiver, the guilty plea is a waiver of the most serious nature. Several rights are relinquished by a guilty plea, including the rights to be tried by a jury, to confront adverse witnesses, and to call friendly witnesses. Since a waiver of these privileges is not to be presumed, the Supreme Court has established rigid guidelines to be followed in accepting guilty pleas.[173]

The second application of the waiver doctrine is in legitimizing government conduct that would otherwise be an infringement of the defendant's constitutional rights. For example, a

170. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
171. *See* text accompanying note 54 *supra*.
172. *See* section IV *infra*.
173. *See* Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v.

suspect may consent to a warrantless search of his premises or he may confess without counsel after being given the *Miranda* warnings.[174] In each of the examples the suspect is said to have waived a right. Again, however, the evidence needed to show a valid waiver varies in quantity; a mere consent to the search will suffice,[175] but a prior warning of rights must be given before a confession is taken.[176]

A third application of the waiver doctrine is in the enforcement of procedural rules that govern objections to unconstitutional government action. For example, if an objection to the use of seized evidence is not made before trial or when the evidence is introduced, the defendant suffers forfeiture of his complaint.[177] Deliberate failure to comply with the procedural rule is considered a waiver. This type of waiver is unlike the waiver or consent which legitimizes what otherwise would be illegal government conduct. Failure to object at trial cannot legalize a prior illegal search or the illegal procurement of a confession; the government's action remains illegal, but the defendant loses his right to be convicted by only legally procured evidence.

This waiver is also unlike the waiver of constitutional privileges. A constitutional privilege may be defined as a constitutional right that is independent of the legality of the government's behavior. For example, a defendant has the right to remain silent at trial, to cross-examine witnesses and to call witnesses. These privileges have nothing to do with the legality of the government's behavior. The element of government conduct is present, however, when the government coerces the defendant's testimony, cuts off the right of cross-examination or prevents the defendant from obtaining witnesses. Similarly, this element is present when the government tries to use the fruits of an illegal search or a coerced confession or when the government discriminates in jury selection. In these cases, the constitutional right is not one of choosing between two alternatives that have nothing to do with government conduct; rather, the constitutional right becomes part of a broader right to be tried and convicted by means that the constitution does not prohibit.

United States, 394 U.S. 459 (1969).

174. Miranda v. Arizona, 384 U.S. 436 (1966).

175. *See, e.g.,* People v. Ledferd, 38 Ill. 2d 607, 232 N.E.2d 684 (1967); State v. Forney, 181 Neb. 757, 150 N.W.2d 915 (1967). *But cf.* United States v. Blalock, 255 F. Supp. 268 (E.D. Pa. 1966).

176. *See* Miranda v. Arizona, 384 U.S. 436 (1966).

177. *See* the discussion in the following subsections *infra.*

The rights involved are designed to protect the individual against certain government behavior, and the constitution may be viewed as a direct restraint on that behavior. The all-important question, then, is whether the government may violate these constitutional restraints in obtaining a conviction and justify or excuse its violation by the same waiver doctrine that is used in the context of constitutional privileges. The significance of the waiver doctrine in situations involving unconstitutional government conduct is underscored by the fact that those defendants who follow the procedural rules can win reversals of their convictions,[178] while those who fail to follow the rules must languish in prison.

The waiver doctrine in the context of unconstitutional government conduct is the topic of this section. At the outset, however, it should be recognized that courts have not treated unconstitutional government conduct as posing special issues and problems. Yet, it is in this context that the ramifications of the right to counsel are most important, for counsel's waiver decision may be the crucial factor in determining whether freedom or imprisonment will result for the accused. The problem is to guarantee that the right to counsel does not defeat the equally important right to be convicted legally and constitutionally.

A. Waiver and Federal Review

Although the Supreme Court had narrowly defined waiver prior to 1963,[179] its definition was not helpful to defendants seeking to allege violations of their constitutional rights which had not been objected to at trial or some prior appropriate time. Failure to object or to assert rights at the proper time was sufficient to preclude the defendant from obtaining relief in subsequent proceedings.[180] State courts strictly enforced state procedural rules and federal courts were hesitant to intervene.[181]

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178. A reversal would not be won, however, if the constitutional defect were harmless. Chapman v. California, 386 U.S. 18 (1967).

179. *See* text accompanying note 170 *supra*.

180. Perhaps one of the harshest applications of the rule appeared in Daniels v. Allen, reported *sub nom.* Brown v. Allen 344 U.S. 443, (1953). Petitioner had lost his chance to appeal alleged discrimination in jury selection because his lawyer was one day late in filing the appeal. The Supreme Court held that the delay also cost the defendant the right to assert his claim in federal habeas corpus proceedings.

181. The procedural rules were seen as necessary to the orderly administration of the criminal justice system: "We cannot permit an accused to elect to pursue one course at the trial and then, when that

Thus, defendant's inaction, which was in reality his lawyer's inaction, was sufficient to waive constitutional rights.[182]

In the 1963 case of *Fay v. Noia*,[183] the Supreme Court revolutionized the waiver doctrine. Noia and two co-defendants had been convicted of murder in a New York trial in which the only evidence consisted of confessions. Although objections to the admission of the confessions were made at trial, Noia, unlike his co-defendants, failed to pursue his claim with an appeal. Subsequently, through federal habeas corpus proceedings, the co-defendants were freed. The state courts, however, would not grant Noia relief because he had failed to appeal his conviction, whereupon he turned to federal habeas corpus. He lost in the district court, but won in the court of appeals. The state, in its appeal to the Supreme Court, argued that Noia's failure to utilize a state procedure should have precluded him from federal habeas corpus relief.

First, the Court concluded that the adequate state ground doctrine, which precludes the Supreme Court from deciding federal issues on direct review, does not apply to habeas corpus proceedings.[184] Second, the Court held that the exhaustion of state remedies doctrine bars habeas corpus relief only if the state remedy is still available at the time habeas corpus is sought.[185] Finally, the Court dealt with the waiver issue by holding that a federal habeas corpus court has the discretionary power to deny relief if the defendant previously waived the opportunity to make his claim. It emphasized, however, that waiver was to be defined as it had been in *Johnson v. Zerbst* and

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has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him." Johnson v. United States, 318 U.S. 189, 201 (1943). Denying the defendant a remedy from a state conviction was usually justified by one of three doctrines: (a) adequate state ground; (b) failure to exhaust state remedies, or (c) waiver. For an excellent discussion of the deficiencies in these grounds and for an exhaustive treatment of the law before *Fay v. Noia*, see Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315 (1961).

182. There was little discussion of the fact that counsel, and not the defendant, was responsible for the forfeiture of these rights. This is understandable in light of the long-established rule that counsel is manager of the suit and the accused is bound by his actions. *See* discussion at text accompanying notes 195-209 *infra*.

183. 372 U.S. 391 (1963).

184. The adequate state ground could be a procedural ground such as the failure to appeal, 372 U.S. at 428-29. *See also* Reitz, *supra* note 181, at 1345-52.

185. 372 U.S. at 434-35.

concluded that the discretion to deny relief is exercised properly only if "[a] habeas applicant . . . understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures . . . ."[186] The federal court has to satisfy itself by a hearing or by other means that the defendant deliberately waived his rights.[187]

The Supreme Court again extended the use of the waiver doctrine in *Henry v. Mississippi*.[188] Defendant's lawyer had failed to make a fourth amendment objection to evidence when it was introduced at trial, as Mississippi law required. The Mississippi Supreme Court, which had previously found the search unconstitutional, denied relief because of this failure. The Supreme Court recognized that an adequate state procedural ground would preclude it from reaching the federal question because the case was before it on direct review. Rather than considering the validity of Mississippi's rule, however, the Court remanded the case for a determination of whether the defendant had waived his objection by deliberately foregoing the opportunity to object.[189] If he had, he would be precluded from direct and collateral relief, except to the extent he could convince a federal court that the state's finding of waiver was erroneous.[190] If he had not, then the adequate state ground doctrine might be interjected to prevent direct review, but the defendant could seek relief in federal habeas corpus proceedings. By ignoring the opportunity to utilize the adequate state ground doctrine and by casting doubt on its utility at least in some cases of direct review,[191] the Court increased the importance of the *Johnson v.*

186. 372 U.S. at 439. If the applicant by-passes a state opportunity to make his claim, a federal court cannot deny collateral relief on the basis of waiver when a state appellate court has ignored the waiver and considered the merits of the claim. Warden v. Hayden, 387 U.S. 294, 297 n.3 (1967). *See also* Curry v. Wilson, 405 F.2d 110 (9th Cir. 1968).

187. 372 U.S. at 439. For the rules governing when a federal court must hold a hearing to resolve an issue, see Townsend v. Sain, 372 U.S. 293 (1963), discussed in the text at notes 234-43 *infra*.

188. 379 U.S. 443 (1965).

189. The Mississippi Supreme Court subsequently found that a waiver had occurred. Henry v. State, 198 So. 2d 213 (Miss. 1967), *cert. denied*, 392 U.S. 931 (1968).

190. Waiver is a federal question enabling the federal courts to reconsider the facts. Brookhart v. Janis, 384 U.S. 1, 4 & n.4 (1966).

191. Defendant's lawyer in moving for a directed verdict had mentioned, albeit perfunctorily, the fourth amendment objection. The Su-

Zerbst standard of waiver in the administration of criminal justice.[192]

In *Kaufman v. United States,*[193] the Supreme Court dealt with the contention that a failure of a federal defendant to assert a fourth amendment objection on appeal precluded his doing so on a motion to vacate judgment.[194] The Supreme Court held that collateral relief for federal prisoners must be as broad as that for state prisoners who can be denied relief only for deliberately forfeiting their remedies.

It is therefore clear that, subject to the court's discretionary power to ignore a waiver, only a deliberate failure to raise constitutional issues in previous proceedings will preclude the defendant from obtaining federal collateral relief. What is not clear, however, is who—counsel or the accused—must make the waiver decision.

B. Waiver, by Whom?

The fundamental issue that has plagued the courts is whether counsel or the accused must make the knowing and intentional waiver. In general, two often overlapping rules place authority in counsel's hands.

1. *Waiver by Counsel, When a Matter of Trial Strategy*

A rule with widespread judicial following is that counsel, and not the accused, is in charge of trial strategy and tactics. The leading case supporting this rule is *Nelson v. People.*[195] In *Nelson,* trial counsel had ignored the defendant's request to make a fourth amendment objection to evidence introduced at trial.[196] In holding that counsel acted within his authority, the court listed several reasons to support its position that counsel, and not the accused, must manage the case and make these decisions: (a) only counsel is competent to make such decisions; (b) the defendant probably would do himself more harm than

preme Court suggested this might have been enough to serve the purposes of Mississippi's timely objection rule. Therefore, the state ground might not have been adequate to preclude direct review. 379 U.S. at 448-49.

192. *But cf.* Hill, *The Inadequate State Ground,* 65 Colum. L. Rev. 943, 984 (1965).

193. 394 U.S. 217 (1969).

194. This contention found considerable support among the federal courts. *See* 394 U.S. at 220 n.3.

195. 346 F.2d 73 (9th Cir.), *cert. denied,* 382 U.S. 964 (1965).

196. *Nelson* is somewhat atypical because the defendant actually

good if he were permitted to decide, and (c) few counsel would want to represent the accused if the latter had control over the decisions to be made.[197]

The first two reasons are basically identical and difficult to refute.[198] This is no consolation, however, to a defendant who is convicted because counsel deliberately failed to make an objection that hindsight reveals should have been made. The harshness of this approach is increased, moreover, by the fact that collateral courts are reluctant to grant the defendant relief under the doctrine of ineffective assistance of counsel.[199] Thus, while counsel's authority is beneficial to the accused in most instances, the *Nelson* rationale forsakes those defendants who have lost legitimate constitutional objections because of counsel's representation.[200] The final reason for giving counsel absolute authority in the case is that few attorneys would accept representation of criminal defendants were it otherwise. There is merit to such a view, especially when it is remembered that counsel on the civil side of the law can enjoy a lucrative practice free from client interference.[201] But conceding that counsel must make most trial decisions, even when the defendant disagrees with the tactics chosen, it still remains open to question

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disagreed with counsel at trial. In the more typical case, counsel makes his decision without consulting the accused and the accused does not complain until after conviction. Nevertheless, the *Nelson* reasoning is used in the latter cases. In fact, a fortiori the latter cases are governed by *Nelson*; if counsel can decide on tactics when the defendant objects, he surely can do so when the defendant is silent.

197. 346 F.2d at 81.

198. It is ironic, however, that the same court adheres to the view that the accused has a constitutional right to proceed *pro se* even though he would harm himself. *Id.* at 81 n.8. Bayless v. United States, 381 F.2d 67 (9th Cir. 1967). Most courts acknowledge a right to proceed *pro se* only when it is asserted before trial (*see* text accompanying note 28 *supra*, but *Nelson* would allow the defendant to discharge counsel and make his objection. Thus, the constitutional objection is made at the cost of losing counsel's assistance. *But cf.* Williams v. Beto, 354 F.2d 698, 706 (5th Cir. 1965) ("If the indigent client . . . knows more about what ought to be done in handling the case, then he needs no counsel and it is folly for him to ask for it.").

199. *See* section IV *infra.*

200. *But cf.* United States *ex rel.* Bruno v. Harold, 408 F.2d 125, 129 (2d Cir. 1969) (Waterman, J. dissenting) (counsel's strategy and the importance of the right should be evaluated before counsel's waiver is found binding on the accused). *See also* Note, *Waiver of Constitutional Rights by Counsel in a Criminal Proceeding*, 1 JOHN MARSHALL J. PRAC. & PRO. 93, 105-10 (1967).

201. *See generally* Mazor, *Power and Responsibility in the Attorney-Client Relationship*, 20 STAN. L. REV. 1120 (1968).

whether counsel's decision should enable the government to convict the accused unconstitutionally.

In deciding *Nelson*, the court was forced to reconcile its rule with the Supreme Court's decisions in *Noia* and *Henry*.[202] Although the Supreme Court stated in *Noia* that an intentional and deliberate failure to appeal would constitute a waiver of further objections to a coerced confession, it added:

> At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief.[203] [footnotes omitted].

In *Henry*, however, the Court held that the decision during trial not to make a fourth amendment objection to evidence was one that counsel could make for his client.[204] The *Nelson* court resolved the apparent contradiction by concluding that the decision to appeal in *Noia* was not a matter of trial strategy as was the decision to by-pass the contemporaneous objection rule at trial.[205] Other courts have agreed that *Noia* and *Henry* are distinguishable by the fact that the former did not involve a matter of trial tactics.[206] Such a reading of these cases, however, leads to anomalous conclusions. For example, it would seem that the decision not to appeal a conviction based on a coerced confession must be made by the defendant[207] while the decision not to object to the same confession at trial must be made by counsel. If this is so, then the crucial fact in characterizing a decision as trial strategy is not necessarily the particular constitutional right involved, but rather the stage of the proceedings at which the waiver occurs.[208] Such a distinction completely obliterates any notion that the purpose of the rule is to prevent defendants from harming themselves. Rather, the real reason for giving counsel

202. *See* text accompanying notes 183-87, 188-90 *supra.*

203. 372 U.S. at 439.

204. 379 U.S. at 451-52.

205. 346 F.2d at 81 & n.6.

206. *See, e.g.*, People v. Williams, 36 Ill. 2d 194, 201, 222 N.E.2d 321, 325 (1966), *cert. denied*, 388 U.S. 923 (1967).

207. *Cf.* United States *ex rel.* Masselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966).

208. Another way of distinguishing tactics from non-tactics is to examine the opportunity for consultation. Thus, decisions made in the heat of battle are for counsel, while those made when there is time to consult (*e.g.*, pleading, stipulating a trial on a transcript of testimony, appealing) require the defendant's participation. *See* Note, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest,* 54 CALIF. L. REV. 1262 (1966).

complete authority in decisions deemed tactical seems to be the interest in preserving order and finality in criminal trials.[209]

2. *Waiver by Counsel, Except in Exceptional Circumstances*

Another rule, although an exception to the *Nelson* rule, is also applied to give counsel authority to make most waiver decisions. The rule was first stated in *Henry*:

> Although trial strategy adopted by counsel *without prior consultation with an accused* will not, where the *circumstances are exceptional*, preclude the accused from asserting constitutional claims, see Whitus v. Balkcom . . . we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in this case.[210]

The language implies that when the circumstances are exceptional, the accused must participate in the waiver. The problem lies in defining "exceptional circumstances." The only clue to the meaning of this term is provided by the citation to *Whitus v. Balkcom.*[211] In that case, trial counsel, without consulting their clients, decided not to object to the systematic exclusion of Negroes from the grand and petit juries. In the habeas corpus hearing, it was revealed that counsel had been aware of the systematic exclusion but had reasoned that an objection would increase the hostility of white jurors toward the defendants.[212] Hence, a deliberate and intentional choice was made to by-pass the available state opportunity to present the objection. Nevertheless, the court of appeals held that counsel's waiver was not binding on the accused.

The problem with *Whitus* is that the reasons underlying the decision are not all clear. At one point in the decision, one of the holdings of *Fay v. Noia* seems to have been the crucial factor.[213] Although Noia had participated in the decision not to appeal his conviction, the Supreme Court refused to find a waiver

209. Copeland v. Commonwealth, 415 S.W.2d 842 (Ky. 1967). If counsel is responsible for the waiver decision it is less difficult to justify finding a waiver from a mere nonobjection, and such passive waivers greatly aid the enforcement of procedural rules. *See* Curry v. Wilson, 405 F.2d 110, 113 (9th Cir. 1968); Henry v. State, 198 So. 2d 213 (Miss. 1967), *cert. denied,* 392 U.S. 931 (1968); Kuhl v. United States, 370 F.2d 20, 26 (9th Cir. 1966).

210. 379 U.S. at 451-52 (emphasis added).

211. 333 F.2d 496 (5th Cir.), *cert. denied,* 379 U.S. 931 (1964).

212. There is no indication in the *Whitus* opinion that counsel may have made a stupid choice, but at least one court has defined exceptional circumstances in terms of counsel's stupidity. *See* Jarrell v. Boles, 272 F. Supp. 755, 757 n.2 (N.D. W. Va. 1967).

213. 333 F.2d at 498-99.

because the choice of alternatives was "grisly." Noia had been given a life sentence and the risk of execution if tried again was substantial, especially in light of certain hostile remarks by the trial judge.[214] The *Whitus* court saw a similarity in being forced to choose between an unfairly selected jury and a prejudiced one.[215] At least one court is convinced that the grisly choice in *Whitus* is what *Henry* was referring to as exceptional circumstances.[216] In other words, counsel would have to obtain the defendant's consent before waiving constitutional rights only when the choice of alternatives was grisly. This interpretation entirely misses the point of *Noia* which held, first, that a personal waiver by the accused was necessary and, second, that even a personal waiver would be invalid when there was no real choice of alternatives.[217] Grisly circumstances do not help determine when the accused, and not counsel, must waive the right.

In another part of its opinion, the *Whitus* court referred directly to the language in *Noia* which indicated that the accused must personally make the waiver decision.[218] *Whitus* read this to mean that the defendant's consent was necessary in all but ordinary procedural decisions.[219] The *Whitus* court, however, was not convinced that *Noia's* requirement of a personal waiver would protect the accused from losing valid constitutional objections. It would be an empty gesture to require counsel to obtain the consent of a defendant who lacked the capacity to understandingly and knowingly waive his rights.[220] Hence, the *Whitus* opinion was not based on counsel's failure to obtain the consent of the accused before waiving the jury defects.

At least one court believes, however, that consultation would protect ignorant defendants. This court has found that exceptional circumstances exist when the defendant is igno-

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214. 372 U.S. at 440. This may be the weakest part of the holding. *See id.* at 471-72 (Harlan, J., dissenting).

215. 333 F.2d at 498-99.

216. Commonwealth v. Snyder, 427 Pa. 83, 233 A.2d 530 (1967), *cert. denied,* 390 U.S. 983 (1968) (counsel entitled to decide not to contest a confession).

217. *See* text accompanying note 214 *supra.*

218. 333 F.2d at 501.

219. In United States *ex rel.* Goldsby v. Harpole, 263 F.2d 71 (5th Cir.), *cert denied,* 361 U.S. 838 & 850 (1959), the court had said that the defendant was only bound by counsel's decision to forego objection to the jury if the record affirmatively showed that a particular jury was actually desired by counsel. In *Whitus* the court evidently felt that *Noia* required more than this.

220. 333 F.2d at 503, *referring to* 372 U. S. at 439.

rant.[221] This anomaly requires counsel to consult with the accused only when the accused lacks the capacity to make a knowing waiver. If anything, this would be the one circumstance which justifies forcing the accused to abide by counsel's decision.[222]

In several sections of its opinion, the *Whitus* court indicated that the objection to the jury defect simply could not have been waived.[223] It is possible to infer that this was its holding. Since the court felt that the accused needed protection against the waiver of his rights by counsel, and since it also felt that this protection could not be provided by requiring a personal waiver, the only conclusion is that the defect could not be waived. If this is the holding, *Henry's* citation to *Whitus* is a red herring because *Whitus* has nothing to say about the existence of exceptional circumstances requiring a personal waiver from the accused.

One court, not willing to go this far, has read *Whitus* to hold that the accused must make a personal waiver whenever the right involved goes to the very foundation of the proceedings.[224] Rather than concluding that some rights are too fundamental to be waived, this rule states that the accused must personally waive certain fundamental rights. Such an interpretation of *Whitus* gains support from the Supreme Court's decision in *Brookhart v. Janis.*[225] In the trial of the case counsel had submitted the issue of guilt to determination by a prima facie case, which was tantamount to a plea of guilty, in spite of the defendant's express statement that he was not pleading guilty in any way. The Court, referring to its exceptional circumstances

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221. In United States *ex rel.* Cuevas v. Rundle, 258 F. Supp. 647 (E.D. Pa. 1966), defendant pleaded guilty after a confession had been obtained from him which his attorney did not contest. The court found exceptional circumstances in that defendant knew little English, had limited schooling and had a history of seizures. The court, however, tried to limit its holding by stating that under these circumstances defendant's guilty plea could not be characterized as voluntary.

222. *Cf.* Cobb v. State, 218 Ga. 10, 126 S.E.2d 231 (1962), *cert. denied,* 371 U.S. 948 (1963).

223. 333 F.2d at 498 & n.3 *passim.*

224. In Ledbetter v. Warden, 368 F.2d 490 (4th Cir. 1966), *cert. denied,* 386 U.S. 971 (1967), the court held that counsel alone could not waive an objection to a confession which was the sole evidence against the accused. The court also noted, however, that the ground for objection was unknown to counsel at the date of trial. *Cf.* Jarrell v. Boles, 272 F. Supp. 755 (N.D. W. Va. 1967), limiting *Ledbetter* to its facts.

225. 384 U.S. 1 (1966).

language in *Henry*,[226] stated that nothing in *Henry* could support the idea that counsel, by preventing the accused from pleading not guilty, could eliminate his right to confront the witnesses against him.[227] Justice Harlan, concurring, noted that the waiver was more significant than the waiver of the right to cross-examine a particular witness.[228] Hence, the *Brookhart* opinion supports the view that exceptional circumstances exist whenever fundamental and significant rights are being waived.[229]

None of the tests for determining what constitutes "exceptional circumstances" is particularly satisfying. Although the last approach does acknowledge that some rights are too basic to be forfeited by proxy, it does not help in determining which rights are so basic. Moreover, the last approach tends to become confused with the rule that counsel must make tactical decisions. Indeed, Justice Harlan distinguished the waiver of the right to cross-examine a particular witness from the complete waiver of the right of cross-examination by characterizing the first as tactical and the latter as nontactical.[230] With the issue so muddled, it is not surprising that only a few courts find exceptional circumstances to exist.[231]

In summary, it is clear that there is some ill-defined concern about permitting counsel to forfeit the accused's constitutional rights. But the rules have not delineated when a personal waiver is necessary. Moreover, it is easy to agree with the *Whitus* statement that a rule of personal waiver would be an empty gesture in most cases. Added protection for the accused will not be found in a rule that entitles him to become involved in trial decisions.

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226. *See* text accompanying note 210 *supra*.
227. 384 U.S. at 7-8.
228. *Id.* at 9 (Harlan, J., concurring).
229. *See* Note, *supra* note 200, at 104-05.
230. 384 U.S. at 9 (Harlan, J., concurring).
231. Poole v. Fitzharris, 396 F.2d 544 (9th Cir. 1968) (case submitted on transcript of testimony from preliminary hearing; court felt it "unfortunate" that counsel did not explain the procedure to defendant); Wilson v. Gray, 345 F.2d 282 (9th Cir.), *cert. denied*, 382 U.S. 919 (1965) (same issue; exceptional circumstances can be decided only on a case by case basis); Jarrell v. Boles, 272 F. Supp. 755 (N.D. W. Va. 1967) (coerced confession; exceptional circumstances exist only when counsel's choice is so erroneous as to amount to ineffective assistance of counsel); McParlin v. Langlois, 244 A.2d 251, 253 (R.I. 1968) (Joslin & Kelleher, JJ., concurring); Commonwealth v. Snyder, 427 Pa. 83, 233 A.2d 530 (1967), *cert. denied*, 390 U.S. 983 (1968). *But cf.* Smith v. Breazeale, 245 F. Supp. 978 (N.D. Miss. 1965) (systematic exclusion of Negroes from juries); State v. Mendes, 99 R.I. 606, 210 A.2d 50 (1965) (confession).

C. Procedural Problems Created by the Waiver Doctrine

When a petitioner asserts that he has been convicted unconstitutionally, the habeas corpus court must ascertain whether or not the complaint has been waived. A study of the problems facing the court when it makes this decision reveals that the waiver doctrine is extremely difficult to administer.

1. *The Need for an Evidentiary Hearing*

Since *Fay v. Noia*, a criminal defendant is guaranteed access to a federal court for collateral relief unless prior available procedures for presenting his claim were deliberately by-passed.[232] Not every petitioner, however, gets a hearing from the habeas court on the issues he has raised.[233] The rules to determine whether a hearing is necessary were defined by the Supreme Court in *Townsend v. Sain*:[234]

> Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court, either at the time of the trial or in a collateral proceeding.[235]

Townsend makes it clear that there is to be no speculation in determining whether constitutional rights have been violated; the defendant is entitled to at least one full evidentiary hearing on his claim. *Townsend* must, of course, be read with *Noia* so that if there has been a deliberate by-passing of a previous opportunity to present the claim, a hearing on the substantive issue is not necessary. The crucial first issue before the court, therefore, is the question of waiver. *Noia* states that a habeas court must satisfy itself that there has been a waiver by holding a hearing or by other means,[236] but if this is to be read consistently with *Townsend* it would seem that a hearing is required whenever the facts are in dispute as to whether the failure to utilize available procedure was deliberate and knowing.[237] The "other means" spoken of in *Noia* would suffice only if they could elim-

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232. *See* text accompanying notes 183-93 *supra*.

233. For an excellent explanation of the habeas corpus procedure, see Note, *The Development of the Plenary Hearing Requirement in Federal Habeas Corpus For State Prisoners*, 34 Brooklyn L. Rev. 247 (1968).

234. 372 U.S. 293 (1963).

235. *Id.* at 312.

236. 372 U.S. at 439.

237. *Cf.* Machibroda v. United States, 368 U.S. 487 (1962) (record could cast no light on the issue in dispute).

inate all factual dispute. For example, the record may establish that counsel explicitly told the trial court that he was not objecting,[238] or the defendant inadvertently may have admitted to the habeas court that counsel deliberately by-passed available procedure.[239] Some courts, however, have intimated that they can infer a deliberate waiver from a trial record that is devoid of any positive affirmations from counsel.[240] One of the few cases taking a more honest approach is *United States ex rel. Hill v. Pinto.*[241] In that case trial counsel remained silent while the prosecution offered as rebuttal evidence two written statements made by the accused. The defendant in trial testimony had admitted making the statements, but he claimed that the first one was false. From the record before it the court noted the ease with which it could infer that the failure to object was deliberate strategy: (1) the statements did not differ substantially from the defendant's testimony on direct examination, and (2) counsel may have been trying to discredit a third, more damaging, oral admission. Nevertheless, the court acknowledged the possibility that counsel did not know that he could object to the confessions. Since a factual dispute existed as to whether the failure to object was deliberate, the court ordered an evidentiary hearing.

The Supreme Court's decision in *Henry* supports the view that the *Hill* approach is the more honest one. In *Henry* the facts from which a waiver could have been inferred were even stronger than in *Hill.* One of the trial lawyers had begun to stand as if to object to the evidence obtained from the search of the defendant's car, but co-counsel had pulled him back into his seat. Even though the Supreme Court was able to infer two tactical reasons for co-counsel's action, it remanded the case for a hearing to determine whether the waiver was in fact deliber-

238. For example, counsel may stipulate to the admission of a confession. *E.g., In re* Reynolds, 397 F.2d 131 (3rd Cir. 1968).

239. In Nelson v. People, 346 F.2d 73 (9th Cir.), *cert. denied,* 382 U.S. 964 (1965), defendant told the court that he had wanted the legality of the search put in issue but that counsel did not think he could overcome the consent issue. Such an admission would serve the defendant's cause only in those jurisdictions requiring a personal waiver from the accused. *See, e.g.,* State v. Mendes, 99 R.I. 606, 210 A.2d 50 (1965).

240. *E.g.,* Commonwealth v. Snyder, 427 Pa. 83, 233 A.2d 530 (1967), *cert. denied,* 390 U.S. 983 (1968) (counsel most likely did not object because he viewed the confessions as largely exculpatory). *Contra,* United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500 (3d Cir. 1969).

241. 394 F.2d 470 (3rd Cir. 1968). *See also* United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500 (3d Cir. 1969).

ate.[242] This should demonstrate conclusively that the first order of business for a habeas court should be a hearing on the waiver issue.[243]

In guilty-plea cases, however, the plea itself constitutes a waiver of all nonjurisdictional defects.[244] Recently the Supreme Court held that a defendant's plea of guilty based on reasonably competent advice by counsel is not open to collateral attack on grounds that a coerced confession motivated the plea.[245] Hence, there need be no speculation as to waiver in guilty-plea cases; the choice to plead guilty indicates a decision to waive.

2. *The Criterion of a "Deliberate" Waiver*

One of the fears underlying the reluctance to hold an evidentiary hearing on the waiver issue is the opportunity for intentional or unintentional after-the-fact tinkering.[246] The only manner of ascertaining whether the failure to object was deliberate or inadvertent is to call on counsel to testify at the hearing. Counsel's dilemma is whether to assert a tactical reason for his decision, thus depriving his former client the collateral relief he seeks, or to admit inadvertence, thus impugning his own professional competence.[247]

If counsel testifies that he deliberately failed to object to the alleged government illegality, the waiver issue is resolved. Even this, however, cannot guarantee the end of collateral proceedings. The petitioner may allege that he was denied effective assistance of counsel because the choice made by counsel was egregious.[248] This claim would be especially strong in those cases in which the evidence not objected to was the only substantial evidence linking the defendant to the crime.

Another problem encountered at the evidentiary hearing is that impediments may preclude a satisfactory solution of the

242. 379 U.S. at 450-52. On remand, a waiver was found; *see* note 189 *supra*.

243. *See also* Note, *supra* note 233, at 262.

244. *See, e.g.*, United States *ex rel.* Garrett v. Russel, 281 F. Supp. 104 (E.D. Pa. 1968). *See also* Boykin v. Alabama, 395 U.S. 238 (1969) (guilty plea is more than a confession; it is a conviction); Hughes v. United States, 371 F.2d 694 (8th Cir. 1967).

245. McMann v. Richardson, 38 U.S.L.W. 4379 (May 4, 1970).

246. *See* Kuhl v. United States, 370 F.2d 20 (9th Cir. 1966).

247. *Id.* at 27.

248. United States *ex rel.* Cornitcher v. Rundle, 285 F. Supp. 625, 628-29 (E.D. Pa. 1968) (asserting that the ineffective assistance of counsel doctrine is distinct from the waiver doctrine). The doctrine of ineffective assistance of counsel is discussed in section IV *infra*.

issue. When the Supreme Court remanded *Henry*, it stated that a hearing was necessary to enable Mississippi to show that a waiver had occurred.[249] In the evidentiary hearing, the state was unable to prove anything beyond what already was known: that one counsel had deterred another who was beginning to rise as if to object. The attorney-client privilege was invoked so that trial counsel did not have to divulge his communications with the accused concerning the possibility of a waiver, and the privilege against self-incrimination was utilized so that the accused did not have to divulge any relevant information.[250] The Mississippi Supreme Court, obviously annoyed by the futility of the proceedings, found the waiver to have been deliberate.[251]

3. *The Criterion of a "Knowing" Waiver*

Although rarely discussed in the cases, a potentially troublesome problem for the habeas court is that the waiver must be of a "known right or privilege."[252] The issue is the amount of fallibility that can be tolerated in counsel's decision not to object before the conclusion must be made that counsel did not "know" of the defendant's right. One of the few cases adequately to discuss the issue is *Kuhl v. United States.*[253] During trial counsel began to cross-examine a police officer as to the propriety of the search of the defendant's home. When the prosecutor objected that the defendant had no standing to raise the issue, counsel concurred stating that the fourth amendment claim probably was not applicable to the defendant. The *Kuhl* court characterized counsel's decision as, at most, a mistake of law.[254] Nevertheless, it still found a knowing waiver of the objection. The court stated that counsel knew the facts pertaining to the search and that there was an arguable basis for an objection. It is seldom, continued the court, that counsel can know whether an objection will be good or bad; he must make a decision on the basis of his beliefs.[255] The "known right or privilege" was said to be no more than knowledge of the right to present the contention to the court.[256]

249. 379 U.S. at 450.
250. Henry v. State, 198 So. 2d 213, 217 (Miss. 1967), *cert. denied*, 392 U.S. 931 (1968).
251. *Id.* at 218.
252. Johnson v. Zerbst, 304 U.S. 458 (1938), *applied in* Fay v. Noia, 372 U.S. 391, 439 (1963).
253. 370 F.2d 20 (9th Cir. 1966).
254. *Id.* at 25.
255. *Id.* at 26.
256. *Id.*

The dissent was not satisfied with this definition. The known right, it argued, is not merely the procedural right of objecting in court but includes the substantive constitutional right. Since counsel believed that the defendant had no fourth amendment objection, the right was not a known right in regard to the particular defendant.[257]

Both positions have some merit. On the dissent's side it may be said that almost all counsel know of the existence of procedures entitling them to make objections. If this were the extent of knowledge required, a waiver would have to be found in all cases. Moreover, counsel in *Henry* indicated knowledge of the procedural right by rising as if to object,[258] but the Supreme Court did not suggest that this alone could constitute a waiver.[259]

On the other hand, the dissent appears to impose a requirement of infallible counsel. There is no waiver, it argued, unless the right is known as to the particular defendant. Such a requirement would destroy finality in criminal cases. The habeas court not only would have to find a deliberate waiver, but it would have to make an after-the-fact determination of counsel's legal knowledge.[260]

The *Kuhl* case demonstrates the difficulty of utilizing the waiver doctrine in the context of unconstitutional government action.[261] When constitutional privileges are involved, the only problem is to determine whether the privilege waived was in fact known. When one's right, however, depends on an evaluation

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257. *Id.* at 33 (Hamley, Jertberg, Browning & Ely, J.J., dissenting).

258. 379 U.S. at 450.

259. *Cf.* Townsend v. Sain, 372 U.S. 293, 317 (1963): "[I]f for some justifiable reason [the applicant] was previously unable to assert his rights or was unaware of the significance of relevant facts, it is neither necessary nor reasonable to deny him all opportunity of obtaining judicial relief." *See also* People v. Johnson, 38 Ill. 2d 399, 231 N.E.2d 447 (1967) (decision made through inadvertance or induced by trial court is not trial "strategy"); People v. Williams, 36 Ill. 2d 194, 222 N.E.2d 321 (1966), *cert. denied*, 388 U.S. 923 (1967) (trial strategy of counsel, but not his "honest mistakes," preclude defendant from getting relief).

260. *Cf.* United States *ex rel.* Cornitcher v. Rundle, 285 F. Supp. 625 (E.D. Pa. 1968) which held that waiver, and not the reason for waiver, is all that matters.

261. The distinction between a right to object to unconstitutional government action and a constitutional privilege that does not depend on the legality of the government's behavior was discussed in the text accompanying notes 177-78 *supra*. *See also* the more detailed discussion accompanying notes 264-71 *infra*.

of the legality of prior government conduct, it is less meaningful to speak of a known right; a right exists only if the government actually violated the constitution. For example, there is no right to exclude evidence unless the government's search was in fact unconstitutional. It is inaccurate to speak of a "known" right unless the right absolutely exists so the defendant, or counsel, can know of it. All that possibly can be known in the context of unconstitutional government conduct is that a certain procedure is available to determine if a right in fact exists. When counsel deliberately and knowingly by-passes this procedure, this cannot be termed a waiver of a "known right or privilege;" if it were known that the government acted unconstitutionally, few counsel would waive the objection.

D. A New Approach to Waiver

Up to this point, the discussion has revealed that the waiver doctrine, although greatly expanded in recent years, still works to the disadvantage of the accused. Counsel has the authority to waive the accused's most fundamental rights and habeas corpus courts are all too eager to find a waiver from counsel's mere failure to make objections. The courts cannot be condemned, however, because any other approach would place an intolerable burden on them. In short, the present doctrine permits an accused to be convicted unconstitutionally and forces the habeas courts to be less than honest in finding a waiver. Moreover, the law on waiver practically guarantees a petition to the habeas court since a defendant has nothing to lose from asserting that counsel's silence did not constitute a knowing and deliberate waiver or that he, and not counsel, should have made the waiver in the particular circumstances.[262]

As discussed above, giving the accused the right to make waiver decisions would not help. The accused usually cannot understand the legal ramifications of trial decisions, and placing the responsibility on him would only increase the likelihood of unfairness. In addition, since the subjective intent of the accused would be at least as difficult to ascertain as that of counsel, such an approach would not be more satisfactory procedurally. Therefore, habeas corpus courts would still be faced with the dilemma of whether or not to hold a hearing to determine if a

262. The number of habeas corpus petitions filed by state prisoners increased from 1,903 in 1963 to 6,331 in 1968. *See* Rep. Dir. Ad. Off. U.S. Cts. 130 (1968).

waiver had occurred through silence.[263] If a hearing were held, the difficulty in ascertaining that the waiver was "deliberate" and "knowing" would be increased because the inducement for perjury would be greater than the average man faced with a prison sentence could withstand. Therefore, it can only be concluded that any rule increasing the accused's power to manage his case would preclude achieving the goal of having a system in which all convictions are legally procured and would increase the procedural problems faced by the habeas corpus courts. The solution to the problem is not a different allocation of waiver responsibility; instead, an entirely new approach is needed.

1. *Abolishing Waiver in the Context of Unconstitutional Government Action*

As discussed previously, some constitutional rights can be characterized as privileges because they do not depend on a determination that the government has violated the constitution. The rights to a jury trial, to cross-examine witnesses, to send for witnesses and to testify on one's own behalf do not depend on the propriety of prior government action; these are privileges which every defendant may exercise in every trial. There can, of course, be cases where government illegality is involved, such as when the government prevents the accused from cross-examining a prosecution witness[264] or from sending for a friendly witness.[265] In such a case, more than a privilege is involved; the conviction itself becomes tainted because the government has violated the supreme law of the land.

It is not always easy to determine whether a case involves unconstitutional government action. Examples of conduct clearly illegal are warrantless searches, coerced confessions, comments on the accused's failure to testify, discrimination in jury selection, failure to inform the defendant of the nature of the accusation and preventing him from confronting or calling witnesses. Other cases may not be so readily classified as involving unconstitutional action. The accused has a right to a speedy trial; if the government delays and the accused does not protest, can it be said the government has acted unconstitutionally?[266]

263. *See* United States *ex rel.* Snyder v. Mazurkiewicz, 413 F.2d 500 (3d Cir. 1969).

264. *See, e.g.*, Barber v. Page, 390 U.S. 719 (1968); Smith v. Illinois, 390 U.S. 129 (1968).

265. *See, e.g.*, Washington v. Texas, 388 U.S. 14 (1967).

266. The cases decided by the United States Supreme Court have involved situations in which the defendant demanded that he be

Government conduct cannot be divorced from this right, for whether or not the accused protests, the government is responsible for initiating the proceedings. Most states, however, hold that the government has not acted unconstitutionally until the defendant demands that he be brought to trial.[267] This approach appears sound provided an exception is made for cases in which the delay is so great that unreasonableness must be found regardless of the defendant's action.[268] In other words, the right to a speedy trial could be characterized as a privilege until demanded by the accused. Once trial is justifiably demanded, the government must initiate proceedings. In addition, the government would have to initiate proceedings at some point in time —whether or not the accused demands trial—or its delay would be unconstitutional. It would be for the courts to ascertain this point in time; the standard of reasonableness would seem to be a valid test.[269]

The above analysis suggests the approach that could be followed in distinguishing a constitutional privilege from a right to prevent unconstitutional government conduct. First, it is clear that some government conduct is illegal per se. Second, there are some areas in which unconstitutional government action will not be found until the government denies a justifiable demand by the accused. Third, some government conduct which is not unconstitutional per se may become so because of excessiveness. Hence, delay in trial can become unconstitutional when the delay is excessive. Similarly, although a defendant may have a right to demand a severance of offenses,[270] failure to sever absent a demand may not be unconstitutional unless the joinder is so un-

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brought to trial but the government refused. *See* Smith v. Hooey, 393 U.S. 374 (1969); Klopfer v. North Carolina, 386 U.S. 213 (1967).

267. *See, e.g.*, Bruce v. United States, 351 F.2d 318 (5th Cir. 1965). *See also* Note, *The Lagging Right to a Speedy Trial*, 51 VA. L. REV. 1587 (1965).

268. Some states will dismiss an indictment on a motion prior to trial even though the defendant never demanded trial. *See, e.g.*, Hicks v. People, 148 Colo. 26, 364 P.2d 877 (1961). Such an approach recognizes that government illegality can arise independent of the accused's actions. It is submitted that this minority view is correct.

269. Hence, there would be two standards of reasonableness: one to determine if the accused is justified in demanding trial, *see* United States v. Ewell, 383 U.S. 116 (1966), and the other to determine if the government had delayed beyond the point justified absent a demand for trial. The latter standard must be the one used by the minority of jurisdictions referred to in note 268 *supra*.

270. *See, e.g.*, Cross v. United States, 335 F.2d 987 (D.C. Cir. 1964); Drew v. United States, 331 F.2d 85 (D.C. Cir. 1964).

reasonable that it should not be permitted in any case.[271]

Even in the early cases dealing with waiver, some distinction was made between privileges that were merely for the benefit of the accused and rights so important that the state prohibited waiver.[272] Justice Frankfurter also was aware that not all constitutional rights should be treated in the same manner:

> Normally rights under the Federal Constitution may be waived at the trial . . . and may likewise be waived by failure to assert such errors on appeal. . . . Such considerations of orderly appellate procedure give rise to the conventional statement that habeas corpus should not do service for an appeal. . . . However, this does not touch one of those extraordinary cases in which a *substantial claim goes to the very foundation of a proceeding*.[273]

The statement was made in a case involving a claim of discrimination in jury selection, but it cannot be said for certain that Justice Frankfurter, any more than the judges in the earlier cases, was distinguishing situations involving unconstitutional government action. Just this distinction, however, was made by the Fifth Circuit's opinion in *Whitus*.[274] The court first acknowledged that a rule permitting waiver of constitutional privileges is supported by consideration of fairness. That is, if a constitutional privilege is designed to help guarantee a fair trial, the defendant or his counsel should be permitted to waive it if he can thereby obtain a fairer trial. But the court added that these considerations of fairness, which permit an accused to follow what seems to him the most advantageous approach, are not relevant when unconstitutional action is involved.[275] It is highly unlikely that many waivers of constitutional defects are made

271. It is possible that a joinder may be so prejudicial that the trial constitutes a violation of due process. This was the claim made in United States *ex rel.* Evans v. Follette, 364 F.2d 305 (2d Cir. 1966). If this is the case, it seems more accurate to characterize the government's conduct as unconstitutional. The question then becomes whether objection to this conduct can be waived. *Cf.* Bruton v. United States, 391 U.S. 123 (1968).

272. *See, e.g.*, State v. Vanella, 40 Mont. 326, 106 P. 364 (1910); State v. Frisbie, 8 Okla. Crim. 408, 127 P. 1091 (1912); *In re* Staff, 63 Wis. 285, 53 Am. R. 285 (1885).

273. Daniels v. Allen, reported *sub nom.*, Brown v. Allen, 344 U.S. 443, 503 (1953) (Frankfurter, J., dissenting) (emphasis added).

274. Whitus v. Balkcom, 333 F.2d 496 (5th Cir.), *cert. denied*, 379 U.S. 931 (1964), discussed in text accompanying notes 211-31 *supra*.

275. *Id.* at 498 n.3. *See also*, Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1366. For example, in the case of the right to a speedy trial, there is a period of time during which the accused might find it advantageous not to demand immediate trial. However, when the delay becomes so un-

because of a belief that a fairer trial can be achieved with the defect present. There may, however, be a few cases in which a tactical advantage can be gained by a waiver. For example, counsel may not object to a coerced confession because he believes that the confession is largely exculpatory and he desires to keep the defendant from testifying and being exposed to cross-examination. As long as an exception is made for this rare case, however, it may be said that considerations of fairness do not preclude a rule prohibiting waiver of unconstitutional government action.

The fact that considerations of fairness do not impede the adoption of the proposed waiver doctrine does not, of course, give affirmative support to the view that the doctrine should be adopted. Such support, however, can be found in other considerations. One of these considerations is that a conviction procured by unconstitutional means remains unconstitutionally procured even though the defendant has forfeited his rights to protest such a conviction. The Supreme Court in *Noia* was aware of this fact, for it stated that a rule forfeiting the defendant's remedies could not legitimize the unconstitutional conduct that helped to procure the conviction.[276] The *Noia* Court also stated that the writ of habeas corpus had as its primary function the correction of unconstitutional and illegal imprisonments:

> [The writ's] root principle is that in a civilized society, government must always be accountable to the judiciary for a man's imprisonment: if the imprisonment cannot be shown to conform with the fundamental requirements of law, the individual is entitled to his immediate release.[277]

If an individual is entitled to his immediate release whenever his imprisonment does not conform with the fundamental requirements of the law, and if a rule of waiver cannot legitimize the illegal means by which an imprisonment is procured, it follows that the writ of habeas corpus should always remedy constitutional defects without regard to waiver. The stage of the proceedings at which a waiver occurs and the individual making the waiver decision are irrelevant to a consideration of whether the defendant is entitled to be released because government illegality has tainted his conviction.

The *Noia* fact situation provides a useful tool with which to

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reasonable that it should be characterized as unconstitutional per se, it no longer makes sense to say that fairness requires that an accused be permitted to waive his right.

276. 372 U.S. at 428.

277. *Id.* at 402.

examine this proposition. It will be remembered that most courts consider the time of waiver and the individual making the waiver as dispositive of the question of whether to overturn an illegally procured conviction.[278] Hence, if the fact situation in *Noia* were altered to present a failure to object to the confession at trial, rather than a failure to appeal, these courts would deny Noia relief.[279] The injustice here involved is highlighted by the fact that these courts would free the co-defendants. It was the spectacle of this horror, however, that led the lower federal court in *Noia* to grant relief.[280]

In *Noia*, the Supreme Court did not rely on the fact that two co-defendants had won their freedom, but certainly this was an influencing factor in the decision.[281] Yet this fact should not be necessary to see that injustice would have resulted if Noia's request for relief were refused, regardless of whether the procedural default occurred at trial or appeal. Noia's conviction would have been procured by a coerced confession in any event and even if he were the sole defendant he should have been released. Surely the presence of co-defendants is not the crucial fact upon which constitutional rights rest.

Some may argue, however, that the presence of co-defendants in *Noia* is a deceiving factor because it leads to the conclusion that justice was not done. According to this view, the government has done all it should do when it has provided opportunities to object to its illegal conduct. After this, the interest in convicting criminals outweighs the interest in penalizing the government for its conduct.[282] The deficiency in such reasoning is bared by considering the government's procedural rules from another angle. Rather than being designed to do all that can be done to aid the defendant, the rules function to give the government an opportunity to profit from its wrongs. The government should not have profited from its unconstitutional behavior in the first place; the procedural rules, therefore, establish traps for the defendant which, if not avoided, enable the government to ignore its illegality. Perhaps the clearest statement denouncing these traps was made by a federal district court:

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278. *See* subsection B of this section *supra.*

279. *Cf.* Brief for Petitioner at 23-24, Fay v. Noia, 372 U.S. 391 (1963). The right to appeal, and not the right to exclude a coerced confession, was the only issue involved in the case.

280. United States v. Fay, 300 F.2d 345, 362 (2nd Cir. 1962), *aff'd on other grounds,* 372 U.S. 391 (1963).

281. *See* 372 U.S. at 441.

282. *Cf.* Henry v. State, 198 So. 2d 213, 218-20 (Miss. 1967) (Rodgers,

> Respondent's reference now to "strategic" failures to object should remind us that the first choice of strategy is for the State. It is at least open to question how far that choice should be held to allow the proffering of illicit evidence in the hope that resulting quandaries of defense counsel may ground procedural arguments for ignoring the wrong.[283]

Of course, these procedural traps may be necessary if the orderly processes of the criminal justice system would be irreparably impaired by their removal. There is sound reason for requiring the defendant to make his claims at the time available for him to do so. It is unthinkable to argue that the defendant be given two trials, a first in which he would fail to present his constitutional claims and a second, in the event of conviction in the first, in which he would present those claims.[284] A rule forfeiting remedies, however, only deters those who purposely seek to impede the procedural rules, for it is plain that penalties do not deter mere inadvertence.[285] This realization led the Supreme Court in *Noia* to hold that only a deliberate waiver would forfeit remedies.[286] The Court expected that very few failures to utilize available procedure would be deliberate because there was more to lose than to gain from such an omission. A deliberate failure would forfeit the opportunities for appellate review and for direct review in the Supreme Court, thus leaving habeas corpus as the only avenue for relief.[287]

It must be admitted that to abolish the waiver rule entirely would enhance the value of deliberately by-passing available procedures. Counsel faced with an impregnable case might deem it tactically advantageous to deliberately forego constitutional objections until habeas corpus proceedings years later when the government would be incapable of obtaining a conviction. For this reason, it is acknowledged that a new procedure must accompany the proposed doctrine.[288] For purposes of the discus-

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J., separate opinion), *cert. denied*, 392 U.S. 931 (1968).

283. United States *ex rel.* Vanderhorst v. La Valle, 285 F. Supp. 233, 244 (S.D.N.Y. 1968). *Cf.* Curry v. Wilson, 405 F.2d 110, 116 n.6, (9th Cir. 1968) (Browning, J., concurring and dissenting): "'[I]t follows that the state cannot then rise above the defect and erase the unconstitutional result of its trial procedure by utilizing still another of its procedural rules to prevent the defendant from raising the question on appeal.'"

284. *See* Reitz, *supra* note 275, at 1367.

285. *Cf.* Townsend v. Sain, 372 U.S. 293, 317 (1963).

286. *See* text accompanying notes 183-87 *supra.*

287. Townsend v. Sain, 372 U.S. at 433. *See also* Reitz, *supra* note 275, at 1369.

288. A new procedure is recommended in part two of this subsection.

sion here, however, it is enough to realize that the present waiver doctrine, if applied in good faith, allows a significant number of complaining defendants to obtain collateral relief. Therefore, the interest in the orderly administration of the criminal justice process cannot justify the government's use of procedural rules in a manner that enables it to profit from its illegality, and a new waiver doctrine would be acceptable as long as it does not increase the number of defendants deliberately flouting available procedures.

A rule prohibiting waiver therefore finds support from the realization that waiver cannot legitimize illegal government conduct and an awareness that there is no justification for permitting the government to establish procedural traps for the defendant. Moreover, such a rule would be more compatible with the due process considerations that led to the recommended rule prohibiting the waiver of counsel.[289] It would be a strange doctrine of constitutional law that left the accused incarcerated because of counsel's "trial strategy" after insisting that counsel and his strategy be forced on the accused in order to assure fairness. Since a right of personal involvement in waiver decisions was rejected for reasons similar to that which led to the rejection of the right to proceed *pro se*, protection against counsel's decisions must be provided by other means. A rule prohibiting waiver supplies that protection. Thus, all defendants are assured maximum fairness because counsel's assistance is made mandatory and because protection is given against the unconstitutional convictions that may result from counsel's failure to object. The only possibility of an unfair result for the defendant is created by the exception that counsel must be permitted to request the utilization of illegally procured evidence. This request may be dictated by an unwise trial strategy, thus leaving the defendant convicted by illegal means. The possibility of this unfair result is somewhat reduced, however, by the procedure to be recommended and by the law on ineffective assistance of counsel.[290]

It remains to be seen whether a rule prohibiting waiver should apply to all types of unconstitutional government action. Not much problem is created by the coerced confession, although most courts refuse to grant defendants relief when trial counsel has failed to make a timely objection.[291] In speaking of

289. *See generally* section II *supra*.
290. The law on ineffective assistance of counsel is treated in section IV *infra*.
291. Defendant can either allege that counsel's failure to object re-

a coerced confession, however, the Supreme Court in *Noia* said: "That complaint is . . . of a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void."[292] The Supreme Court has also made it clear that prejudice need not be shown by a defendant who seeks to have his conviction reversed because of the use of an involuntary confession.[293] If any government violation goes to the "very foundation of a proceeding" it would be the use of a coerced confession. Convictions obtained by the use of coerced confessions should not stand.

The answer is less clear when the government's unconstitutional action consists of a violation of the fourth amendment.[294] The petitioner in *Henry* had argued that due process is denied when a conviction is supported only by evidence seized in violation of the fourth amendment and that neither the waiver doctrine nor the presence of competent counsel could overcome such a defect.[295] The Supreme Court held, however, that counsel, as

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sulted in his receiving ineffective assistance of counsel or he can allege that counsel could not waive his rights. For cases denying relief when ineffective assistance of counsel was alleged, see Vizcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968); Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967); United States *ex rel.* Garrett v. Russell, 281 F. Supp. 104 (E.D. Pa. 1968); United States *ex rel.* Kern v. Maroney, 275 F. Supp. 435 (W.D. Pa. 1967). *But cf.* Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963). For cases holding defendant bound by counsel's waiver, see *In re* Reynolds, 397 F.2d 131 (3d Cir. 1968); United States *ex rel.* Garrett v. Russell, 281 F. Supp. 104 (E.D. Pa. 1968); Prescoe v. State, 231 Md. 486, 191 A.2d 266 (1963). *But cf.* Ledbetter v. Warden, 368 F.2d 490 (4th Cir. 1966), *cert. denied,* 386 U.S. 971 (1967); United States *ex rel.* Gainer v. New Jersey, 278 F. Supp. 127 (D.N.J. 1967). *See also* Jarrell v. Boles, 272 F. Supp. 755, 757 (N.D. W. Va. 1967) (defendant bound by counsel's waiver unless decision so erroneous as to amount to ineffective assistance of counsel).

292. 372 U.S. 391, 414 (1963), *quoting from* Brown v. Mississippi, 297 U.S. 278 (1936). *See also* Curry v. Wilson, 405 F.2d 110, 116 (9th Cir. 1968) (Browning, J., concurring and dissenting); People v. Williams, 36 Ill. 2d 194, 222 N.E.2d 321, 328 (1966) (Schaefer, J., dissenting), *cert. denied,* 388 U.S. 923 (1967).

293. Jackson v. Denno, 378 U.S. 368, 376 (1964); Stroble v. California, 343 U.S. 181, 190 (1952).

294. For cases denying relief on the basis of ineffective assistance of counsel for failure to object to illegally seized evidence, see Argo v. United States, 378 F.2d 301 (9th Cir. 1967), *cert. denied,* 390 U.S. 907 (1968); Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967). For cases holding defendant bound by counsel's waiver, see Mize v. Crouse, 399 F.2d 593 (10th Cir. 1968); Pope v. Swenson, 395 F.2d 321 (8th Cir. 1968); Nelson v. California, 346 F.2d 73 (9th Cir.), *cert. denied,* 382 U.S. 964 (1965). *But cf.* People v. Johnson, 38 Ill. 2d 399, 231 N.E.2d 447 (1967).

295. Petitioner's Brief for Certiorari at 9-10; Brief for Petitioner at

part of trial strategy, could waive objections to illegally seized evidence. It has also been suggested that while an involuntary confession affects the reliability of a conviction, illegally seized evidence does not and should therefore be treated differently.[296] There are two possible answers to this contention. First, coerced confessions are excluded even though they may be trustworthy because the state is not permitted to profit by its wrong and because it is not considered fair to compel a person to convict himself.[297] Second, in *Kaufman v. United States*,[298] the government argued that the fourth amendment exclusionary rule should not be applied by a federal court granting collateral relief to a federal prisoner because a fourth amendment claim does not impugn the fact-finding process but only serves as a deterrent device. The Supreme Court rejected this argument, stating that collateral remedies were necessary "to insure the integrity of procedings at and before trial where constitutional rights are at stake."[299] The Court also quoted the statement in *Noia* that the purpose of collateral relief is to permit challenges to "restraints contrary to our fundamental law."[300]

The better approach, therefore, is to prohibit waivers of objections to both fourth and fifth amendment violations. As long as these amendments provide protection for some defendants, they should equally protect all. Since the waiver doctrine should be reconsidered *in toto*, the *Henry* decision should not be allowed to stand in the way.

It would seem that the systematic exclusion of Negroes from juries, as in *Whitus*, should also be considered nonwaivable illegal action. It has been suggested, however, that this unconstitutional action is different from coercing a confession in that it is possible to select the same jury from both a proper and an improper array.[301] Such a view, however, makes it possible to legitimize this most abhorrent unconstitutional government be-

7, Henry v. Mississippi, 379 U.S. 443 (1965).

296. People v. Williams, 36 Ill. 2d 194, 222 N.E.2d 321, 328 (1966) (Schaefer, J., dissenting), *cert. denied*, 388 U.S. 923 (1967).

297. Jackson v. Denno, 378 U.S. 368, 386 (1964); Rogers v. Richmond, 365 U.S. 534 (1961).

298. 394 U.S. 217 (1969).

299. *Id.* at 225. *See also* Lee v. Florida, 392 U.S. 378, 385-86 (1968): "Under our Constitution, no court, state or federal, may serve as an accomplice in the willful transgression of 'the Laws of the United States,' laws by which 'the Judges in every State [are] bound . . . .' "

300. 394 U.S. at 222.

301. Brief for Respondent at 14, Fay v. Noia, 372 U.S. 391 (1963).

havior, and the better approach is to find the objection non-waivable.[302]

The government, of course, can violate the constitution in several other ways. If the means used above[303] to characterize government action as unconstitutional are kept in mind, however, it will be seen that the number of other violations will be small. Many of the remaining violations involve refusing a valid demand, and even under present law no waiver would be found. The others involve conduct so patently unconstitutional that waiver should not be allowed.

2. *A Procedure to Complement the New Rule*

As already indicated, it cannot be doubted that a rule prohibiting waiver would increase whatever tendency there is to flout procedural rules that govern criminal trials. Without a new procedure to eliminate this threat, it may be doubted that the increased fairness produced by the substantive rule is worth the cost.

The Minnesota Supreme Court, without changing the substantive rules of waiver, has suggested a remedial procedure. In *State ex rel. Rasmussen v. Tahash*,[304] the court expressed dismay over the fact that so many fourth and fifth amendment issues were being settled on appeal rather than at trial. This not only indicated inefficiency in the judicial process, but it also encouraged disrespect for the law. The court reasoned that respect for the legal process is engendered not by appellate corrections of injustice but by trials that conform with constitutional requirements in the first instance.[305] To correct these deficiencies, the court established a procedure whereby at the time of arraignment, or as soon thereafter as possible, the state must inform the court whether its case includes a confession or evidence seized as a result of a search. The trial court then must inform defendant's counsel and advise him of the right to a pre-trial hearing in which motions to suppress can be made. If a hearing is desired, the state has the burden of identifying the evidence and showing that it was obtained in a constitutional manner.[306]

The Minnesota procedure would eliminate some of the procedural problems created by the present waiver doctrine. A deliberate and knowing waiver would be evidenced in the trial

302. *See* Reitz, *supra* note 275, at 1367.
303. *See* text accompanying notes 264-71 *supra*.
304. 272 Minn. 539, 141 N.W.2d 3 (1966).
305. *Id.* at 553, 141 N.W.2d at 13.
306. *Id.* at 554, 141 N.W.2d at 13-14.

record and the habeas corpus court would not be forced to struggle with the question of whether a hearing should be held. The improvement over the present system would be significant. It would not, however, warrant abandoning the proposed substantive change. As already discussed, even a deliberate waiver does not legalize prior, illegal government conduct, and the defendant would still be left to pay the price of counsel's poor judgment.

Actually, the Minnesota procedure is not completely satisfactory even if viewed from merely a procedural perspective. If counsel waives the pre-trial hearing and the defendant is subsequently convicted, the defendant has nothing to lose by asserting in collateral proceedings that counsel's decision was such poor judgment that it amounted to ineffective assistance of counsel.[307] This complaint is one of the claims most frequently asserted in habeas corpus[308] and one of the most difficult to resolve. The habeas court is faced with the dilemma of speculating about counsel's tactics or holding a hearing in which counsel must be called to testify. Thus, the very same procedural problems created by present waiver doctrine[309] are also presented by the Minnesota procedure.

The Minnesota procedure would clearly be inadequate if a rule prohibiting waiver is adopted. Although it was argued that a rule prohibiting waiver could not prevent trial counsel from using illegally seized evidence if he thought it could help his case, there is a difference between an actual desire to utilize evidence and an opinion that an objection need not be made. The Minnesota procedure does not make this distinction, thereby allowing many pre-trial hearings to be waived even though counsel would agree that the defendant would have a better chance without the prosecutor's use of the evidence. This is not compatible with a rule that is supposed to prohibit waivers of objections to constitutional defects.

What is needed is a procedure to assure that the only exception to the general rule is the situation in which counsel clearly wants the evidence introduced and that eliminates, as far as pos-

307. In State v. Fields, 279 Minn. 374, 157 N.W.2d 61 (1968), counsel would not heed defendant's motion to suppress, thus enabling defendant to attack counsel's effectiveness on appeal. *See also* State v. Williams, 282 Minn. 240, 155 N.W.2d 739 (1968).

308. The frequency with which this complaint is made was noted as early as 1952, *see* Daniels v. Allen, reported *sub nom.* Brown v. Allen, 344 U.S. 443, 520, 525-26 (appendix to dissenting opinion of Frankfurter, J.).

309. *See* subsection C *supra*.

sible, the need for collateral proceedings.[310] This can be achieved by making the Minnesota procedure mandatory in all trials and by extending it to cover all evidence which may be excludable because of a constitutional provision. The government would be expected to explain the means used to obtain its evidence and the defendant could be required to testify as to the accuracy of the government's explanation. Self-incrimination problems would be eliminated by a grant of immunity and by strict rules limiting the questioning to the particular matter in issue. Since the prosecutor would have the burden of establishing the manner in which the evidence was seized, the questioning of the defendant could be by the judge in much the same manner that questions are asked before accepting guilty pleas. The procedure would culminate with the trial judge's ruling on the legality of the evidence seized.

Such a procedure must be recognized as a step away from the adversary system. It appears, however, that this step is a prerequisite to satisfying the conflicting considerations of effective criminal law administration on the one hand and the preservation of the right of the accused to be convicted only by constitutional means on the other hand. If the preservation of these basic rights were to depend only on counsel's initiative, the defendant would still have the opportunity to initiate costly and wasteful collateral proceedings by attacking counsel's effectiveness. Counsel, of course, would be entitled to do what he could in this pre-trial hearing, but a full hearing would be required even if counsel did nothing.

It might be asked why such a procedure would not enable the defendant to attack the trial judge's conclusions in collateral proceedings. The answer is that the defendant could attack these findings, but in most cases the attack would be in vain. *Townsend v. Sain* does not require a habeas corpus hearing when there has been a prior hearing,[311] and the habeas court would have to grant relief only in those cases in which it appeared from the record that the trial judge clearly had erred.[312]

After the hearing, counsel would be permitted to make known his desire to have the excluded evidence utilized. Even

310. *Cf.* McCarthy v. United States, 394 U.S. 459, 469-70 (1969) expressing the concern that issues related to guilty pleas be disposed of at the trial level where problems of credibility and reliability of memory can be avoided.

311. 372 U.S. 293, 313 (1963).

312. Written findings from state hearings are presumed correct. 28 U.S.C. § 2254(d) (Supp. IV, 1969).

in this instance the pre-trial hearing serves a purpose because it makes certain that counsel is making the decision with full knowledge that the evidence could be excluded. The case where counsel utilizes such evidence should be extremely rare. If the defendant is convicted, however, the possibility of a claim of ineffective assistance of counsel is present. Since this type of waiver would be extremely rare, the burden on the habeas corpus courts would not be as great as it is today. Besides, the only two other alternatives available are to: (1) permit the trial judge to become involved in counsel's tactical decisions and thereby raise serious questions of the propriety of such involvement or (2) prohibit waiver absolutely and thereby raise due process questions in regard to prohibiting counsel from using evidence which he believes would aid his case. The recommended procedure is as far as one can go in remedying the deficiencies of the present procedure.

One problem presented by the recommended procedure is whether it also should be utilized in guilty plea cases.[313] As noted earlier, the guilty plea waives all nonjurisdictional defects.[314] This is because a conviction after a plea of guilty normally rests on the defendant's own admission in open court that he committed the charged acts, and not on the unconstitutional government conduct.[315] Nevertheless, courts can be more certain that guilty pleas are intelligently made by requiring the prosecutor to disclose all evidence that could be subject to a constitutional attack and by determining that the defendant would still plead guilty if the evidence were found inadmissible.[315a] A pre-trial hearing on the admissibility of the evidence would be necessary only if the defendant had doubts as to whether he would still plead guilty.

The recommended procedure might, however, preclude the use of a process which is deemed desirable. In some cases plea bargaining is enhanced because of the uncertainty that exists concerning the legality of the government's evidence. Under the recommended system, the government would be assured a hearing on the issue and thus might be inclined not to compromise too early. This would deprive counsel of one of his bargaining

313. The Minnesota court limited its procedure to cases involving pleas of not-guilty. State *ex rel.* Rasmussen v. Tahash, 272 Minn. 539, 553, 141 N.W.2d 3, 13 (1965).

314. *See* text accompanying note 244 *supra*.

315. McMann v. Richardson, 38 U.S.L.W. 4379 (May 4, 1970).

315a. *Cf.* People v. Taylor, 9 Mich. App. 333, 338, 155 N.W.2d 723, 726 (1968): "[T]he court shall inquire as to whether the defendant

weapons. In light of the advantages, however, this result should not be of significant weight. It is also open to question whether the outcome of criminal cases should depend on uncertainty in regard to the legality of the government's conduct.

A mandatory hearing on evidentiary matters would not, of course, deal with all types of unconstitutional government action. But unconstitutional government conduct outside the sphere of the fourth and fifth amendments is much less frequent. Much of this illegal conduct involves refusing to agree to a proper demand, such as a demand for immediate trial or that a certain witness be subpoenaed. In such a case, however, the demand itself presents the issue to the trial court. Other government illegality, such as a totally unreasonable delay in beginning trial or the systematic exclusion of Negroes from juries, would only be remedied in collateral proceedings. The accused would, however, have to present some evidence to substantiate his claim before being entitled to a collateral hearing. Collateral relief against these infrequent illegalities should be a sufficient deterrent. If a particular illegality were found to be recurrent, however, the proper solution would be to devise a trial procedure that would obviate the need for collateral proceedings.[316]

IV. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

The previous section advocated the adoption of a rule prohibiting the waiver of objections to unconstitutional government conduct. It was suggested that such a rule, coupled with a mandatory pre-trial hearing to determine the constitutionality of the government's evidence, would eliminate the procedural problems arising from the waiver doctrine. Constitutional privileges were distinguished from rights to object to unconstitutional government conduct. With respect to the waiver of constitutional privileges, it may be argued that the rule giving counsel authority to decide on trial tactics should govern.[317]

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has made any confession to the police prior to the time of his plea of guilty and ascertain if the confession is a reason for making the plea." If so, a hearing on the confession is required.

316. One problem may be whether the defendant is competent to stand trial, since a conviction while incompetent is unconstitutional. However, to get the habeas corpus hearing defendant would have to do more than *allege* his incompetency. *See, e.g.*, Sharp v. Beto, 276 F. Supp. 871 (N.D. Tex. 1967).

317. This rule is discussed in the text accompanying notes 195-209 *supra*.

The last statement, however, requires further elaboration. Many criminal defendants claim their trials were unfair because counsel did not follow their instructions or because counsel did not consult them for permission to waive constitutional privileges. These complaints are usually aired by means of the general allegation of ineffective assistance of counsel. This allegation, however, is not restricted to claims for personal control over the management of the defense; attacks on counsel's preparation for trial and representation in general are even more frequent. The allegation of ineffective assistance of counsel has become an anathema to post-conviction courts.[318] A single rule of law to dispose of all complaints cannot be found, and some commentators have contended that there is no alternative but for the post-conviction courts to accept the burden and try to do justice on a case by case basis:

> Courts will continue to be burdened by convicts' claims that their trial defense counsel was intrinsically inadequate and conscientious courts will continue their efforts to separate the meritorious allegations from the frivolous. No test more specific than that embodied in the concept of a fair trial can appropriately be employed in determining whether post-conviction relief should follow a defense effort the claimed inadequacy of which stemmed from counsel's intrinsic shortcomings.[319]

It seems, however, that further examination of the issues is justified. The goal must be to establish, if possible, rules and procedures that will maximize fairness for defendants by a process implemented at trial rather than by a process which burdens the post-conviction judiciary. This examination will first review the present law on ineffective assistance of counsel and then treat the problems of preparation, unwise tactics and ultimate responsibility for trial decisions.

A. THE TESTS FOR INEFFECTIVE ASSISTANCE OF COUNSEL

Ever since the Supreme Court denounced the "denial of effective and substantial" assistance of counsel and the appointment of counsel in a manner which precludes "the giving of ef-

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318. The variety of proceedings in which the claim of ineffective assistance of counsel can be asserted is explained in an exhaustive treatment of the topic. *See* Waltz, *Inadequacy of Trial Defense Representation As a Ground for Post-Conviction Relief in Criminal Cases,* 59 NW. U.L. REV. 289, 290 n.7 (1964). For other good treatments of the subject, see Comment, *Federal Habeas Corpus—A Hindsight View of Trial Attorney Effectiveness,* 27 LA. L. REV. 784 (1967); Comment, *Incompetency and Inadequacy of Counsel as a Basis for Relief in Federal Habeas Corpus Proceedings,* 20 SW. L.J. 136 (1966).

319. Waltz, *supra* note 318, at 341-42.

fective aid,"[320] there has been a growing volume of post-trial attacks on the quality of representation afforded by counsel. The Supreme Court has never defined "effective representation" and the lower courts have therefore written their own definitions. These definitions have not been liberal. The one most frequently given is in negative terms: ineffective representation by counsel is representation that is perfunctory, in bad faith, a sham and a pretense, reducing the trial to a farce or a mockery of justice, or representation that is shocking to the conscience.[321] The same definition is often stated in placating words: representation that is so lacking in competence that it becomes the duty of the court or the prosecution to observe and correct it.[322] Synonymous with these are the statements that the representation must be so incompetent as to deny defendant a trial[323] or so inadequate as to amount to no representation at all.[324] Needless to say, few defendants obtain relief under these tests.[325]

A second definition is theoretically more liberal than the first: effective representation by counsel is "counsel reasonably likely to render and rendering reasonably effective assistance."[326]

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320. Powell v. Alabama, 287 U.S. 45, 53, 71 (1932). The existence of a constitutional right to *effective* assistance of counsel is discussed in Waltz, *supra* note 318, at 293-95.

321. Williams v. Beto, 354 F.2d 698, 704 (5th Cir. 1965).

322. *Id.*

323. Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

324. Smith v. Woodley, 164 N.W.2d 594 (N.D. 1969).

325. The "mockery" test in one or another of its phraseologies has been applied in numerous cases, including the following: Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); United States v. Currier, 405 F.2d 1039 (2d Cir. 1969); United States *ex rel.* Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); McMillan v. State, 408 F.2d 1375 (3d Cir. 1969); United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Hayes v. Russell, 405 F.2d 859 (6th Cir. 1969); Tompsett v. Ohio, 146 F.2d 95 (6th Cir. 1944), *cert. denied*, 324 U.S. 869 (1945); United States v. Stahl, 393 F.2d 101 (7th Cir.), *cert. denied*, 393 U.S. 879 (1968); Cardarella v. United States, 375 F.2d 222 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967); Vizcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968); Kienlen v. United States, 379 F.2d 20 (10th Cir. 1967); People v. Hill, 70 Cal. 2d 678, 452 P.2d 329, 76 Cal. Rptr. 225 (1969); Smith v. Woodley, 164 N.W.2d 594 (N.D. 1969); Anderson v. Peyton, 209 Va. 798, 167 S.E.2d 111 (1969); Holbert v. State, 439 S.W.2d 507 (Mo. 1969).

326. *See, e.g.*, Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967) (but also finding the trial a mockery); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963); People v. McDowell, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968). All three cases granted defendant relief.

Stated differently, ineffective representation is representation that denies the defendant a fair trial.[327] This definition suffers from ambiguity; the first construction defines effective representation in terms of itself and the second merely substitutes an imprecise term.

A third definition is a variant of the first: ineffective representation is representation that withdraws a crucial defense from the case. The courts usually hinge a reversal, however, on a finding that the trial amounted to a mockery of justice.[328]

Yet a fourth definition is used in the Maryland courts. This one turns away from the "mockery" test and adopts what seems to be a variant of the second definition: ineffective representation is representation which under all the circumstances of the particular case is so incompetent that the accused has not been afforded genuine and effective legal representation.[329] The circuity of this definition renders it meaningless.

Although the wording of the various definitions suggests differences which might be of significance to defendants seeking relief, one court has described the difference as more illusory than real.[330] For example, two courts, one using the mockery standard and one using a more liberal standard, both granted relief to a defendant whose counsel failed to raise a vital defense, while a third court refused relief under the mockery standard.[331] Thus, appellate and collateral courts seem to proceed on a case by case basis, recognizing that the guidelines are too indefinite to distinguish the effective from the ineffective, the competent from the incompetent and the diligent from the indifferent.[332]

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327. Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967); State v. Robinson, —Wash. 2d—, 450 P.2d 180 (1969).

328. People v. Hill, 70 Cal. 2d 678, 452 P.2d 329, 76 Cal. Rptr. 225 (1969); People v. McDowell, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968) (counsel did not know evidence of abnormality was admissible in the guilt phase of trial to negate specific mental states; court used all three tests); People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963).

329. O'Connor v. Warden, 6 Md. App. 590, 253 A.2d 434 (Ct. App. 1969).

330. Goodwin v. Swenson, 287 F. Supp. 166 (W.D. Mo. 1968).

331. *Compare* Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (counsel failed to raise issue of penetration in a rape case) *and* People v. McDowell, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968) (counsel failed to utilize evidence that could have negated a specific mental state), *with* Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), *cert. denied*, 393 U.S. 986 (1968).

332. State v. Wright, 203 Kan. 54, 453 P.2d 1, 4 (1969) (Fontron, J., dissenting). *See also* Thomas v. State, — Ind. —, 242 N.E.2d 919 (1969).

The only certainty is that few defendants will get relief. Of course, this is not necessarily bad, for it safely can be assumed that most claims of ineffective assistance of counsel are frivolous. Nevertheless, some defendants with valid claims are denied relief because courts have failed to adopt a rule more meaningful than the mockery standard. Thus, one court refused to find ineffective assistance of counsel in a case where counsel's inadequate preparation precluded his learning of facts which suggested the defense of insanity, even though it was the only possible defense.[333] Similarly, relief was denied to a defendant even though inadequate preparation led counsel to suggest a guilty plea which resulted in the defendant's deportation.[334]

The rigidity of the present approach can be traced to a number of judicial concerns. The first arises from the recognition that the drafting of habeas corpus petitions has become somewhat of a game for those convicted of crime. There is nothing to lose and much to gain by filing such petitions, and even a hearing with little probability of success grants relief from prison monotony.[335] Cases attacking trial counsel are flooding the courts because practically every convicted person can find points in his trial where a different course might have been pursued.[336]

This concern could largely be eliminated by the adoption of the recommended rule prohibiting waiver in the context of unconstitutional government action. Alleged unconstitutional conduct, such as fourth and fifth amendment violations, causes many of the current problems. Grounds for complaint would also be less likely if the law clearly delineated responsibility for other trial decisions.[337] Defendants could still, of course, make a claim of ineffective assistance of counsel based on a cumulation of counsel's other conduct, such as his failure to object to the charge, failure to object to irrelevant testimony, failure to argue to the jury and failure to move for a directed verdict. But a cursory examination of the record should often suffice

333. Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), *cert. denied,* 393 U.S. 986 (1968).

334. Vizcarra-Delgadillo v. United States, 395 F.2d 70 (9th Cir. 1968).

335. Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied,* 385 U.S. 889 (1945).

336. Tafoya v. United States, 386 F.2d 537 (10th Cir. 1967), *cert. denied,* 390 U.S. 1034 (1968); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963); Johnson v. United States, 267 F.2d 813 (9th Cir.), *cert. denied,* 361 U.S. 889 (1959); Mitchell v. United States, 259 F.2d 787 (D.C. Cir.), *cert. denied,* 358 U.S. 850 (1958).

337. *See* subsection E *infra.*

to declare these decisions, even if egregious, harmless, and a curt dismissal rather than a hearing should greet the petitioner. This concern, therefore, could no longer lend support to the rigid approach taken by courts.

A second concern is that a more liberal approach would induce counsel to make deliberate errors so their clients would ultimately win relief.[338] This would be less likely under the recommended waiver doctrine since it would be impossible to err on the typically crucial issues. Counsel would have to err purposely on many minor matters before his representation would be ineffective. Intentional delinquency on counsel's part, however, can and should be dealt with separately. When counsel admits such misbehavior, he should be disbarred.[339] When claims of ineffective assistance of counsel succeed more than once against a particular attorney, the court should examine his competency to continue representing criminal defendants. The reluctance to punish attorneys should not be used to engender a reluctance to grant defendants relief when merited; rather, courts should recognize that this supervision of counsel's performance is necessary to make the system work. The approach would not be unduly harsh on counsel, but it would discourage any inclination to present less than the best defense.

Finally there is the fear that hindsight would reveal tactical errors over which conscientious attorneys might differ.[340] This fear is negated by its own statement; if conscientious attorneys would differ, it is impossible to conclude that "errors" necessitating relief were made.

B. Status of Defense Counsel as Affecting the Test

Some courts make it almost impossible for a defendant to obtain relief from inadequate assistance of counsel when counsel is retained rather than appointed.[341] Two reasons are usually given for the distinction: (1) counsel is the employed agent

338. Cross v. United States, 392 F.2d 360 (8th Cir. 1968); United States *ex rel.* Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

339. *See, e.g.*, Cross v. United States, 392 F.2d 360 (8th Cir. 1968).

340. *See, e.g.*, United States *ex rel.* Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967).

341. *See, e.g.*, United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir.), *cert. denied*, 346 U.S. 865 (1953); Weatherman v. Peyton, 287 F. Supp. 819 (W.D. Va. 1968). *Contra*, United States *ex rel.* Masselli v. Reincke, 383 F.2d 129 (2d Cir. 1967).

of the accused, and an agent's actions bind the principal and (2) the fourteenth amendment is directed to state action, and state action is not involved when counsel is retained. But when the representation of retained counsel is so obviously ineffective that it becomes the duty of the court to correct it, state action is involved and relief is granted.[342] This, in effect, is an application of the "mockery" test. Hence, whatever test is used for appointed counsel, courts recognizing this distinction use the mockery test for retained counsel. Relief from even the most serious errors cannot, however, be given unless the errors are such that they would come to the attention of the trial judge.

Both reasons for the distinction have been adequately repudiated by legal scholars.[343] Furthermore, the state action theory is rejected by implication in the proposition that due process may require representation to be forced on the accused.[344] Mandatory representation is justified only if the government has an interest in seeing that no man is punished without a fair trial. If the government has such an interest, then the status of defense counsel is irrelevant.

The distinction should be abolished for a final, practical reason. Courts which purport to make the distinction often use the same rigid standards when counsel is appointed.[345] Moreover, some courts are not at all consistent in applying the tests.[346] It makes little sense to try to maintain the distinction when the same test is used in all cases or when it is not clear what test is used in any particular case.

C. INADEQUATE PREPARATION BY COUNSEL

In *applying* the tests for ineffective assistance of counsel, courts occasionally distinguish errors committed as a result of

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342. *See generally* Waltz, *supra* note 318.

343. *See, e.g., id. See also* Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254 (1969).

344. *See* section II *supra.*

345. *Third Circuit: Compare* United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3d Cir.), *cert. denied,* 346 U.S. 865 (1953), *with* McMillan v. New Jersey, 408 F.2d 1375 (3d Cir. 1969) (rigid test for appointed counsel—to find that counsel is appointed one must read the state report, 65 N.J. Super. 473, 168 A.2d 81 (1961)). *Fifth Circuit: Compare* Bell v. Alabama, 367 F.2d 243 (5th Cir. 1966), *cert. denied,* 386 U.S. 916 (1967) (no distinction), *with* Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967) (liberal test for appointed counsel) *and* Atilus v. United States, 406 F.2d 694 (5th Cir. 1969) (harsher rule applied to retained counsel).

346. *Ninth Circuit:* Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963) (liberal test for appointed coun-

counsel's faulty judgment from errors committed because of counsel's failure to investigate and prepare the defense.[347] The distinction is a variant of the rule that the accused is bound by counsel's choice of trial tactics; a choice of tactics is absent when counsel has failed to prepare. Whatever the merits of the distinction, the problem of counsel's failure to investigate and prepare a defense is a real one.

A frequent assertion is that counsel has not spent adequate time in consultation with the accused. Often there has been only one meeting of short duration[348] or a few meetings which together amount to little consultation.[349] Such meager preparation might well result in a failure to advance available defenses. For example, in *Daugherty v. Beto*[350] the defendant's criminal record dated to age 15. During previous imprisonments he had amputated a finger, cut his heel tendons seven times, slashed his wrists twice and broken his arm. He had received up to 30 shock treatments and had been committed to a hospital. In the present case he was charged with robbery and kidnapping. Counsel spent no more than 20 minutes with him before he entered a plea of guilty to a lesser charge. The defendant then was sentenced to 75 years imprisonment. The court felt the "mockery" test had not been met, but Judge Rives, in dissent, noted that the only possible defense was insanity and that a 20 minute conference would not have been enough time for the defendant even to relate the history of his trouble. Judge Rives asked whether employed counsel in a capital case would have spent so little time.[351]

The fault in *Daugherty* and in many other cases does not lie with counsel but with the trial court. Counsel frequently is not

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sel); Eaton v. United States, 384 F.2d 235 (9th Cir. 1967) (liberal test for retained counsel); Vizcarra-Delgadillo v. United States, 395 F.2d 70 (1968) (mockery test for appointed counsel).

347. *E.g.*, Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963).

348. *See, e.g.*, Doughty v. Beto, 396 F.2d 128 (5th Cir. 1968) (conference 15 minutes before pleading guilty); Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), *cert. denied*, 393 U.S. 986 (1968) (15 to 20 minutes before pleading); Brooks v. Texas, 381 F.2d 619 (5th Cir. 1967) (15 to 20 minutes, three days before trial); Townsend v. Bomar, 351 F.2d 499 (6th Cir. 1965) (one hour); United States *ex rel.* Williams v. Brierly, 291 F. Supp. 912 (E.D. Pa. 1968) (three to 15 minutes).

349. *See, e.g.*, Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (three meetings, longest 30 minutes); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), *cert. denied*, 372 U.S. 978 (1963) (three meetings, total of one hour).

350. 388 F.2d 810 (5th Cir. 1967), *cert. denied*, 393 U.S. 986 (1968)

351. *Id.* at 814-17.

appointed until minutes before the accused is called upon to plead. The Fourth Circuit, however, has adopted an approach that merits the support of other courts. Whenever counsel is not appointed promptly so that he may have a reasonable time to prepare the defense, ineffective assistance of counsel is presumed unless the state proves that no prejudice has occurred.[352] The same court found that an appointment of two public defenders to represent 58 defendants in a three month term of court raised a presumption of prejudice.[353]

Some courts, however, have persisted in holding that an appointment immediately before trial is permissible.[354] One of the problems facing the courts is the shortage of attorneys available for appointment in criminal cases. Capacity determines doctrine, except for those courts willing to be idealistic.[355] This problem will be magnified by the proposed rule that insists on representation in all cases. Yet, it must be recognized that due process requires representation in many of the cases lacking representation today, and this need for representation cannot be satisfied adequately and efficiently except by requiring counsel in *all* cases.[356] Therefore, it is imperative that the means be found to provide counsel if ours is to be a system of equal justice. In the meantime, local bar associations and the judiciary should work out standards providing for a minimum period of time for preparation which, if not provided, would raise a presumption of prejudice. As the system solves the problem of the availability of counsel this period could be lengthened. Even before this is done, all courts could find that an appointment on the day of trial, or on the eve of trial, is presumptively ineffective.

Once a procedure is adopted that guarantees adequate time to prepare, the burden is on counsel to use his time adequately.

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352. Coles v. Peyton, 389 F.2d 224 (4th Cir.), *cert. denied,* 393 U.S. 849 (1968).

353. *Id. See also* United States *ex rel.* Mathis v. Rundle, 394 F.2d 748 (3rd Cir. 1968 (attorney appointed on eve of trial, court adopted Fourth Circuit approach but found presumption overcome by counsel's testimony that he was unable to say he was unprepared); United States *ex rel.* Williams v. Brierly, 291 F. Supp. 912 (E.D. Pa. 1968) (attorney assigned to court room with a list of cases for the day).

354. Daugherty v. Beto, 388 F.2d 810 (5th Cir. 1967), *cert. denied,* 393 U.S. 986 (1968); United States v. Trigg, 392 F.2d 860 (7th Cir.), *cert. denied,* 391 U.S. 961 (1968).

355. *Compare* United States *ex rel.* Adams v. Rundle, 294 F. Supp. 194 (E.D. Pa. 1968) (must be sensitive to case load of public defenders), *with* Thomas v. State, — Ind. —, 242 N.E.2d 919 (1969) (defendant's rights cannot be determined by case load of public defenders).

356. *See* section II, subsections D & E *supra.*

Failure to do so, however, could still result in a collateral attack which necessitates a hearing. For example, counsel subjected himself to this attack in *Vizcarra-Delgadillo v. United States*[357] by not investigating the circumstances of a confession of questionable validity, by not interviewing a prosecution witness under circumstances which suggested that he would not testify and by making an incomplete investigation of the law which left him unaware that a guilty plea would mandate deportation. The court's finding that the defendant had not met the burden of proving ineffective assistance of counsel should "shock the conscience" of the fair-minded jurist.[358]

The *Delgadillo* case does raise the issue of what test should be applied to meet these kinds of allegations. It would appear that in a system dedicated to justice, but limited by human frailities, no more and no less should be demanded than a fair trial. The mockery test, with its approach that something, albeit small, is better than nothing, cannot be what the right to counsel is all about. The "fair trial" approach, however, leaves the standard subjective and indefinite and it is out of such subjectivity and indefiniteness in the law that collateral attacks are spun. An approach is needed to guarantee adequate preparation in the first instance. It is difficult, however, to devise means for evaluating counsel's preparation before trial. Adequate preparation depends on the prosecutor's evidence, the complexity of the case, the defendant's background and myriad other factors which are not known to the trial judge. The best that can be achieved is a means of avoiding the necessity for further hearing if counsel's preparation is attacked after conviction. This can be accomplished by requiring counsel to file a confidential worksheet with the trial judge before trial. This worksheet would specify the time spent in consultation and other investigation, the witnesses interviewed and not interviewed and other work done on the case. If a collateral attack on counsel's effectiveness were made, this sheet would accompany the record to the appellate court and would often exonerate counsel and obviate the need for a hearing.

There should be no objection to providing such a worksheet. First, as indicated, a worksheet would make counsel's appearance

357. 395 F.2d 70 (9th Cir. 1968).

358. *Accord*, Bell v. Alabama, 367 F.2d 243 (5th Cir. 1966), *cert. denied*, 386 U.S. 916 (1967). *But cf.* Thomas v. State, — Ind. —, 242 N.E.2d 919 (1969) (beginning investigation of witnesses on eve of trial will not suffice).

in a post-conviction hearing unnecessary. Second, the information provided would be the same as that required of counsel when he is called to testify at post-conviction hearings, and it would be provided when memory was not dulled by the lapse of time. Finally, in light of the frequent attacks on counsel's effectiveness, many diligent counsel keep similar records in their files; there should be no objection to providing a confidential copy to the court for part of the record of the case.

A worksheet, of course, will not always reveal inadequate preparation. For example, if counsel advises a guilty plea not knowing that the rule of legal insanity has been changed,[359] the worksheet is not likely to reveal the defect. This is the type of case, however, that collateral proceedings should remedy. The approach recommended here should help accomplish the goal of eliminating frivolous claims.

D. Mistakes in Managing the Case

1. *Not-Guilty Plea Cases*

Closely related to the charge of inadequate preparation, and often inextricably bound to it, is the charge that counsel has made serious tactical blunders. The charges are inextricable when counsel's lack of preparation prevents possible defenses from being presented, as when counsel did not know that the rule of legal insanity was changed, that certain evidence was admissible to negate specific intent or that deportation was mandatory punishment for conviction.[360] The charges are extricable when adequately prepared counsel has made decisions which hindsight proves may have been faulty. For example, without defendant's disagreement, counsel may have decided not to call a witness who might have established the defense of entrapment[361] or may have decided not to raise the defense of insanity when psychiatric reports suggested an abnormality.[362] Counsel may also have interrogated defendant at trial about prior indictments—for the prosecutor to have done so would be reversible error—or may have asked a revolting question of a rape vic-

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359. *See* Kienlen v. United States, 379 F.2d 20 (10th Cir. 1967) (defendant changed plea from not guilty by reason of insanity to guilty after being incorrectly advised by counsel as to insanity test).

360. *See* subsection C *supra*.

361. *See, e.g.,* Andrews v. United States, 403 F.2d 341 (9th Cir. 1968).

362. *See, e.g.,* Hacker v. Statman, 105 N. J. Super. 385, 252 A.2d 406 (1969).

tim.[363] Finally, counsel's representation may be attacked on a number of minor points, each insignificant by itself.

The previously discussed concerns underlying the rigid definitions of ineffective assistance of counsel are most valid here. It is difficult to establish a pre-trial or trial procedure to deal with the many decisions and actions that may be attacked in subsequent proceedings. In spite of this difficulty, it is unjustifiable to provide the accused representation which is only marginally better than no representation. Such representation is likewise unjustifiable if due process makes counsel's assistance mandatory.

The problem of post-conviction proceedings is real enough to necessitate the clear enunciation of a standard by which ineffective assistance of counsel can be determined. It will be recalled that one of the concerns impeding the liberalization of the law is that hindsight would reveal errors over which conscientious lawyers would differ. Since the government's only obligation is to assure a fair trial, however, this fear need cause no concern. A fair trial has not been denied when counsel has pursued a course of action over which conscientious lawyers might differ. The accused cannot complain provided there is a reasonable basis for counsel's actions.

Two findings should be made before granting relief for ineffective assistance of counsel: (1) that there was no reasonable basis for counsel's action and (2) that the error was serious enough to have probably affected the outcome.[364] The second criterion is a harmless error rule. If counsel's unreasonable actions are probably harmless, the defendant should have no grounds for complaint. A probability, rather than a possibility, of harm should be required because the former is more realistic in a system dependent on human beings.[365] In many, if not all, trials, counsel may do something which could be characterized as unreasonable; if a possibility of harm sufficed for reversal, finality would rarely be achieved. On the other hand, our system should be capable of providing lawyers competent enough

363. State v. Cutcher, 17 Ohio App. 2d 107, 244 N.E.2d 767 (Ct. App. 1969) (counsel's assistance denounced as a flagrant instance of farcical inefficiency).

364. *Cf.* Commonwealth *ex rel.* Washington v. Maroney, 427 Pa. 599, 235 A.2d 349 (1967).

365. In cases of constitutional errors, the Supreme Court has required only a possibility of harm, *see* Chapman v. California, 386 U.S. 18 (1967). There is a difference, however, in deterring illegal government conduct and deterring mistakes on the part of counsel.

so as not to err so seriously that the outcome is probably affected.

It may yet be contended that the test is imprecise and difficult to apply. It is, however, more precise than the ones currently used. The most liberal of the current tests requires only that counsel render reasonably effective assistance or, alternatively, that counsel not deprive the defendant of a fair trial,[366] whereas the test suggested here explicitly states criteria by which counsel's effectiveness and the fairness of the proceedings can be determined. Each of counsel's actions that are challenged would be examined for reasonableness. Those that are found unreasonable would be examined singularly and collectively to determine their probable effect on the outcome. The two criteria do indeed leave some room for speculation, but courts have had experience with these standards. The advantage over the present tests is that it would be clear to courts *how* to proceed in reaching a conclusion.

While the suggested test liberalizes the law, it also places a heavy burden of proof on the defendant. In short, the defendant's burden should be light enough to assure fairness but heavy enough to deter frivolous, time-consuming claims in collateral proceedings. Such a burden is just, for a system dependent on human minds cannot be perfect. But it can and should be fair.

2. *Guilty Plea Cases*

Counsel's assistance is often criticized when the defendant has been persuaded to plead guilty. For example, a defendant may complain that counsel was not adequately aware of the law when he advised a guilty plea[367] or that counsel advised such a plea knowing that the defendant did not remember committing the crime.[368] These issues can be resolved by the same standards; relief should be granted only if counsel committed an unreasonable error without which he probably would have recom-

366. *See* text at notes 326-27 *supra.*

367. *See, e.g.,* Kienlen v. United States, 379 F.2d 20 (10th Cir. 1967).

368. *See, e.g.,* United States *ex rel.* Garrett v. Russell, 281 F. Supp. 104 (E.D. Pa. 1968); People v. Garrison, 108 Ill. App. 2d 77, 246 N.E.2d 465 (App. Ct. 1969). Practically all courts permit the trial of defendants who cannot remember committing crimes, *see* Recent Case, 52 IOWA L. REV. 339 (1966); Note, *Amnesia: A Case Study in the Limits of Particular Justice*, 71 YALE L.J. 109 (1961). It does not follow, however, that because a defendant is found competent to stand trial he should be permitted to plead guilty. There is a split of opinion as to whether the

mended a plea of not guilty. The criteria would be more difficult to administer here; but again, it seems that they are better than the standards now used.

A different situation is presented where improper conduct on the part of counsel induces a guilty plea. Counsel may, for example, play the role of amicus curiae instead of advocate and induce a guilty plea because he believes that the defendant should not be at large.[369] Perhaps counsel may have misrepresented to the defendant that a bargain had been negotiated.[370] In such cases, relief should be granted and counsel should be warned that repeated performances can result in disbarment. Cases such as these, however, will probably be rare.

E. Responsibility for Trial Decisions

The recommended test for ineffective assistance of counsel cannot determine the allocation of responsibility for trial decisions. For example, the defendant may allege that counsel was ineffective because counsel disregarded the defendant's orders or because counsel failed to consult with the defendant before making trial decisions. Only a delineation of responsibility can remove this issue from the dockets of the post-conviction judiciary. Responsibility for the waiver of objections to unconstitutional government action, however, would no longer be an issue if the proposed rule prohibiting waiver of such action is adopted.[371]

1. *Pleading and Appealing*

The decision to plead guilty is considered to be outside the sphere of trial strategy even by those courts which adhere most strictly to the rule that counsel and not the accused must make trial decisions.[372] The Supreme Court's decision in *Brookhart v.*

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accused must be convinced of his guilt before a guilty plea is accepted. *Compare* McCoy v. United States, 363 F.2d 306 (D.C. Cir. 1966), *with* United States v. Rogers, 289 F. Supp. 726 (D. Conn. 1968) (counsel must exercise scrupulous care to see that an innocent man does not plead guilty).

369. People v. Heirens, 4 Ill. 2d 131, 122 N.E.2d 231 (1954).

370. State v. Tunender, 182 Neb. 701, 157 N.W.2d 165 (1968).

371. *See* section III *supra*.

372. Nelson v. People, 346 F.2d 73, 81 n.7 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965); People v. Williams, 36 Ill. 2d 194, 222 N.E.2d 321, 325 (1966), *cert. denied*, 388 U.S. 923 (1967). *See also* United States *ex rel.* Kern v. Maroney, 275 F. Supp. 435 (W.D. Pa. 1967); Commonwealth v. Garrett, 425 Pa. 594, 229 A.2d 922 (1967).

Janis[373] supports this view. In that case, trial counsel agreed to submit the issue of guilt to determination by a prima facie case, a procedure that the trial judge recognized as tantamount to a guilty plea. The crucial fact relied on by the Court in reversing the decision was the defendant's statement to the trial judge that he was in no way pleading guilty.[374]

Further support for the view that the accused must personally decide to plead guilty is found in two recent cases decided by the Supreme Court. The Federal Rules of Criminal Procedure require the trial judge to personally address the defendant to ascertain whether his guilty plea is voluntarily and understandingly made,[375] and the Court in *McCarthy v. United States*[376] held that there must be strict compliance with this procedure even though counsel is present at the time of pleading. More recently, the Court held it to be a *constitutional* requirement that state and federal judges alike personally address the defendant to determine the voluntariness of his guilty plea.[377]

It is only fair to prohibit counsel from forcing the defendant to plead guilty since a plea ends all controversy and waives all nonjurisdictional defects.[378] There may, of course, be tactical reasons for pleading guilty. For example, counsel may be able to negotiate a good plea bargain in a situation where a trial conviction would be most severe.[379] If counsel had the authority to decide on the plea, the defendant could be prevented from harming himself. Such a result, however, would be completely contrary to our notions of fairness. Our system presumes innocence until a finding of guilt beyond a reasonable doubt by a proper trier of fact; the system could not tolerate permitting counsel to usurp the role of the trier of fact. At most, counsel can be permitted to advise the defendant to plead guilty, but counsel cannot be permitted to decide for the defendant.

The more interesting question is whether counsel should be permitted to enter a plea of not guilty over the defendant's protest. At present, the defendant does not have an absolute right to plead guilty. The federal rules direct the trial judge not to accept a guilty plea unless he is satisfied that it is made with

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373. 384 U.S. 1 (1966).
374. *Id.* at 7.
375. FED. R. CRIM. P. 11 (1968).
376. 394 U.S. 459 (1968).
377. Boykin v. Alabama, 395 U.S. 238 (1969).
378. *Id.* at 242.
379. *E.g.*, Doughty v. Beto, 396 F.2d 128 (5th Cir. 1968) (prosecutor

an understanding of the nature of the charge and the consequences of the plea. Moreover, the trial judge is prohibited from entering a judgment upon a guilty plea unless he is satisfied that there is a factual basis for the plea.[380] Due process considerations undoubtedly underlie this rule; it is preferred in our system to prevent the conviction of innocent persons. Beyond these considerations, however, there is no reason to prohibit the defendant from pleading guilty.[381] The issue, therefore, is to define the role that counsel should play when he believes the defendant's guilty plea is not voluntary, understanding or made with an underlying factual basis. It is probably true that counsel can assess these factors better than the trial judge because of counsel's opportunity to study the case and communicate with the accused. Nevertheless, due to the strong sentiment that exists for encouraging the acknowledgment of guilt, it is better not to give counsel the power to override the defendant's desire to plead guilty.[382] Counsel should instead be limited to assisting the trial judge so that the latter can better fulfill his responsibility.

The recommended approach would provide an outlet for the commendable concerns of counsel that led to the appeal in *People v. Whitfield*.[383] The prosecutor had offered to reduce the charge from murder to manslaughter with a recommendation of probation if the defendant pleaded guilty. Counsel, thinking he would win the case, declined the offer without communicating it to the defendant. Defendant was convicted and sentenced to a maximum of 18 years' imprisonment. The Illinois Supreme Court, by positing the *non sequitur* that the defendant must have the right to plead guilty if he has the right to plead not guilty, concluded that counsel should have informed the defendant of the offer. The court was certainly correct in holding that counsel should have communicated with the accused. A better

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dropped recidivist charges which would have mandated a life sentence in exchange for defendant's guilty plea).

380. FED. R. CRIM. P. 11 (1968). *See also* Lynch v. Overholser, 369 U.S. 705, 719 (1962) which contains dicta to the effect that there is no constitutional right to have a guilty-plea accepted.

381. "If the plea is thus determined to be knowing, voluntary, and accurate, there is no basis for giving the court discretion to refuse to accept the plea." ABA STANDARDS RELATING TO PLEAS OF GUILTY § 1.1(a), Commentary (1968).

382. *But cf.* People v. Merkouris, 45 Cal. 2d 540, 297 P.2d 999 (1956) (court erred in permitting defendant, over counsel's protest, to withdraw plea of not guilty by reason of insanity).

383. 40 Ill. 2d 308, 239 N.E.2d 850 (1968).

conclusion, however, would have added that counsel's duty was to explain to the trial judge why he felt a guilty plea was inappropriate.

The result may still seem harsh to some observers. One can imagine counsel in *Whitfield* convincing the trial judge that there was no factual basis for a guilty plea to the recommended charge and the defendant subsequently being convicted on the original charge. The problem, however, is a product of the negotiated plea process. The hypothetical is unsatisfactory only if one assumes that a guilty plea should be accepted merely because it has been induced by a promise of leniency. To the extent that it is a valid policy of the law to reject guilty pleas which may be inaccurate,[384] the hypothetical represents a tough break, but not injustice.

The decision to make or forego an appeal is similar to the decision to plead guilty; the defendant and not counsel must make it. On the basis of *Noia*,[385] it has been held that counsel has no right to forego an appeal without consulting the defendant,[386] even if counsel has an objective in mind.[387] This is consistent with the Supreme Court's more recent holding in *Anders v. California*[388] that counsel cannot merely conclude that an appeal is frivolous and so inform the court. If defendant wishes to appeal, counsel must submit a brief referring to any arguable points whether or not the appeal seems frivolous to him. It is clear, therefore, that counsel cannot prevent the defendant from appealing.[389]

2. *Submitting the Case on a Transcript*

Defense counsel will occasionally arrange with the prosecutor for the case to be submitted on the transcript of the preliminary hearing. If the right to produce evidence at trial is preserved, the shortcut procedure amounts only to a waiver of the right to cross-examine witnesses. If the right to produce evidence

384. *See* ABA STANDARDS, *supra* note 381, § 1.6, Commentary.

385. 372 U.S. 391 (1963). *See* text accompanying notes 202-09 *supra*.

386. Wainwright v. Simpson, 360 F.2d 307 (5th Cir. 1966).

387. *See* United States *ex rel.* Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967), where counsel hoped to better his chances of successfully negotiating pending and unrelated charges.

388. 386 U.S. 738 (1967).

389. If the sentencing judge were to advise the defendant of the right to appeal, collateral proceedings to determine the defendant's "knowing" waiver would be unnecessary.

is not preserved, however, the procedure is tantamount to a guilty plea.

In general, the decision to cross-examine a particular witness belongs to counsel.[390] The decision to submit the case on a transcript of testimony, however, involves more than a decision to forego cross-examination of a particular witness; it involves a complete waiver of the right to cross-examine. In *Brookhart v. Janis*,[391] counsel's decision to submit the matter on a prima facie case over defendant's express denial that he was pleading guilty was held not binding. The framing of the legal issue by the Court, however, makes it unclear whether the right to plead, the right of confrontation, or both rights were found personal to the accused: "whether counsel has power to enter a plea which is inconsistent with his client's expressed desire and thereby waive his constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him."[392] Later in the opinion *Henry* was distinguished and found not to support the idea that counsel could "enter in the name of his client another plea—whatever the label—which would shut off the defendant's constitutional right to confront and cross-examine the witnesses against him which he would have an oportunity to do under a plea of not guilty."[393]

In the more recent case of *Boykin v. Alabama*,[394] the Court noted that a guilty plea waives the right to confront one's accusers and that such a waiver could not be presumed from a silent record. Hence, if the record must clearly establish a voluntary guilty plea before a waiver of the right to confrontation can be found, strong support is gained for the view that a complete waiver of the right of confrontation cannot be made by counsel.

The ordinary case, however, does not involve an expressed disagreement with counsel; usually counsel, after a plea of not guilty, states in defendant's presence that the case will be submitted on the transcript. In this situation, most courts find the defendant to have acquiesced in the decision.[395] In *People v.*

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390. Brookhart v. Janes, 384 U.S. 1, 8 (1966) (Harlan, J., concurring); People v. Modesto, 66 Cal. 2d 695, 427 P.2d 788, 59 Cal. Rptr. 124, *cert. denied*, 389 U.S. 1009 (1967).

391. 384 U.S. 1 (1966).

392. *Id.* at 7.

393. *Id.* at 8.

394. 395 U. S. 238 (1969).

395. Poole v. Fitzharris, 396 F.2d 544 (9th Cir. 1968); Wilson v. Gray, 345 F.2d 282 (9th Cir.), *cert. denied*, 382 U.S. 919 (1965). *Cf.*

Wheeler,[396] however, the defendant's silent acquiescence lasted only until the court pronounced him guilty. The verdict was met by defendant's shouts of shocked indignation that he had not had a trial. The court found the case indistinguishable from *Brookhart*, but emphasized that it was not expressing doubt on the validity of the rule that silent acquiescence constitutes waiver.

The above approach favors the defendant who has the temerity to make a courtroom outburst. If the defendant is given authority to make the decision when disagreement with counsel is made known to the court, he should also be given the right to make the decision when the disagreement is not aired. The crucial question is whether the defendant should have the right to decide the matter at all. The answer must depend on the particular waivers involved in the stipulation. The prima facie case in *Brookhart* involved a waiver of the rights to testify, to call witnesses and to confront witnesses. As the trial judge had remarked, it was in effect a plea of guilty.[397] Since the guilty plea is considered personal to the accused, the prima facie case should involve the same procedural safeguards as does the plea of guilty. In cases where submitting the issue on a transcript does not amount to a guilty plea but only waives the right of confrontation, however, the better approach is to recognize that counsel may be making a tactical decision for the defendant's own good. For example, counsel may believe that the force of damaging testimony can be blunted by use of this procedure.[398] Nevertheless, because such a drastic and complete waiver of a constitutional privilege is involved, the trial judge should explain the procedure to the defendant and ascertain whether he approves. If the defendant does not approve, the burden should be on counsel to prove that a tactical advantage is to be gained. This allocation of the burden is justifiable since the defendant has the right to decide to plead not guilty[399] and because a plea of not guilty connotes a full trial to the average person. The stipulated transcript case involves such a diminution of the normal incidents of a full trial that it should not be allowed over

People v. Chamberlin, 242 Cal. App. 2d 594, 51 Cal. Rptr. 679 (1966). *See also* the cases cited in Waltz, *infra* note 398, at 322 n.190.

396. 260 Cal. App. 2d 522, 67 Cal. Rptr. 245 (1966).

397. 384 U.S. at 6.

398. Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 Nw. U.L. Rev. 289, 322 (1964).

399. *See* text accompanying notes 372-79 *supra*.

the defendant's dissent unless counsel can clearly establish a tactical advantage. This simple rule and procedure would increase fairness for defendants as a whole and would establish a record that would obviate the need for subsequent post-trial hearings in which a decision on the defendant's consent or lack of consent would be speculative.

3. *Calling Particular Witnesses*

One of the complaints most frequently heard is that counsel failed to call a suggested witness. Although the sixth amendment gives defendants the right to have compulsory process for obtaining witnesses, the almost unanimous approach has been to place on counsel, who has the legal acumen to determine if a witness will be helpful or harmful, the responsibility for deciding which witnesses to call.[400] It is, however, difficult to attack counsel's decision after the pressure of decision-making is over.[401] Nevertheless, a different case is presented when the accused can show that the desired witness' testimony would have gone to the heart of the matter or that counsel's refusal to comply prevented an available defense from being presented.[402] Likewise, a different case is presented when counsel does not even investigate the leads supplied to him.[403]

It has also been suggested that a different result would be reached if the defendant were to tell the trial court that counsel

400. Gravenmier v. United States, 399 F.2d 677 (9th Cir. 1968); United States v. Meek, 388 F.2d 936 (7th Cir.), *cert. denied*, 391 U.S. 951 (1968); Eaton v. United States, 384 F.2d 235 (9th Cir. 1967); United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3rd Cir.), *cert. denied*, 346 U.S. 865 (1953); Coleman v. Peyton, 287 F. Supp. 892 (W.D. Va. 1968); State v. Crepeault, — Vt. —, 252 A.2d 534 (1969); Smith v. Woodley, 164 N.W.2d 594 (N.D. 1969).

401. Smith v. Woodley, 164 N.W.2d 594 (N.D. 1969) (also expressing the fear that such second-guessing would discourage counsel from representing defendants).

402. In United States *ex rel.* Jefferson v. Follette, 396 F.2d 862 (2nd Cir. 1968) counsel would not subpoena a witness for a *coram nobis* proceeding to determine the voluntariness of a confession. This and other failures were sufficient for the court to conclude that the defendant was prevented from raising the coercion issue. *Cf.* Eaton v. United States, 384 F.2d 235 (9th Cir. 1967) (hearing not necessary because facts not alleged to show testimony would have helped defense).

403. Thomas v. State, — Ind. —, 242 N.E.2d 919 (1969) (calling one of the suggested witnesses the night before trial was not adequate investigation). *Contra*, State v. Bentley, 45 N.J. Super. 193, 134 A.2d 445 (1957) (counsel need not interview a witness unless his judgment indicates he should).

refused to subpoena desired witnesses.[404] Such a procedure discriminates against those defendants who, for one reason or another, are reluctant to bring their discontent to the trial judge's attention. If the defendant who disagrees with counsel can prevail by notifying the court of the disagreement, then the less aggressive defendant should also prevail. Only the need for finality can justify such a distinction, but that need can be met by a procedural change. The trial judge, out of the jury's presence, could ask the defendant at the conclusion of the testimony whether he wanted to call other witnesses. The judge could also explain that failure to speak would preclude relief on the basis of a contrary assertion at a later date. A negative answer from the defendant would eliminate the need for any collateral hearings on this issue.

An affirmative answer squarely presents the issue of ultimate responsibility for the decision. It is fair to protect the accused from his own ignorance and arrogance but it is not fair to prevent him from presenting his case. A just result can be achieved by having the disagreement presented for the record and by having the trial judge make findings of fact. In this situation, however, unlike that created by submitting the case on a transcript, most of the incidents of a full trial are not being waived. Therefore, counsel's decision should prevail unless the defendant can show that the decision is unreasonable. This, of course, requires the trial judge to make a value judgment on counsel's tactics, a result not generally favored. Indeed, it has been said that placing such responsibility on the trial judge would affect the entire trial procedure:

> If a trial judge were to understand that after the trial he would in all probability be called upon to determine whether each or any of the trial steps taken by the defense was or was not "ineffective", his whole attitude toward and conduct of the trial would change.[405]

Such involvement, it is feared, would destroy the impartiality of the judge. The fear may, however, be exaggerated. It cannot be doubted that the trial judge has the duty of preventing unfairness to the accused. The involvement suggested here would function to assure that the defendant is not being denied a full hearing on the facts in controversy. In general, counsel's decision will prevail, but the infrequent case of inadequate prepa-

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404. State v. Deal, 17 Ohio St. 2d 17, 244 N.E.2d 742 (1969); State v. Bentley, 46 N.J. Super. 193, 134 A.2d 445 (1957).

405. Mitchell v. United States, 259 F.2d 787, 793 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

ration or unreasonable motive will be rectified at the trial level without the need for collateral hearings. Since a trial judge's findings supported by an adequate record are difficult to overturn, a decision that counsel's choice should prevail would also eliminate the need for collateral fact-finding hearings. The result in either case should be greater fairness for defendants as a whole and the elimination of this issue in post-trial proceedings.

4. *Defendant's Testifying in His Own Behalf*

It has been suggested that the decision to have the defendant testify is no more than a variant of the broader decision to call particular witnesses and that accordingly the authority rests with counsel.[406] It also has been argued that such a rule is necessary to keep the defendant from doing himself more harm than good:

> [I]t is difficult to conceive of the average defendant making an 'intelligent and knowing' waiver . . . of his privilege against self-incrimination: Without some legal background, few persons could understand the consequences of such a relinquishment in terms of cross-examination, impeachment, jury effect, character evidence, and prior criminal record. Most defendants merely wish to 'tell my side of the story' and are oblivious to the procedural consequences of such a step.[407]

A problem arises, however, that has escaped the attention of the courts and commentators. In considering the common law history underpinning the so-called right to proceed *pro se*, it was seen that defendants at common law had the right to tell their side of the story. It was also suggested that the early state constitutional provisions, which seemingly established a right to proceed *pro se*, may have been intended merely to preserve the right of the defendant to explain the case against him.[408] It can be argued that the old common law right should

406. *See* Waltz, *supra* note 398, at 319. For cases holding defendant bound by counsel's choice, see Hall v. Warden, Maryland Penitentiary, 313 F.2d 483 (4th Cir. 1963); United States *ex rel.* Darcy v. Handy, 203 F.2d 407 (3rd Cir.), *cert. denied*, 346 U.S. 865 (1953); Commonwealth *ex rel.* Bell v. Rundle, 420 Pa. 127, 216 A.2d 57, *cert. denied*, 384 U.S. 966 (1966). *But cf.* Poe v. United States, 233 F. Supp. 173 (D.D.C. 1964) (right to testify is personal to the accused), *aff'd*, 352 F.2d 639 (6th Cir. 1965) (but stating that counsel remain free to keep defendants from testifying).

407. Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1270 (1966).

408. *See* text accompanying notes 99-104 *supra*. *But cf.* Sims v. Lane, 411 F.2d 661 (7th Cir. 1969).

not be binding on modern procedure. But if the state constitutional provisions granting the right "to be heard by oneself" were in fact aimed at preserving the right to testify, the policy argument cannot prevail. Constitutional demands must be followed.

The right to testify regardless of counsel's wishes should not cause procedural problems. The trial judge should ask the defendant at the close of the testimony if he wishes to testify. The judge should also warn the defendant that a negative answer would forever preclude a contrary assertion. An affirmative answer would require the judge to warn the defendant of the risks involved; but if the judge's warnings and the advice of counsel do not overcome the defendant's will, he should be permitted to testify. Such a procedure would obviate the need for collateral proceeding to determine whether counsel prevented the defendant from testifying.

5. *Other Decisions*

A general approach emerges from the particular problems discussed. Only the defendant himself can make decisions which relinquish a contest on the issue of guilt. Examples include the entering of a plea of guilty and submitting the issue of guilt on a prima facie case. Counsel must have the authority, however, to make decisions which involve tactical or strategic judgment, with two provisos: (1) if a substantial number of the incidents of a full trial are being waived, the accused needs the added protection of a procedure which determines either his understanding acquiescence or the merit to such action if he protests, and (2) if the waiver does not affect a substantial number of the incidents of a full trial, fairness and procedural efficiency can be achieved by a procedure that determines if there is dissatisfaction and which places the burden on the accused to justify overriding counsel's decision. With this approach it is not difficult to assign responsibility for most of the decisions that have to be made. For example, the decision whether to object to evidence as irrelevant or inflammatory,[409] the decision whether to object to a particular juror,[410] and the decision whether to request a specific

409. *See, e.g.*, Harried v. United States, 389 F.2d 281 (D.C. Cir. 1967); Weller v. United States, 369 F.2d 919 (9th Cir. 1966); Williams v. Beto, 354 F.2d 698 (5th Cir. 1965); Anderson v. Peyton, 209 Va. 798, 167 S.E.2d 111 (1969); State v. Haley, 87 Ariz. 29, 347 P.2d 692 (1959).

410. *See, e.g.*, Anderson v. Peyton, 209 Va. 798, 167 S.E.2d 111 (1969).

charge to the jury[411] would be for counsel to make. Unlike the decision to call a particular witness, these decisions require more legal acumen than the average defendant even thinks he has. A simple query at the end of the trial as to whether the defendant disagrees with counsel on any matter would suffice if coupled with a warning that a negative answer would forever preclude defendant's alleging disagreement. An affirmative answer would place the burden on the accused to show his course of action to be more meritorious than counsel's. The result in either event would be a trial record that would eliminate the possibility of post-trial speculation as to whether or not disagreement existed and that would contain a trial judge's findings as to why counsel's decision did or did not prevail. The defendant would, of course, be able to attack counsel's decisions as egregious under the rules previously discussed, but the defendant would no longer be able to attack counsel for disregarding his wishes or for failure to obtain consent before acting.

F. Summation

In the United States, the right to counsel must equal the right to a fair trial. When counsel's representation denies the defendant a fair trial, the sixth amendment has been violated. Establishing a fair trial as a minimum goal for all defendants does not mean that the post-trial judiciary must be burdened by claims of ineffective assistance of counsel. To relieve the post-trial judiciary of this burden and to assure fairness in the first instance, the following procedural steps are recommended:

1. The trial attorney should file a confidential work sheet with the trial judge indicating the extent and nature of his preparation.
2. In all cases involving guilty pleas, the trial judge should assure himself that there is an adequate factual basis for the plea.
3. If a significant number of the incidents of a full trial are being waived, the trial judge should assure himself that the defendant understandingly acquiesces; if there is disagreement, counsel should have the burden of illustrating a reasonable tactical objective for such waiver.
4. At the conclusion of the testimony, the trial judge should

411. *See* Waltz, *supra* note 398, at 326.

determine if disagreement exists over calling witnesses, defendant's testifying and other matters. Defendant should be warned that a negative answer is forever binding. On all but the decision to testify, defendant would have the burden of convincing the judge he should prevail.

5. At sentencing, the trial judge should notify the defendant of the right to appeal.

For the claims of ineffective assistance of counsel which cannot be prevented by the above procedural steps, a "fairness" test should be utilized which places on the accused the burden of showing:

1. That there was no reasonable basis for the action or actions of counsel that are attacked, *and*
2. That the actions probably affected the outcome of the case.

No system can be better than the people who administer it. The system recommended here places the major burden on the trial judge. If he faithfully follows these steps, it is believed that the goals of fairness and overall efficiency will be closer to fulfillment.

V. CONCLUSION

A set of problems relating to the right to counsel has been examined. When the right to counsel is viewed from such an overall perspective, significant changes in the system of administering criminal justice are mandated. Under the recommended system no defendant would have the right to waive the assistance of counsel in a trial. Mandatory representation would help assure that a conviction would be procured only by fair means since a defendant's best defense is much more likely to be presented if he is assisted by counsel. In addition, special protection would be given against unsatisfactory representation. First, protection from the unwise waiver of objections to unconstitutional government conduct would be afforded by abolishing the waiver doctrine in this context. Second, the accused would personally have to consent to any waiver of a significant number of the incidents of a normal, full trial. Third, the test for judging counsel's effectiveness would be liberalized so that nothing short of a fair trial could justify any conviction.

In addition to maximizing fairness for the accused, the new rules would narrow the opportunity for convicts to demand post-

trial hearings. First, it would be impossible to taunt courts with claims that either the right to counsel or the right to proceed *pro se* had been violated; the first right would be satisfied by universal representation and the second right would be nonexistent. Second, post-trial hearings to determine if counsel's waivers were "deliberate" or "knowing" would not be necesary in the context of objections to constitutional defects, as such waivers would not be permissible. In addition, post-trial hearings would not be necessary to determine the constitutional legality of evidence, because a pre-trial hearing would be mandatory. Third, the trial judge's new role at trial would create a record, showing either agreement or disagreement with counsel, that would obviate the need for many post-trial hearings. Finally, because of these measures, the claim of ineffective assistance of counsel would be difficult to assert without specific and detailed allegations of counsel's shortcomings.

In short, the collateral issues engendered by the right to have the assistance of counsel require a revolutionizing of the substantive and procedural aspects of criminal justice administration. Such a "revolution," however, should be welcomed by all segments of the philosophical spectrum, for it seeks both fairness and finality.