

1976

Waiver of Trial by Jury Following Waiver of Counsel

Eric E. Wright

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Eric E. Wright, *Waiver of Trial by Jury Following Waiver of Counsel*, 25 Cath. U. L. Rev. 380 (1976).
Available at: <https://scholarship.law.edu/lawreview/vol25/iss2/10>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

WAIVER OF TRIAL BY JURY FOLLOWING WAIVER OF COUNSEL

That the rights to trial by jury and representation by counsel both are tied intimately to the manner in which a defendant conducts his defense seems to suggest that they should be given parallel treatment by the courts. This has not been the case. As the 1974 Term ended, the Supreme Court in *Faretta v. California*¹ held that a defendant in a state criminal trial has a constitutional right under the sixth and fourteenth amendments to waive representation by counsel whenever he voluntarily and intelligently chooses to do so. In 1965, by contrast, the Court in *Singer v. United States*² decided that a defendant in a federal criminal case does not have an absolute right under the fifth and sixth amendments to waive trial by jury.³

Although the *Faretta* Court believed that its holding was consistent with *Singer*,⁴ the results in the two cases do appear to clash. Yet *Faretta* is not remarkable simply because it seems contrary to *Singer*. The decision also is striking because, as the *Faretta* majority noted, it "seems to cut against the

1. 422 U.S. 806 (1975).

2. 380 U.S. 24 (1965).

3. The word "absolute" suggests that no party to a trial other than the defendant is to have any say in deciding whether there shall be a waiver of trial by jury. It has that meaning in this article, with the qualification that the trial judge is to determine whether the defendant's waiver has been made voluntarily and intelligently. In *Singer*, however, the Court upheld the restrictions on the absolute waiver provided by FED. R. CRIM. P. 23(a): "Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

Rule 23(a) is discussed in 3 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES §§ 23:36, 23:38-44 (1966). The consent of the government is not required in trials of minor or petty offenses, although triable before a jury, *United States v. Au Young*, 142 F. Supp. 666 (D. Hawaii 1956), or triable before a federal magistrate. *United States v. Hamilton*, 60 F.R.D. 192 (W.D. Tenn. 1973). See 18 U.S.C. § 3401(b) (1970); Rules of Procedure for the Trial of Minor Offenses Before U.S. Magistrates 2(b).

4. Justice Stewart, writing for the majority, stated:

We follow the approach of *Singer* here. Our concern is with an *independent* right of self-representation. We do not suggest that this right arises mechanically from a defendant's power to waive the right to the assistance of counsel. . . . On the contrary, the right must be independently found in the structure and history of the constitutional text.

422 U.S. at 819-20 n.15. The dissenters also thought that the approach taken in *Singer* was sound. See *id.* at 841 n.4 (Burger, C.J., dissenting).

grain of this Court's decisions holding that . . . no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel."⁵ *Faretta* thus becomes a useful tool for inquiring whether *Singer* should remain viable today.

I. FUNDAMENTAL COMPARISONS AND CONTRASTS

A. *Trial by Jury Versus Representation by Counsel*

Certain similarities exist between the rights to representation by counsel and trial by jury which the differing results of *Faretta* and *Singer* do not accommodate completely. Both rights flow from the sixth amendment.⁶ It is no historical accident that their constitutional source is common, for the sixth amendment provides a defendant with a "package of rights"⁷ with which to make his defense. The Supreme Court has praised both rights elaborately⁸ and, before *Singer* and *Faretta*, apparently viewed neither as jurisdictional,

5. *Id.* at 832.

6. The sixth amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . , and to have the Assistance of Counsel for his defence." Article III, section 2 of the United States Constitution provides in part: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury"

7. *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J., concurring).

The history of trial by jury is traced in 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 312-50 (Little, Brown ed. 1931), and 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 117-25 (1895). Trial by jury has been called "the grand bulwark" of liberty. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349 (G. Sharswood ed. 1870). "[T]he subject [of trial by jury] took up a considerable time" at the Constitutional Convention. 3 THE RECORDS OF THE CONSTITUTIONAL CONVENTION 349 (M. Farrand rev. ed. 1937). The upshot was that "[i]t was agreed by all that one clause in [the] Constitution was absolutely essential" C. WARREN, CONGRESS, THE CONSTITUTION, AND THE SUPREME COURT 43-44 (1925). Article III, section 2 thus was written. See also 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 292 (Vintage Books ed. 1945); THE FEDERALIST No. 83, at 559 (J. Cooke ed. 1961) (A. Hamilton).

The right to counsel developed more slowly, and it was not until 1836 that a felon in England clearly was entitled to counsel. This was a "spectacular" reform. 15 W. HOLDSWORTH, *supra*, at 157. Even before then, however, if litigants "were too poor to employ counsel the court could and did assign counsel to assist them." 2 W. HOLDSWORTH, *supra*, at 478. Further, Blackstone paid homage to the importance of counsel. 3 W. BLACKSTONE, *supra*, at 26-27; 4 W. BLACKSTONE, *supra*, at 355-56. Although counsel was not granted universally in colonial America, the "practice was well in advance of England's" in several colonies. L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 376 (1968). The perceived need for counsel thus was given expression in the sixth amendment.

8. On the right to counsel, see *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932), and *Gideon v. Wainwright*, 372 U.S. 335, 344 (1962). On the right to trial by jury, see *Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968), and *Glasser v. United States*, 315 U.S. 60, 84-85 (1942).

in the sense that a court could not sit if the right were denied; rather, both have been thought to exist for the protection of an accused against the threat of an oppressive government.⁹ In addition, the rights recently have been vastly expanded.¹⁰

An exact parallel between the two rights cannot be said to exist, however. At the same time that the right to counsel has been propelled into all cases in which the defendant faces the threat of imprisonment,¹¹ the Supreme Court has adhered to its long-established position that no jury is essential in trials of petty crimes.¹² In juvenile proceedings, moreover, it has required the right to counsel but not the right to jury trial.¹³ The Court also has reconsidered basic premises which underlie trial by jury.¹⁴ Although these developments may seem to lessen the importance of the right to trial by

9. In *Patton v. United States*, 281 U.S. 276 (1930), the Court said "that the framers of the Constitution simply were intent upon preserving the right of trial by jury primarily for the protection of the accused" and "that Article III, Section 2, is not jurisdictional . . ." *Id.* at 297-98. With regard to representation by counsel and its concomitant waiver, see *Johnson v. Zerbst*, 304 U.S. 458 (1938): "When this right is properly waived, the assistance of counsel is no longer a necessary element of the court's jurisdiction to proceed to conviction and sentence." *Id.* at 467-68.

10. On the right to counsel, see *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (counsel must be available to any defendant faced with the threat of imprisonment); *In re Gault*, 387 U.S. 1 (1967) (counsel must be available in juvenile proceedings); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (counsel must be available to defendants in state felony prosecutions); *Powell v. Alabama*, 287 U.S. 45 (1932) (counsel must be available to defendants charged with capital crimes). *Cf. Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (right to counsel in probation or parole revocation hearings to be decided on case by case basis); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (counsel permitted but not required at welfare recipient's pretermination hearing).

On the right to trial by jury, see *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) (jury trial available in criminal contempt proceedings in which aggregate punishment of various offenses exceeds six months); *Bloom v. Illinois*, 391 U.S. 194 (1968) (jury trial available in criminal contempt proceedings of serious offenses); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (sixth amendment right to jury trial applicable to the states); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960) (jury trial available to civilians accompanying members of the armed forces abroad). *But see Taylor v. Hayes*, 418 U.S. 488 (1974) (no right to jury trial in criminal contempt proceedings of petty offenses); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial in juvenile proceedings).

11. *See Argersinger v. Hamlin*, 407 U.S. 25 (1972).

12. *See, e.g., Duncan v. Louisiana*, 391 U.S. 145, 159 & n.31 (1968). *See also* Rules of Procedure for the Trial of Minor Offenses Before U.S. Magistrates 3(c)(1).

13. *Compare McKeiver v. Pennsylvania*, 403 U.S. 528 (1971) (no right to jury trial), *with In re Gault*, 387 U.S. 1 (1967) (right to counsel).

14. *See, e.g., Apodaca v. Oregon*, 406 U.S. 404 (1972) (jury unanimity not required in state criminal cases); *Johnson v. Louisiana*, 406 U.S. 356 (1972) (holding similar to *Apodaca*); *Williams v. Florida*, 399 U.S. 78 (1970) (states may use juries of less than 12 members in criminal cases).

jury,¹⁵ the Court a generation ago approved the concept of waiver of both counsel and jury trial.¹⁶

Waiver of trial by jury was approved in *Patton v. United States*.¹⁷ The Court determined that the right to a jury trial had been intended by the framers of the Constitution to be a protection for the accused and not an essential part of the court or "a part of the frame of government."¹⁸ Since a jury was not viewed as jurisdictional but was said to exist uniquely for the benefit of the defendant, it followed that the jury was not an imperative, but could be waived by the defendant. Although this suggested that the right to waive a jury was unconditional, the Court dispelled any such idea by insisting that "before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant."¹⁹

The Court did not outline its rationale in conditioning the right to waive a jury. Consequently, the precise meaning of *Patton* remained uncertain until *Singer*. The requirement of consent followed in *Patton* immediately after discussion of the necessity for the court to insure that the defendant had acted intelligently and voluntarily in seeking a waiver of a right to which he was entitled. Impliedly, therefore, the Court may well have meant for the

15. The Court in *Palko v. Connecticut*, 302 U.S. 319 (1937), stated that "[t]he right to trial by jury . . . [is] not of the very essence of a scheme of ordered liberty." *Id.* at 325. *But see* *Duncan v. Louisiana*, 391 U.S. 145 (1968) ("trial by jury in criminal cases is fundamental to the American scheme of justice . . ." *Id.* at 149).

The Court seems not to have entirely thrown over the thought, also expressed in *Palko*, that "[f]ew would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without [juries]." 302 U.S. at 325. *See also* *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971), in which the Court stated "one cannot say that in our legal system the jury is a necessary component of accurate factfinding." *Id.* at 543. "Although the function of the jury is to find facts, that body is not necessarily or even probably better at the job than the conscientious judge." *Id.* at 551 (White, J., concurring). Rather, the jury now seems to have been deemed fundamental in its role as a guardian against governmental tyranny.

16. *See* *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942) (counsel and jury trial); *Johnson v. Zerbst*, 304 U.S. 458 (1938) (counsel); *Patton v. United States*, 281 U.S. 276 (1930) (jury trial).

17. 281 U.S. 276 (1930). The precise question in *Patton* was whether a trial could continue, with the defendant's consent, after one of the original jurors became unable to continue. In holding that it could, the *Patton* Court

reject[ed] *in limine* the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and . . . treat[ed] both forms of waiver as in substance amounting to the same thing.

Id. at 290.

18. *Id.* at 293.

19. *Id.* at 312.

government and the court to play only a limited part in a waiver procedure that was not to be complex.²⁰ But the words "in addition to the express and intelligent consent of the defendant" may be read as having given the prosecution and the trial judge a wider role.²¹ This ambiguity was not resolved until the Court in *Singer* chose the latter interpretation in upholding the constitutional validity of rule 23(a) of the Federal Rules of Criminal Procedure.²²

B. *Faretta Versus Singer*

Anthony Faretta, charged in Los Angeles County Superior Court with grand theft, was represented by a public defender. Expressing concern to the trial judge that his defense would suffer because of the defender's "heavy case load,"²³ Faretta before trial asked permission to defend himself. The judge initially agreed. After questioning Faretta in depth about various evidentiary and procedural matters, however, he reversed himself, finding that Faretta's waiver of counsel had not been made knowingly and intelligently. After ruling that Faretta had no right to represent himself, to make his own motions, or to have appointed counsel of his own choice, the judge required that Faretta's defense be conducted by the appointed public defender. Faretta was found guilty by a jury, and a California Court of Appeal affirmed. It held that a defendant had no right under either the federal or California constitution to represent himself.²⁴

Mortimer Singer was indicted in federal district court for allegedly having committed 30 acts of mail fraud by using the mails to convince amateur songwriters to send money to him to market their songs. As his trial opened, Singer offered in writing to waive his right to a trial by jury "[f]or the purpose of shortening the trial."²⁵ The trial judge approved, but the government, without stating its reasons, refused to consent to the proffered waiver.²⁶ The trial proceeded with a jury, and Singer was convicted on all

20. See 13 U.C.L.A.L. REV. 189, 194-95 nn. 21 & 22 (1965).

21. *Adams v. United States ex rel. McCann*, 317 U.S. 269 (1942), the Supreme Court's only other comment on the subject before *Singer*, does nothing to clear up the confusion. It merely holds that a defendant need not have consulted an attorney before his waiver of jury trial could be found by the court to have been "made with eyes open." *Id.* at 279.

22. See note 3 *supra*.

23. 422 U.S. at 807.

24. The California Supreme Court denied review in Faretta's case. The California decisions in *Faretta* are unreported.

25. 380 U.S. at 25.

26. Both Singer's offer of waiver and the government's objection to it were put forth under FED. R. CRIM. P. 23(a). 380 U.S. at 25-26. See note 3 *supra*.

but one of the counts. The United States Court of Appeals for the Ninth Circuit affirmed.²⁷

Faretta and Singer each argued essentially that his right to waiver had descended from the common law of England and was supported by colonial legal history. Each argued that the constitutional right involved in his case was intended for his protection, as an accused, against possibly arbitrary exercise of governmental authority. As such, the right could be waived by him at his discretion, unfettered by objections from the prosecution or the court. Each argued as well that waiver was implied by the right expressly granted to him by the Constitution.

The *Faretta* Court agreed with these contentions. It held that Faretta had correctly assessed that the right to representation by counsel belonged to him and was not jurisdictional. The Court stated that “[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.”²⁸ The decision thus riveted the sixth amendment generally—and the right to counsel particularly—to the defendant personally. Counsel is “to be used at [the accused’s] option”;²⁹ “forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so.”³⁰ Implicit in the sixth amendment’s right to assistance of counsel is the right to waive that right.

Singer likewise stated that the jury clause of article III, section 2 of the Constitution “was clearly intended to protect the accused from oppression by the Government.”³¹ But the Court emphasized that the early American judicial attitude was that “trial by jury [was] the exclusive method of determining guilt”³² and declined to follow the implication in *Patton* that a jury was not an imperative. In the face of a waiver sought by a defendant, a jury trial would be required if the government or the court so insisted. Nor could the Court find an absolute right to waiver of trial by jury in the sixth amendment’s grant of that right. It indicated 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.”³³ Finally, the Court stated that, independent of the sixth amendment, a requirement of consent by the government and the trial judge normally was not to be considered a denial of due process, for

27. 326 F.2d 132 (9th Cir. 1964).

28. 422 U.S. at 819.

29. *Id.* at 832.

30. *Id.* at 817.

31. 380 U.S. at 31.

32. *Id.*

33. *Id.* at 34-35.

"the result is simply that the defendant is subject to an impartial trial by jury—the very thing that the Constitution guarantees him."³⁴

II. THE CONSTITUTIONAL CHALLENGE TO *Singer*

A. *Sixth Amendment: The Uncertain History*

The essence of the Court's forays into history in *Singer* and *Faretta* is that an accused historically has enjoyed the unrestricted right to waive representation by counsel but has not had an absolute right to waive trial by jury. In *Faretta*, the Court stated that "[t]he right of self-representation finds support in the structure of the Sixth Amendment, as well as in the English and colonial jurisprudence from which the Amendment emerged."³⁵ This conclusion was said to be supported by decisions of lower federal courts and dicta from a number of the Court's own opinions. *Singer* differed with respect to each of these matters. The Court could "find no evidence that the common law recognized that defendants had the right to choose between court and jury trial."³⁶ If such a right existed in colonial times, it was only in "isolated instances" which were "clear departures from the common law."³⁷ The Court further found a common understanding among early federal judges that a defendant could not be tried without a jury.

The sixth amendment says nothing explicit about waiver. The divergent results of the historical reviews in *Faretta* and *Singer* are nowhere more impressive than in the antithetical conclusions each case draws from this silence. The *Faretta* Court concluded that "[i]f anyone had thought that the Sixth Amendment, as drafted, failed to protect the long-respected right of self-representation, there would undoubtedly have been some debate or comment on the issue. But there was none."³⁸ *Singer*, on the other hand, concluded that "if there had been recognition of . . . a right [to waive trial by jury], it would be difficult to understand why Article III and the Sixth Amendment were not drafted in terms which recognized an option."³⁹

The dissenters in *Faretta* were sharply critical of the Court's historical review, viewing the history as scanty and indecisive.⁴⁰ The question thus

34. *Id.* at 36.

35. 422 U.S. at 818.

36. 380 U.S. at 26.

37. *Id.*

38. 422 U.S. at 832.

39. 380 U.S. at 31. Such an approach clearly would be followed by the *Faretta* dissenters. See 422 U.S. at 844 (Burger, C.J., dissenting); *id.* at 850 (Blackmun, J., dissenting).

40. Chief Justice Burger particularly objected to the majority's historical analysis:

. . . I hesitate to participate in the Court's attempt to use history to take it

arises whether they would have agreed with the historical conclusion of the *Singer* Court, which may be as accurate as *Faretta's*—or as inaccurate. There is sufficient obscurity in the history of waiver of trial by jury to prohibit those who dissented in *Faretta* from also participating in the history relied upon by the Court in *Singer*.⁴¹

History is an unsatisfactory guide for a second reason. Whatever may be said for the history utilized in either *Faretta* or *Singer*, certainly the Constitution changes,⁴² and the right to counsel and the right to trial by jury

where legal analysis cannot. Piecing together shreds of English legal history and early state constitutional and statutory provisions, without a full elaboration of the context in which they occurred or any evidence that they were relied upon by the drafters of our Federal Constitution, creates more questions than it answers and hardly provides the firm foundation upon which the creation of new constitutional rights should rest.

422 U.S. at 843 (Burger, C.J., dissenting). Justice Blackmun also disagreed with the majority: "To begin with, the historical evidence seems to me to be inconclusive in revealing the original understanding of the language of the Sixth Amendment." *Id.* at 850 (Blackmun, J., dissenting).

41. See U.C.L.A.L. REV., *supra* note 20, in which it is stated that "[w]aiver of jury trial has a rich historical background in English common law and the colonial experience." *Id.* at 190 n.6. Yet the article later reverses field, declaring that "*Singer's* extensive and scholarly rebuttal of the defendant's contentions emphatically resolves the issue of a constitutional right to waive jury trial." *Id.* at 191. See also Oppenheim, *Waiver of Trial by Jury in Criminal Cases*, 25 MICH. L. REV. 695 (1927), in which the author presented an exhaustive study not referred to in *Singer*, concluding that:

Researches in legal history have thrown grave doubt upon, if not dispelled, the traditional idea that a trial by jury in criminal prosecutions was intended as an exclusive mode of determining the fate of the accused.

. . . .

It is also likely that the legal profession generally has been too confident in the assumption that in the colonial period of American history, criminal offenses of misdemeanor and felony grade were always tried by jury.

Id. at 696-97.

See also Griswold, *The Historical Development of Waiver of Jury Trial in Criminal Cases*, 20 VA. L. REV. 655 (1934): "[T]here is ample evidence to show that waiver of trial by jury, even in trials for serious offences, was not unknown at the time of the adoption of the Constitution." *Id.* at 656. The article further suggests that waiver of jury trial has not been well recognized largely because only a few of the relevant historical records have survived. *Id.* at 660, 669.

These studies indicate that the *Patton* Court rested on firm constitutional ground in alluding to the fact that "in the Colonies such a waiver and trial by the court without a jury was by no means unknown, as the many references contained in the brief of the Solicitor General conclusively show." 281 U.S. at 306. In this light, it appears questionable that the Court in *Singer* could validly say that waiver of jury trial existed only in "isolated instances."

42. In *South Carolina v. United States*, 199 U.S. 437 (1905), the Supreme Court observed that "[t]he Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted it means now." *Id.* at 448. This syllogism has been described as "almost as poor in sense as it is rich in logic." C. MILLER, *THE*

clauses do not mean today what they meant when adopted. Analogy may be made to the right to counsel in state criminal cases. As late as 1942, the Supreme Court espoused the view that provisions in various of the constitutions of the 13 original states which allowed an accused to defend himself alone or with counsel "were intended to do away with the rules which denied representation, in whole or in part, by counsel in criminal prosecutions, but were not aimed to compel the State to provide counsel for a defendant."⁴³ That approach now is thoroughly discredited.⁴⁴ Likewise, it is beyond debate today that trial by jury is not the exclusive mode of trial.⁴⁵ Furthermore, the states now have been given leeway to abandon the common law requirements of 12-member juries and unanimity of verdicts.⁴⁶

Beyond this lie broader considerations. Since history is one of the Court's principle vehicles of adjudication and justification, it is not peculiar that the sixth amendment analyses in *Singer* and *Faretta* were entirely historical. As suggested, however, the historical records in both cases are not cloudless; when history is ambiguous, reliance upon it becomes most risky. It is then that the Court should recognize "that the Constitution need not be interpreted solely in light of its history."⁴⁷ Indeed, "the relevant constitutional history casts considerable doubt on the easy assumption . . . that if a given feature existed in a jury at common law in 1789, then it was necessarily preserved in the Constitution."⁴⁸

SUPREME COURT AND THE USES OF HISTORY 150 (1969). For comments on change in the meaning of the Constitution, see *Estes v. Texas*, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 451 (1934) (Sutherland, J., dissenting); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926); *Weems v. United States*, 217 U.S. 349, 373 (1910).

43. *Betts v. Brady*, 316 U.S. 455, 466 (1942) (dictum).

44. *Betts v. Brady* was overruled in *Gideon v. Wainwright*, 372 U.S. 335, 339, 345 (1963).

45. H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 12-32 (1966).

46. See cases cited note 14 *supra*.

47. C. MILLER, *supra* note 42, at 197. This observation is particularly apt in the context of *Singer*, for it has been said that "*Singer* rests its conclusion upon an examination of the common law history of jury waiver. At common law, an obdurate defendant was tortured until he consented to jury trial. This has never been the procedure in federal courts, however." SEL. SERV. L. REP., PRACTICE MANUAL § 2254 n.1 (1968).

48. *Williams v. Florida*, 399 U.S. 78, 92-93 (1970). See *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), in which it was stated that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Id.* at 234 (Brennan, J., concurring). See also *Oppenheim*, *supra* note 41, in which the author states:

The truth of the matter is that trial by jury is not wholly a static thing. It is a method, a form, a process. It is a part of a criminal trial procedure which should at all times function in harmony with newer and ever changing social interests.

Id. at 712.

B. Fifth Amendment: Due Process Discarded

It was a conditional waiver of trial by jury that was assented to in *Patton* and that was codified in rule 23(a) when the Federal Rules of Criminal Procedure were promulgated in 1946. Since *Singer* in no way undermined the *Patton* Court's approval, on constitutional grounds, of the concept of waiver of trial by jury, the question in *Singer* became whether or not the consent requirements imposed by rule 23(a) were reasonable. The sixth amendment determination that an accused historically had no absolute right to waive a jury left this question unanswered. The Supreme Court instead inquired whether the requirements of rule 23(a) violated the due process clause of the fifth amendment by denying *Singer* a fair trial.

Singer leaves the impression that, since rule 23(a) already existed and since the judicial authority of *Patton* already had charted a course against absolute waiver, the Court simply was not inclined to lean the opposite way.⁴⁹ In assuming this attitude, the Court ignored "the traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of defendants where substantial rights are involved."⁵⁰ The implied response, it seems, was that rule 23(a) could not deny a substantial right because none had existed. But this would have reflected entirely too stingy an approach. Rules of procedure for criminal trials exist to allow the Supreme Court, "in the exercise of its supervisory authority over the administration of criminal justice in the federal courts," to insure fairness.⁵¹ The *Singer* Court thus would have done well to recall that the standards adopted for criminal trials "are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law.'"⁵²

The due process analysis employed in *Singer*, therefore, was simply inadequate. The Court previously had expounded a rule under which it would be most careful in construing the Federal Rules of Criminal Procedure. A rule of leniency was to apply; where doubt existed regarding the proper

49. See 60 Nw. U.L. REV. 722, 729-30 (1965).

50. *Smith v. United States*, 360 U.S. 1, 9 (1959).

51. *McNabb v. United States*, 318 U.S. 332, 341 (1943). This view was adopted in the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 2. See *Fallen v. United States*, 378 U.S. 139 (1964); *United States v. Debrow*, 346 U.S. 374 (1953).

52. *McNabb v. United States*, 318 U.S. 332, 340 (1943). "[T]he scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity." *Id.* See also *Murphy v. Florida*, 421 U.S. 794, 803-04 (1975) (Burger, C.J., concurring). Indeed, there is meant to be a "fastidious regard for the honor of the administration of justice . . ." *Communist Party v. Subversive Activities Control Bd.*, 351 U.S. 115, 124 (1956).

construction of any of the rules, an accused's rights were not to be disparaged unnecessarily. Had the Court interpreted Singer's due process claims in this light, it would have acted within the rich tradition which holds that each part of the Bill of Rights was intended to protect individuals from overbearing governmental action.⁵³

As it was, the Court's decision virtually awarded the government and the trial judge veto power over a defendant's proffered waiver. Even assuming that the Court's historical reading in *Singer* was correct, however, its holding that the government and the court could determine when a defendant is to be permitted to waive a jury did not follow. The jury exists to protect the defendant, not the government or the court. No historical evidence supports the *Singer* implication that the prosecution has "any interest in or right to a jury trial."⁵⁴ Furthermore, since the jury is not jurisdictional, it is doubtful that a court could make the jury an imperative for an accused by denying his request for waiver of jury trial for any reason at all.

The Court in *Singer* offered two reasons for allowing the government to veto a defendant's request for waiver:⁵⁵ (1) the government is a litigant with an interest in its cases; and (2) the government will be presumed not to have acted ignobly when it disapproves a proffered waiver. This presumption was strong enough that the *Singer* Court did not require the government to state why it was refusing to consent.⁵⁶ The first reason was premised on a half-truth; the second has been undermined by events of the past decade.

Singer cited *Berger v. United States*⁵⁷ for the proposition "that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but 'a servant of the law' with a 'twofold aim . . . that guilt shall not escape nor innocence suffer.'"⁵⁸ To that end, the government may refuse to consent to a defendant's waiver in order to place the trial before the jury, "the tribunal which the Constitution regards as most likely to produce a fair result."⁵⁹ Significantly, *Singer* excised the overriding duties

53. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713, 715 & n.1 (1971) (Black, J., concurring).

54. *Nw. U.L. Rev.*, *supra* note 49, at 729. See also *U.C.L.A.L. Rev.*, *supra* note 20, at 190, 193.

55. Apparently because the trial judge *had* approved Singer's waiver, the Supreme Court discussed only the role of the government in the administration of rule 23(a).

56. 380 U.S. at 37.

57. 295 U.S. 78 (1935).

58. 380 U.S. at 37, *quoting* *Berger v. United States*, 295 U.S. 78, 88 (1935).

59. 380 U.S. at 36. By comparison, see *Olmstead v. United States*, 277 U.S. 438 (1928), in which Justice Brandeis stated that "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Id.* at 479 (Brandeis, J., dissenting).

which *Berger* said rest with a United States Attorney: "to govern impartially" and "not [to] win a case, but [to assure] that justice shall be done."⁶⁰ It was not a mere nuance that the Court in *Singer* failed to grasp. Rather, these duties imply meeting a sense of honor quite beyond keeping a scorecard of the number of defendants properly convicted and acquitted. Moreover, the government's interest either in counting proper dispositions or in doing justice hardly depends in any case upon the presence of a jury.⁶¹

Other events in the intervening years have cast doubt upon the good sense of the proposition that the government will act with the integrity presumed by the *Singer* Court. Closely in point is *United States v. Banks*,⁶² the well-known Wounded Knee case. As it went to the jury, one of the jurors became ill and was unable to continue. Although the defendants were willing to have their guilt or innocence decided by the 11 remaining jurors, the government asked for a mistrial. The trial judge, however, went further. He dismissed the charges against the defendants, saying that he was "ashamed"⁶³ of the conduct of the prosecution. Among his criticisms was that the government's insistence on a mistrial was based on its fear "that the chances of obtaining a conviction from the remaining jurors were 'slim.'"⁶⁴

60. 295 U.S. at 88. See AMERICAN BAR ASS'N, CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 7-13 (1969).

61. Several facts indicate that the jury has not been viewed as an absolute requisite in order that justice be served: (1) *Patton* approved the concept of waiver; (2) the concept was codified in rule 23(a); (3) nearly half the states allow waiver of jury trial without consent of the prosecution, see 51 CORNELL L.Q. 339, 343 (1966); (4) many trials are heard by the judge alone, see H. KALVEN & H. ZEISEL, *supra* note 45, at 24 n. 24, 25; Note, *Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure*, 65 YALE L.J. 1032, 1039 (1956); and (5) guilty pleas long have been an accepted mode of disposing of criminal cases, and the government need not be consulted in such cases. *United States ex rel. Adams v. McCann*, 317 U.S. 269, 276 (1942) (dictum); *Patton v. United States*, 281 U.S. 276, 305 (1930) (dictum); *Oppenheim*, *supra* note 41, at 715.

62. 383 F. Supp. 389 (D.S.D. 1974).

63. N.Y. Times, Sept. 20, 1974, at 22, col. 6. This feeling was elaborated in the court's written opinion:

Although it hurts me deeply, I am forced to the conclusion that the prosecution in this trial had something other than attaining justice foremost in its mind.

. . . [T]his case was not prosecuted in good faith or in the spirit of justice.

383 F. Supp. at 397.

64. 383 F. Supp. at 397. The trial judge was careful to note that the government's refusal to consent to a nonjury trial

was the exercise of a statutorily specified right, and thus, in itself, does not even approach misconduct.

The reasons given by the chief prosecutor to the media for refusal to accept the verdict of eleven, however, constitute a violation of the spirit in which a prosecutor should function. It is beyond question that a prosecutor's duty is to insure that justice is done, and not simply to seek convictions.

Id. at 396.

The *Singer* presumption arguably still might attach if prosecutorial mishaps were unwitting. Deliberate actions of the prosecution which are found to have denied defendants their right to a fair trial,⁶⁵ however, impel the conclusion that there should not be a general presumption that the government always has acted in good faith when it objects to a defendant's requested waiver of trial by jury. The government may well be acting in good faith, to be sure, but that cannot be known unless it is put to the proof.

Lastly, the Court in *Singer* suggested the possibility that the government may improperly demand a jury.⁶⁶ This implies that rule 23(a) may be unconstitutional as applied or that the prosecution is capable of abusing its discretion in not agreeing to a waiver of jury trial. Although the former alternative seems "unlikely" since the Court serves as official promulgator of the Federal Rules of Criminal Procedure,⁶⁷ nonetheless the argument should be advanced in the proper case, for "happily, all constitutional questions are always open."⁶⁸ The latter alternative itself may be read as weakening a presumption of governmental integrity, notwithstanding the record of the last several years.

III. POLICY IMPLICATIONS OF THE CHALLENGE TO *Singer*

It is generally true that public policy should not form the sole basis of a judicial decision. This is so, as the *Patton* Court recognized, because "public policy embodies a doctrine of vague and variable quality, and . . . [t]he public policy of one generation may not, under changed conditions, be the public policy of another."⁶⁹ Policy decisions also threaten to cast courts into

65. The noted trial of Daniel Ellsberg and Anthony Russo, Jr. also involved prosecutorial misconduct. In dismissing the charges against the defendants, the trial judge criticized the government for having failed "time and again to make timely productions of exculpatory information in its possession, requiring delays and disruptions in the trial." N.Y. Times, May 12, 1973, at 14, col. 6. The oral dismissal order stated that "the conduct of the Government has placed this case in such a posture that it precludes the fair, dispassionate resolution of [the] issues by a jury." *Id.* at col. 8.

66. 380 U.S. at 37. See also *United States v. Harris*, 314 F. Supp. 437, 439 (D. Minn. 1970); *United States v. Daniels*, 282 F. Supp. 360, 361 (N.D. Ill. 1968).

67. *Nw. U.L. REV.*, *supra* note 49, at 729-30. That a declaration of the unconstitutionality of rule 23(a) may be unlikely is underscored by the fact "that the Supreme Court, which had the ultimate responsibility for the [Federal Rules of Criminal Procedure], gave them close attention." C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 2, at 7 (1969). A contrary view on the possible unconstitutionality of rule 23(a) is expressed in Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 254 (1956); YALE L.J. Note, *supra* note 61, at 1035.

68. *Gideon v. Wainwright*, 372 U.S. 335, 346 (1963) (Douglas, J., concurring).

69. 281 U.S. at 306. The Court went on to refer to the demise of former trial practices, among them the absence of counsel for an accused and the inability of an accused to testify on his own behalf, as partial justification for abandonment of any earlier rule

a legislative role. Nonetheless, such matters clearly are relevant. The conclusion of *Singer* that rule 23(a) was reasonable is, in the last analysis, a policy decision dressed in due process garb. The articulated premise was that the government should have, when it chooses, the deciding role in the waiver procedure. The unarticulated premise seemed to be that a defendant is not able to act competently if left to his own devices.

Faretta revealed both premises to be erroneous. The government was given no authority to contest a defendant's request to argue his own case because "[t]he right to defend is personal."⁷⁰ This view of the sixth amendment was solidified by practical considerations. An unwanted attorney may well be ineffective because "the potential advantage of [his] training and experience can be realized, if at all, only imperfectly."⁷¹ And governmental compulsion which "force[s] a lawyer on a defendant can only lead him to believe that the law contrives against him."⁷² The Court, furthermore, did not bridle at the thought that *Faretta* could act for himself. His choice in waiving counsel may not have been wise, but it was to be respected so long as the trial judge found that he had acted "knowingly and intelligently."⁷³ It was sufficient "that *Faretta* was literate, competent, and understanding, and that he was voluntarily exercising his informed free will."⁷⁴

This pragmatism necessarily implicates policy considerations, as the dissenters in *Faretta* ably showed.⁷⁵ However the questions raised by them

of no waiver of jury trial. *Id.* at 306-07. In *Faretta*, by comparison, Justice Blackmun, in dissent, relied on the same changed conditions as removing any basis for a right to appear "in person" which may have existed at common law. 422 U.S. at 850-51 (Blackmun, J., dissenting).

70. 422 U.S. at 834.

71. *Id.*

72. *Id.*

73. *Id.* at 835, citing *Johnson v. Zerbst*, 304 U.S. 458 (1938):

A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

304 U.S. at 464.

74. 422 U.S. at 835.

75. Chief Justice Burger especially was concerned with the likelihood that, with a "right to self-representation, it would almost certainly follow that there will be added congestion in the courts and that the quality of justice will suffer." *Id.* at 845 (Burger, C.J., dissenting). He further feared, despite the Court's disclaimer that waiver of counsel would foreclose any argument by an accused on appeal that he had had ineffective assistance of counsel, "that many expensive and good-faith prosecutions will be nullified on appeal." *Id.* at 846. Justice Blackmun catalogued his own fears in a series of questions:

eventually are answered, the fact remains that there are issues that courts will have to tackle. The winnowing and sifting that will be necessary to define further the procedure attendant to waiver of counsel is at least a short-term problem of no small complexity.⁷⁶ By contrast, a departure from *Singer*

Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in mid-trial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?

Id. at 852 (Blackmun, J., dissenting).

76. Indeed, the process has begun in both state and federal courts. A trio of courts has determined that an accused already represented by counsel has no constitutional right to defend himself. *United States v. Wolfish*, 525 F.2d 457 (2d Cir. 1975); *United States v. Swinton*, 400 F. Supp. 805 (S.D.N.Y. 1975); *Stiner v. State*, 539 P.2d 750 (Okla. Crim. 1975). Two courts have held that *Faretta* implies a right to waive one's right to an attorney who is free from conflicts of interest. *United States v. Arredo-Sarmiento*, 524 F.2d 591 (2d Cir. 1975); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975).

Two courts have held timely a waiver of counsel on the day one's trial was to begin, *Barnes v. States*, 528 S.W.2d 370 (Ark. 1975); *People v. McCaffrey*, 29 Ill. App. 3d 1088, 332 N.E.2d 28 (1975), and one has held such a waiver untimely. *People v. Brown*, 124 Cal. Rptr. 130 (Ct. App. 1975). Similarly, withdrawal of waiver of counsel on the day of trial has been found untimely unless good cause is shown. *State v. Austin*, 219 S.E.2d 279 (N.C. Ct. App. 1975).

Appellate courts in Illinois have considered whether a waiver of counsel continues through proceedings subsequent to the stage at which it was made, two courts responding in the affirmative, *People v. Bobo*, 337 N.E.2d 227 (Ill. App. Ct. 1975); *People v. McCaffrey*, 29 Ill. App. 3d 1088, 332 N.E.2d 28 (1975), and one in the negative. *People v. Taylor*, 335 N.E.2d 533 (Ill. App. Ct. 1975).

In *People v. Reason*, 37 N.Y.2d 351, 334 N.E.2d 572, 372 N.Y.S.2d 614 (1975), the standard of competence to waive counsel and to stand trial were equated, and in *Allan v. State*, 541 P.2d 656 (Nev. 1975), a waiver of counsel was upheld after a psychiatric finding of competency to stand trial. But in *People v. Greene*, 333 N.E.2d 661 (Ill. App. Ct. 1975), a waiver of counsel was found ineffective when the trial court failed adequately to inform an indigent defendant of his right to appoint counsel, to inquire whether the defendant could afford an attorney, to determine whether the defendant understood the nature of the charges against him, and to inform him of the maximum penalties which could be imposed.

Two courts have found no waiver of counsel in an accused's mere expression of dissatisfaction with his attorney, *United States ex rel. King v. Schubert*, 522 F.2d 527 (2d Cir. 1975); *State v. Renshaw*, 276 Md. 259, 347 A.2d 219 (1975), and two likewise have found no waiver in a defendant's refusal to participate in his own defense. *People v. Gazic*, 336 N.E.2d 73 (Ill. App. Ct. 1975); *State v. Renshaw*, *supra*.

A number of courts have dealt recently with other miscellaneous implications of waiver of counsel. *See Stepp v. Estelle*, 524 F.2d 447 (5th Cir. 1975) (defendant's insistence on handling own defense not proof of incompetency); *United States v. Corrigan*,

would not create problems that will take time and effort to solve; the procedure for waiver of jury trial already is simple and established.⁷⁷

The procedure is set, of course, because in many areas the vast majority of trials are held without juries. Most defendants plead guilty and do not go to trial. Of those who do, a sizable minority are tried by the court alone.⁷⁸ Nor is the decline of the jury a recent phenomenon.⁷⁹ Juries thus have been, and are constantly, removed from a great proportion of the cases in which they could be present. The same cannot be said of defense counsel. He must be present, unless waived, at the trial of every offense, "whether classified as petty, misdemeanor, or felony," for which an accused may be imprisoned.⁸⁰ He must, or may, be present at far more stages of a criminal case than is the jury.⁸¹ And he plainly has a larger part to play than the jury in the smooth and dynamic functioning of a trial on an hour to hour, day to day basis. Counsel is an active participant in an ongoing trial; the jury is required to be passive throughout and becomes active only when it renders its verdict. Yet it is waiver of assistance of counsel, not trial by jury, that the Supreme Court so far has approved as an absolute right.

There are compelling policy reasons, however, why the Court no longer should follow *Singer* insofar as it failed to sanction an absolute right to waiver of trial by jury. By its very words, the sixth amendment entitles an accused to an impartial jury. Absence of such a jury denies him a fair trial.⁸² *Singer* suggested that changes of venue, use of voir dire examina-

401 F. Supp. 795 (D. Wyo. 1975) (right to waive counsel does not imply right to replace attorney with layman); *Bradley v. State*, 219 S.E.2d 451 (Ga. 1975) (defendant may waive counsel by action or by declaration); *People v. Holcomb*, 235 N.W.2d 343 (Mich. 1975) (*Faretta* retroactive); *People v. Schuster*, 374 N.Y.S.2d 951 (N.Y.C. Crim. Ct. 1975) (defendant's waiver not to be ignored easily).

77. That this procedure is simple assumes that under rule 23(a), as it was construed in *Singer*, approval is given by the government and the court. *Faretta* provides helpful guidelines if no consent of the government is to be required. See pp. 398-401 *infra*.

78. H. KALVEN & H. ZEISEL, *supra* note 45, at 18.

79. See J. HALL, *THEFT, LAW AND SOCIETY* 112-18 (1935), cited in J. MICHAEL & H. WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 997 (1940).

80. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972).

81. See, e.g., *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *Mempa v. Rhay*, 389 U.S. 128 (1967) (deferred sentencing or probation revocation); *United States v. Wade*, 388 U.S. 218 (1967) (postindictment lineup); *Miranda v. Arizona*, 384 U.S. 436 (1966) (custodial interrogation); *Escobedo v. Illinois*, 378 U.S. 478 (1964) (custodial interrogation); *Hamilton v. Alabama*, 368 U.S. 52 (1961) (arraignment); *Townsend v. Burke*, 334 U.S. 736 (1948) (sentencing after guilty plea). But see, e.g., *United States v. Ash*, 413 U.S. 300 (1973) (preindictment photo showing); *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation or parole revocation); *Kirby v. Illinois*, 406 U.S. 682 (1972) (preindictment lineup).

82. See *Murphy v. Florida*, 421 U.S. 794 (1975); *Groppi v. Wisconsin*, 400 U.S. 505

tions, and use of challenges for cause and peremptory challenges can provide "safeguards to make [the jury] as fair as possible."⁸³ Another alternative might be the use of continuances.

Continuances and changes of venue, however, necessarily entail time and expense to all parties in a trial. When the simple remedy of waiver of trial by jury could be available, these procedures appear to be needlessly great hardships. The same may be said for voir dire examinations and challenges to prospective jurors, and these are complicated as well by the need to actually begin selection of a jury.⁸⁴ Each of these proposed elixirs is inadequate, at least for the reason that it will only slow further a criminal justice system already fraught with delay.⁸⁵ In addition, voir dire examinations cannot counter pervasive community hostility, uncover a prospective juror's unconscious bias, or force a juror to admit a bias publicly.⁸⁶ Each of the alternative remedies suffers from not being able to avoid, as the absence of a jury obviously does, the possibility of improper jury instructions. An unfettered right to waiver of trial by jury would reduce that fertile field of appellate reversals.⁸⁷

As it looked toward making the jury as fair as possible, *Singer* did not confront directly those situations in which that end could be accomplished. A direct challenge could be made, however, if a defendant were allowed to waive a jury whenever he believed that an impartial jury could not be obtained.⁸⁸ Prejudice among jurors may arise in a number of different

(1971); *Turner v. Louisiana*, 379 U.S. 466 (1965); *Irwin v. Dowd*, 366 U.S. 717 (1961).

83. 380 U.S. at 35.

84. See *United States v. Kahaner*, 204 F. Supp. 921, 924 (S.D.N.Y. 1962), *aff'd*, 317 F.2d 459 (2d Cir.), *cert. denied*, 375 U.S. 835 (1963).

85. On the evils of delay, see *Barker v. Wingo*, 407 U.S. 514, 519-21 (1972).

86. See *Nw. U.L. Rev.*, *supra* note 49, at 727-28; 26 *U. PITT. L. REV.* 867, 869 (1965); *YALE L.J. Note*, *supra* note 61, at 1035-38.

87. On the other hand, waiver of jury trial also will eliminate improper instructions as a defense argument on appeal. Loss of this argument will have to be weighed by the defendant against those other considerations which suggest to him that he should waive a jury. It is, of course, proper that it is he who is to weigh such matters, for it is *his* guilt or innocence that it is to be determined.

88. The objection was stated in *Holt v. United States*, 218 U.S. 245 (1910), that "[i]f the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day." *Id.* at 251. See also *Irwin v. Dowd*, 366 U.S. 717, 723 (1961). The right to jury trial, although firmly established as a constitutional right, has not maintained itself perfectly as a practical matter. Moreover, the thinking in *Holt* assumes that a defendant given an absolute right to waive jury trial will exercise it automatically. This would seem improbable. Rather, a defendant only will be able to elect to waive jury trial, although this freedom of choice is important in itself.

kinds of cases and for any number of reasons.⁸⁹ While the Supreme Court has stated that “[i]t is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court,”⁹⁰ it also has cautioned that “our system of law has always endeavored to prevent even the probability of unfairness.”⁹¹

Faretta now requires that probability of unfairness be viewed more closely through the eyes of the accused. The Court there was concerned with the potentially damaging effects, beyond simply an imperfect defense, to both the defendant and the criminal justice system if the defendant is left to feel “that the law contrives against him.”⁹² An unrestricted right to waiver of jury trial would serve the law well in this respect by helping to create an atmosphere of noncompulsion.⁹³ “[T]he inestimable worth of free choice”⁹⁴ itself can yield immeasurable gains.

89. There are several kinds of cases in which jurors may be biased such that a defendant may want to waive a jury and in which alternative methods of seeking an impartial jury may well be ineffective: (1) prejudicial pretrial publicity, *see* *United States v. Wright*, 491 F.2d 942 (6th Cir.), *cert. denied*, 419 U.S. 862 (1974); *Janko v. United States*, 281 F.2d 156 (8th Cir. 1960), *rev'd on other grounds*, 366 U.S. 716 (1961); *United States v. Daniels*, 282 F. Supp. 360 (N.D. Ill. 1968); U. PRTT. L. REV., *supra* note 86; (2) gruesome or revolting crimes, especially if involving children or sex, *see The Supreme Court, 1964 Term*, 79 HARV. L. REV. 56, 176 (1965); (3) widespread or deepseated hostility towards a particular defendant or towards a defendant because of his or her race, sex, religion, appearance, or lifestyle, *see United States v. Ceja*, 451 F.2d 399 (1st Cir. 1971); *United States v. Samuel*, 433 F.2d 663 (4th Cir. 1970), *cert. denied*, 401 U.S. 946 (1971); *The Supreme Court, 1964 Term, supra*, at 176; Nw. U.L. REV., *supra* note 49, at 727; (4) sensitive political issues, *see United States v. Spock*, 416 F.2d 165 (1st Cir. 1969); YALE L.J. Note, *supra* note 61; (5) complex or technical defenses, *see United States v. Wright*, 491 F.2d 942 (6th Cir.), *cert. denied*, 419 U.S. 862 (1974); *United States v. Simon*, 425 F.2d 796 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); *United States v. Mayr*, 350 F. Supp. 1291 (S.D. Fla. 1972), *aff'd*, 487 F.2d 67 (5th Cir. 1973), *cert. denied*, 417 U.S. 914 (1974); *United States v. Venn*, 41 F.R.D. 540 (S.D. Fla. 1966); and (6) desire by the defendant not to take the stand before a jury when his previous criminal record or past associations may be revealed, *see United States v. Kramer*, 355 F.2d 891 (7th Cir.), *remanded for resentencing*, 384 U.S. 100 (1966); *United States v. Farries*, 328 F. Supp. 1034 (M.D. Pa. 1971), *aff'd*, 459 F.2d 1057 (3d Cir.), *cert. denied*, 409 U.S. 888 (1973), 410 U.S. 912 (1974); *United States v. Harris*, 314 F. Supp. 437 (D. Minn. 1970); *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968); *The Supreme Court, 1964 Term, supra*, at 176; Nw. U.L. REV., *supra*, at 727.

90. *Irwin v. Dowd*, 366 U.S. 717, 723 (1961).

91. *In re Murchison*, 349 U.S. 133, 136 (1955). In *Dennis v. United States*, 339 U.S. 162 (1950), it was said that “[t]he right to fair trial is the right that stands guardian over all other rights.” *Id.* at 173 (Jackson, J., concurring in result).

92. 422 U.S. at 834.

93. *See R. PERKINS, CRIMINAL LAW AND PROCEDURE* 949 (1959).

94. 422 U.S. at 834.

IV. A PROPOSED REMEDY

Even assuming that *Singer* was correct in construing rule 23(a) as giving the court and the prosecution a role beyond only insuring that an accused acts voluntarily and intelligently,⁹⁵ the Court erred in not requiring the government to articulate the reasons for its nonconsent. The usual rule is that the reasons for governmental actions are to be stated.⁹⁶ Without such a requirement, it is impossible to determine whether the government has acted in good faith. Moreover, without a statement of reasons there can be no presumption that the government has so acted. Only by such a requirement can possibly illegitimate refusals to consent be exposed. On the other hand, when the government has acted with integrity, a reasons requirement will preserve that fact in the public record. The requirement will help to insure that the executive branch has taken care to see that the laws are faithfully

95. *Singer* actually was concerned only with the role of the government under rule 23(a). See note 55 *supra*. But rule 23(a) has been interpreted as applying equally to the prosecution and the trial judge, as it would seem to be by its terms. See, e.g., *Serfass v. United States*, 420 U.S. 377, 389 (1975) (dictum); *United States v. Johnson*, 496 F.2d 1131 (5th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *United States v. Radford*, 452 F.2d 332 (7th Cir. 1971); *United States v. Ceja*, 451 F.2d 399 (1st Cir. 1971); *United States v. Bowles*, 428 F.2d 592 (2d Cir.), *cert. denied*, 400 U.S. 928 (1970).

96. The Administrative Procedure Act, 5 U.S.C. §§ 501-76 (1970), generally requires that administrative agencies state their "findings and conclusions, and the reasons or basis therefor." *Id.* § 557(c)(3)(A). Except with respect to the Freedom of Information Act, 5 U.S.C. § 552 (1970), however, the Military Selective Service Act of 1967, 50 U.S.C. App. §§ 451-73 (1970), was not subject to the Administrative Procedure Act. See *id.* § 463(b). The 1967 draft act thus is analogous to rule 23(a) in its not having included a reasons requirement. But there would seem to be no doubt that such a requirement could be read into rule 23(a). All but one of the federal appeals courts, finding it impossible to review draft board actions without a statement of reasons for their decisions, came to require that reasons be articulated. See SEL. SERV. L. REP., INDEX TO DRAFT AND MILITARY CASES §§ 4212, 4213 (1973). Furthermore, the Military Selective Service Act was amended in 1971 to include a reasons requirement. 50 U.S.C. App. § 471b(4) (Supp. III, 1973). See *Fein v. Selective Serv. Sys. Local Bd. No. 7*, 405 U.S. 365, 377-80 (1972). Rule 23(a) similarly could be rewritten to overrule that language of *Singer* which permits the government to refuse to consent to an accused's waiver of jury trial without giving its reasons.

On the other hand, a federal judge in sentencing a youth offender as an adult under section 5010(d) of the Federal Youth Corrections Act, 18 U.S.C. §§ 5005-26 (1970), need not express the reasons for his decision that the offender would not benefit from the provisions of the Act. *Dorszynski v. United States*, 418 U.S. 424 (1974). This decision, however, seems based on the traditional rule that judges are not required to explain their sentencing practices. The rule of the case thus would have no applicability beyond the area of sentencing. See *id.* at 442 n.15. For instance, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), the Supreme Court stated that "[i]t is necessary that if a district court does decline to award back pay [in a suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Supp. III, 1973)], it carefully articulates its reasons." *Id.* at 421 n.14.

executed.⁹⁷

The better view, however, is to permit the government no role in a defendant's attempt to waive jury trial.⁹⁸ The government's interests normally can be protected adequately by the court.⁹⁹ This approach would align waiver of jury trial with waiver of counsel and introduce into the sixth amendment a symmetry that is currently lacking. It also would be, in those cases in which there exists the possibility of "dissemination of potentially prejudicial material," in accord with the conclusions of the American Bar Association.¹⁰⁰

97. See U.S. CONST. art. II, § 3. Cf. *United States v. Nixon*, 418 U.S. 683 (1974) ("The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts." *Id.* at 709).

98. The overwhelming weight of critical opinion agrees. See Donnelly, *supra* note 67, at 259; Orfield, *Trial by Jury in Federal Criminal Procedure*, 1962 DUKE L.J. 29, 75; *The Supreme Court, 1964 Term*, *supra* note 89, at 176; CORNELL L.Q., *supra* note 61, at 345-46; 48 KY. L.J. 457, 464 (1960); NW. U.L. REV., *supra* note 49, at 728; 29 ROCKY MTN. L. REV. 253, 258 (1957); U. PITT. L. REV., *supra* note 86, at 869; 38 TEX. L. REV. 928, 930 (1960); YALE L.J. Note, *supra* note 61, at 1041-42. *But see* U.C.L.A.L. REV., *supra* note 20, at 198.

99. The interests of the government are listed succinctly in ABA STANDARDS RELATING TO TRIAL BY JURY § 1.2(a) Commentary (tent. draft 1968). They are said to include preservation of the jury as an institution, protection of the accused, equal treatment for the defendant and the prosecution, and protection for the public against a judge thought to be biased in favor of the defendant's case.

The first of these is dubious. An absolute right to waiver of jury trial will hardly cause an institution provided for by the Constitution to dissolve. Trial by jury will remain available. The second is a public interest with a paternalistic flavor. It ought not to be accepted in the face of the logic of *Faretta* and a traditional mistrust of placing one's rights in another's hands. The third is not persuasive given the imbalance under *Singer's* interpretation of rule 23(a) and the unavoidable fact that the jury is intended for the benefit of the accused, not the government.

The final interest cannot be dismissed so lightly. It has been said that "[i]n some instances, the nature of the offense, the demeanor and circumstances of the defendant, or other less tangible variables will arouse predispositions in the court" so that "the government should not be required indiscriminantly to prosecute its case solely before a judge." 13 U.C.L.A.L. REV., *supra* note 20, at 194. It is argued that the interests of the government can be protected by having both sides file briefs on the defendant's proffered waiver, with the burden falling on the government to persuade the court that its objections outweigh the defendant's valid reasons for waiver, by strengthening recusal procedures, *see* 28 U.S.C. § 144 (1970), and by allowing the prosecution one peremptory challenge of the judge remaining in the case after waiver. *Id.* at 198.

This solution is plausible, for if current recusal procedures are not as effective as they might be, "the remedy is not to give the government a power to insist on jury trial. Instead the disqualification procedure should be strengthened." YALE L.J. Note, *supra* note 61, at 1044 n.61. Recently, a California Court of Appeal removed the judge trying the case of Symbionese Liberation Army members William and Emily Harris—whether or not he was biased—holding that the defendants were entitled to one peremptory challenge of the trial judge. *Washington Post*, Nov. 6, 1975, § A, at 8, cols. 4-5.

100. The reference is to ABA STANDARDS RELATING TO FREE TRIAL AND FREE PRESS

The defendant still would be protected. The trial judge cannot be an automaton. As in *Faretta*, the court has a proper role to insure that the accused has waived a jury free of any coercion and with knowledge of the consequences of his election.¹⁰¹ But *Faretta* dictated that the court have no larger role.¹⁰² Much as that case required that the trial judge make the defendant "aware of the dangers and disadvantages of self-representation,"¹⁰³ the court must inform the accused of the advantages of a jury trial. Since trial by jury is a right belonging to the defendant, however, he should have the right to waive it and should be told so.

These guidelines should apply in all cases. Just as *Faretta* denied a court any room to consider the "technical legal knowledge"¹⁰⁴ of one who waives counsel, so the sagacity of an election to waive trial by jury should not be questioned.¹⁰⁵ Similarly, whether a defendant is permitted to waive a jury

§ 3.3 (Tent. Draft 1966). The commentary proposes looking to the reasonableness of the defendant's belief, in the circumstances, that he will not get a fair trial. *Cf.* *Holt v. United States*, 218 U.S. 245, 251 (1910). *See also* ABA STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2 (1971); ABA STANDARDS RELATING TO TRIAL BY JURY § 1.2 (Tent. Draft 1968).

101. Rule 23(a) requires written waiver, assuredly a legitimate requirement. *See* *Bayless v. United States*, 381 F.2d 67 (9th Cir. 1967); ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.3 (Tent. Draft 1972). Courts should not infer waiver of fundamental rights from inaction or from a silent record. *Barker v. Wingo*, 407 U.S. 514, 525-26 (1972); *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). Therefore, close questioning by the trial judge in open court also may be desirable to insure that the defendant's waiver is personal and is made competently. *See* *United States v. Hunt*, 413 F.2d 983 (4th Cir. 1969). *But see* *Estrada v. United States*, 457 F.2d 255 (7th Cir.), *cert. denied*, 409 U.S. 858 (1972). *Cf.* *Johnson v. Zerbst*, 304 U.S. 458 (1938) ("it would be fitting and appropriate for [a determination of waiver] to appear upon the record." *Id.* at 465).

102. *See* *Donnelly*, *supra* note 67, at 259; YALE L.J. Note, *supra* note 61, at 1042. No further burdens can be imposed. *United States ex rel. Adams v. McCann*, 317 U.S. 269 (1942), established that one need not consult an attorney before his waiver can be adjudged competent. Nor can the court insist that a defendant relinquish his right, afforded by FED. R. CRIM. P. 23(c), to have special findings of fact. *United States v. Livingston*, 459 F.2d 797 (3d Cir. 1972); *Howard v. United States*, 423 F.2d 1102 (9th Cir. 1970). *Contra*, *United States v. Johnson*, 496 F.2d 1131 (5th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975). *Cf.* *United States v. Koury*, 319 F.2d 75 (6th Cir. 1963); *United States v. Beard*, 313 F. Supp. 844 (D. Minn. 1970).

103. 422 U.S. at 835.

104. *Id.* at 836.

105. H. KALVEN & H. ZEISEL, *supra* note 45, found generally that "the cases that go to the jury . . . will be more likely to involve pro-defendant sentiments than would the totality of all criminal trials." *Id.* at 31. They also found to be infrequent a "cross-over phenomenon," in which the judge is more likely than the jury to find an accused not guilty. *Id.* at 375-80. On the other hand, waiver of jury trial may mitigate the severity of the sentence imposed. *Id.* at 27 n.26, 444. These are matters about which, quite simply, the defendant alone must be allowed to speculate. Indeed, it must be his

trial in no way should rest on a subjective assessment by the court of the sufficiency of his reasons. Indeed, an accused should not have to say why he has decided to waive his jury trial right. *Faretta* established a prophylactic rule. The right to jury trial, too, should be waivable for any or no reason.

Faretta has caused the inadequacies of *Singer* to stand out in bold relief. The cases represent conflicting approaches to sixth amendment rights and to various policy considerations. Years ago, Robert Frost stood where "[t]wo roads diverged in a yellow wood."¹⁰⁶ He could not travel both, and neither can the Supreme Court without maintaining both an inconsistency in the law and a pall over defendants and the criminal justice system. *Faretta* should provoke a reconsideration of *Singer*. That will require setting out on a road "less traveled by," but one which can make "all the difference."¹⁰⁷

Eric E. Wright

burden to do so. For a description of the arguments in favor of a defendant's not waiving a jury, see Nunnelley, *When a Trial by Jury?*, 43 J. AM. JUD. SOC. 87 (1959).

106. R. Frost, "The Road Not Taken," in *THE POETRY OF ROBERT FROST* 105 (E. C. Latham ed. 1969).

107. *Id.*