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THE PROBLEM OF THE UNREPRESENTED, MISREPRESENTED AND REBELLIOUS DEFENDANT IN CRIMINAL COURT

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Remember that no man can be a great advocate who is no lawyer.
Erskine

For upwards of twenty years, the Supreme Court of the United States has wrestled with the question whether an indigent defendant charged with serious crime must, on request, be afforded the assistance of counsel at public expense. In a series of landmark cases it has decided such assistance must be afforded as a matter of constitutional right.[1] Most trial judges are in agreement with these decisions, not so much on constitutional grounds but because they see practical advantages therein, and because they would welcome an even broader rule requiring every party to a lawsuit to have full representation. While trial judges in those jurisdictions not having public defenders have some concern over the mechanics of supplying and paying for lawyers to assist indigents, they are in no panic about it, knowing that the organized bar and the state legislatures will undoubtedly solve many of their difficulties for them in the near future.

Experienced trial judges everywhere have had painful experiences with unrepresented litigants, and if they have any quarrel with what the Supreme Court has done, it is because the more acute aspects of the problem have been left untouched by appellate decisions. Although there are a few cases either upholding or condemning the manner in which a judge has conducted the trial of the unrepresented accused, there is no prescribed mode of procedure to act as a guide and compass to lead judges through the maze of pitfalls which they may encounter at trial. Trying a case in criminal court with an unrepresented defendant is often like riding a tiger from which one dares

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1. Powell v. Alabama, 287 U.S. 45 (1932); Johnson v. Zerbst, 304 U.S. 458 (1938); Betts v. Brady, 316 U.S. 455 (1942); Gideon v. Wainwright, 372 U.S. 355 (1963); White v. Maryland, 373 U.S. 59 (1963).

not to dismount, and many a trial judge supplements his crier's opening prayer with a muttered supplication of his own, ". . . and, please, God, let there be no unrepresented defendants in court today!"

The problem is easily stated thus: Can a trial judge really exercise control of a criminal trial when the defendant is ignorant or unscrupulous and is unrepresented? The cause of the problem is likewise easy to isolate, for many laymen, whether ignorant or shrewd, possess the bad morals of heedless self-interest,[2] running roughshod over precedent, order, rules of evidence and even decency, making the trial a nightmare for the judge. Socrates jabbed his finger into the tender spot of human psychology when he said, "The partisan, when he is engaged in a dispute, cares nothing about the rights of the question, but is anxious only to convince his hearers of his own assertions."[3] Few lawyers, even those rare pleaders whom Plato unflatteringly described as cankers that poison and corrupt noble things, would be so bold as to follow the lead of an unscrupulous or ignorant layman in court, if not for professional considerations, at least for fear of that awesome threat called *contempt*.[4] But these things seldom seem to affect such a layman. In a civil case he banks heavily upon his ignorance, his rights as a citizen, and the indulgence of the court as insulation against reprisals. But in a criminal case, he rises to new heights; here he not only invites but welcomes disciplinary action, feeling that this establishes such prejudice on the part of the court as to justify a reversal in the event of a conviction. Moreover, when the restraining influence of ethical counsel is absent, truth is often slain in its tracks by a layman charged with crime, and the tenuous threat of perjury which lurks behind his conduct is no deterrent to his present determination to win a favorable verdict whatever the cost. He is, therefore, apt to make his case so perfect in every detail that its very perfection, like an artificial flower, arouses suspicion. While grudging admiration is sometimes aroused by these tactics, one cannot erase the feeling expressed by Publilius Syrus that "Successful guilt is the bane of society." If, as said in Betts v. Brady,[5] ". . . [T]he Fourteenth Amendment prohibits the conviction . . . of one whose trial is offensive to the common and fundamental ideas of fairness and right. . .", what can be said of an acquittal won by a similar trial?

2. "We have always known that heedless self-interest was bad morals." F.D.R. Second Inaugural Address.

3. PHAEDO. Dialogues of Plato.

4. Unfortunately, there are some lawyers who perform in even worse fashion than laymen. See U.S. v. Dennis, 183 F.2d. 201 (1950). On the other side of the coin are lawyers fitting Thomas Fuller's description of the good advocate as one who "will not plead that cause wherein his tongue is confuted by his conscience."

5. Betts v. Brady, *Supra* note 1.

The essentials of a fair trial have been variously described,[6] including many facets of law and procedure with which everyone is familiar, but no one could successfully argue that a presiding officer empowered to control the proceedings is not a prime requisite, and at least one distinguished author believes that an independent bar also has a place of prime importance in the scheme.[7] While there may be some disagreement whether counsel is essential where not desired or requested, it is likely that few would disagree that the likelihood of achieving justice is enhanced when each party has a lawyer. It would seem, therefore, that in examining this problem some consideration should be given to the functions of both the court and counsel at trial, for these are inextricably entwined in the matter.

Piero Calamandrei recites that he once saw a boy pull off the antennae of a black beetle which was then placed at the edge of a road. Deprived of his exploratory organs, the mutilated insect swayed from side to side, turned in circles and became overturned by blades of grass. "This picture," said Calamandrei, "Is recalled to me whenever I think what the judicial process would become if, as some people suggest, the lawyers, those sensitive antennae of justice, were eliminated."[8] The author of this statement might easily have used for his illustration the lawyerless, pointless, hodge-podge trial of the Knave of Hearts for the larceny of tarts,[9] but he would, perhaps, have found a more poignant answer to his implied concern had he been present at an American trial of a self-represented defendant charged with crime; if he was fortunate enough to select the prototype of the trials to be mentioned later in this paper, he might well have been more vehement and forceful in his statements.

Whatever may be said of lawyers as a class, it should be recognized that they supply a much needed catalyst in the chemistry of trial practice, controlling the passions of the client, cooperating with the court in its search for truth, and helping keep the proceedings within prescribed limits so that they might not descend to the level of a backyard brawl with no holds barred. Not only this, but their detachment and training enable them to approach a factual and legal problem with logic and science. If Susanna had not been represented by Daniel,[10] the perjury of the elders would have prevailed; if Gamaliel had not offered his services as counsel for the Apostles, they

6. See Com. v. Fugmann ,330 Pa. 4, 29, 198 Am. Jud. Soc'y Atl. 99 (1938). Goodhart, *Legal Procedure and Democracy,* 47 J. Am. Jud. Soc'y, p. 58 (1963-64).

8. *Eulogy of Judges,* 21 (1954).

9. LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND, (1865).

10. *Daniel* 13 (Douay).

too would have been condemned to death.[11] True, a lawyer is prone to turn the spotlight on facts which support his client's position and often sublimates details which are unimportant thereto, but he knows that his adversary will do the same, for this is our time-honored means of ascertaining truth. Through the presentation of different aspects of the same circumstances, the finder-of-fact is enabled to recognize reality from a full face view after considering each contending profile.

The judge, of course, has a most important function to perform. He supervises the trial[12] and the word *supervises* implies something more than merely acting as an umpire[13] or moderator in a battle of wits;[14] it imports such control of affairs as to prevent interference with the proper flow of information into the jury box. This is not confined solely to deciding what is or is not admissible. It includes the prevention of unfairness of any sort, control of the manner in which the parties conduct themselves, and the order in which each is to offer and present his arguments. It certainly encompasses keeping the trial in such an orderly and dignified climate that the jury is not confused, distracted or impassioned. In exercising these functions the judge must act with reasonable firmness when the occasion demands, for "Justice can be as readily destroyed by the flaccidity of the judge as by his tyranny; impartial trials need a firm hand as much as a constant determination to give each one his due."[15]

Absent the ability to control the trial, the judge becomes like a corpse at a funeral, a necessary item to make the affair a success but unable to fashion the proceedings to his liking. The ability to control connotes the power to exercise restraints and impose sanctions against those who disobey rulings. Yet, in a criminal case, the judge may construct a dark record of prejudice if he wields a heavy hand. As a judge, he may not be the defendant's advocate, yet he must guide him through the procedural aspects of trial with appropriate advice and counsel at prescribed moments. He must take due cognizance of the defendant's ignorance of legal procedure and the rules of evidence. Yet if the defendant ignores his instructions, there is little he can do with safety except to give stern and repeated warnings. Even then, if these make the written record look bad, a new trial may result. Repeated warnings without action converts the judge into a weakling;

11. *The Acts*, 5:34-40 (King James).

12. Com. v. Fugmann, *supra* note 5.

13. Herold v. Washington No. Ins. Co., 128 Pa. Super. 563, 194 Atl. 687 (1937).

14. Keating v. Belcher, 384 Pa. 129, 119 A.2d 535 (1956).

15. U. S. v. Dennis, *Supra* note 4 at p. 226.

stern action, even outside the presence of the jury, may give the appearance of coercion or prejudice. It is a lottery which the judge does not relish and in which he has barely a fifty-fifty chance of winning.

Acute difficulty is not unusual where the accused is highly intelligent and *knows the score.* One such defendant became involved in a series of self-represented actions in several federal courts wherein, among other things, he claimed he was not given time to prepare for trial; that he had been assigned inexperienced counsel and so was forced to represent himself; that he was denied the opporutnity to summon witnesses to testify in his own behalf, although the truth of the matter was that when the court on appeal granted him this right, he refused to name the witnesses.[16] At a subsequent time, he was charged in a state court with burglary, larceny and receiving stolen goods, and again, with variations and additional stratagems, asserted the same matters.[17] He first brought unsuccessful habeas corpus proceedings to test the sufficency of the Commonwealth's evidence at the preliminary hearing. Competent counsel was appointed for him in this effort. When the case was called for trial, he asked leave to discharge his counsel and try the case himself and although counsel was repeatedly offered to him thereafter, he refused to accept assistance. The trial court, in order to protect itself against the standby counsel to sit through the case and be in readiness if the defendant felt that he needed him. Thereafter, the defendant was guilty of tactics, well planned in the opinion of the trial judge, which would not have been attempted or tolerated by or in a lawyer. He presented the court with the names of eighteen witnesses whom he desired to have subpoenaed in his defense.[18] The court directed the sheriff to subpoena these witnesses, with instructions to afford them transportation from their homes one hundred and thirty miles away to the court and return, should their presence be actually required by the defendant. Only one of these witnesses voluntarily appeared in

16. The Federal proceedings are listed in Com. v. Helwig, 184 Pa. Super. 370, 134 A.2d 694. (1957)

17. Com. v. Helwig, 40 Erie 64. (1956)

18. It is not beyond the realm of possibility that some day an accused will hand the trial judge a telephone directory and ask that every one whose name appears therein be subpoenaed in his behalf, basing his demand on Art. 1, § 9, of the Pennsylvania Constitution giving him the right to the compulsory attendance of witnesses in his favor. The trial judge will then probably try to determine whether the supposed witnesses are, in fact, witnesses in the case and will call upon the defendant to show cause why he is entitled to the service he demands. To this the defendant will answer that whom he wishes to call in his own defense in his own considered discretion, that the court may not require him to reveal his defense in advance of trial and that the only time the court may pass upon the relevancy of testimony is when the witness is on the stand and objection has been made.

court and the defendant promptly excused him. A few days later, the court inquired of the defendant whether he would need any of these witnesses for his defense and the judge was given the names of four of them, including the same witness whom the defendant had previously excused. These witnesses were eventually called at the county's expense and their testimony was of little consequence. The trial court in its opinion refusing a new trial, expressed its opinion that the defendant by naming these witnesses was merely setting the stage for raising the precise question he had previously raised successfully in federal court.

At a high cost to the public, this defendant cluttered up the record with repetitious cross-examination, repeated flaunting of rules of evidence, lengthy colloquies, repeated motions, arguments and other devices calculated to try the patience of the judge and trap him into committing reversible error. In cross-examining a Commonwealth's witness he cleverly phrased his questions so that the correct answers would disclose the fact that defendant had been in prison and had a criminal record. In commenting upon the phase of the trial, the Superior Court on appeal restricting the introduction of a defendant's criminal record, and his cross-examination was a clever plan to bring about the disclosure he later complained about. Said Judge Watkins, on behalf of the court,

> "While pretending to seek sympathy from the court because of his self-inflicted burden of defending himself, the knowledge he disclosed of the law with regard to the introduction of distinct crimes suggests that he shrewdly hoped to use this protection of the accused as a means of obtaining a reversal in the event the verdict went against him."[19]

Another convicted defendant, lacking the intelligence and shrewdness of the one just referred to, but motivated by greater malice, illustrates the extent to which a self-represented defendant will go in distorting truth and attempting to pervert the safeguards which a benign system has built in behalf of an accused. This convict brought a habeas corpus action alleging that he had been made to stand trial without counsel; that the trial judge conducted the trial like a Roman Circus and was prejudiced against him. At the hearing on the writ, he vigorously denied that the services of a lawyer had been offered to him. As disclosed by the record, this was what occurred with respect to counsel: when defendant was brought up before the court on arraignment, the assignment judge offered to appoint counsel for him but the defendant refused to accept assistance. When the jury had been selected and the case was sent to another

19. Com. v. Helwig, *Supra* note 16, at 378, 134 A.2d at 698.

courtroom for trial, the trial judge in that court room offered to appoint a lawyer to assist the defendant. This was refused and defendant insisted on going to trial without representation. After conviction, the defendant moved for a new trial and argued his own case before the court in banc. At the argument, the trial judge suggested that it was not too late to supply defendant with state-paid counsel and offered to appoint a lawyer to represent him. The defendant refused to accept legal counsel and persisted in making his own argument. Later, when defendant brought his habeas corpus proceedings, state-paid counsel was afforded him but after the hearing the defendant discharged his lawyer, stating that he could do a better job on appeal himself, refusing to sign and swear to a petition for leave to appeal his conviction nun pro tunc, the appeal time having lapsed.

It might also be interesting to note what the record disclosed as to the defendant's other allegations, *i.e.,* that the trial was conducted like a Roman Circus and the judge was prejudiced. In support of these averments in his petition, the defendant (now the relator) testified that the judge had allowed free reign to the district attorney to push defendant around and take advantage of him; that the trial was a farce from beginning to end; that the judge was prejudiced against him, did not give him a break, and ignored the jury's recommendation of mercy by turning a deaf ear to the jury's plea to "please, please, please" have mercy on the defendant, and to prove this point the defendant argued that he had been given the severist possible sentence. When the hearing judge, who had also been trial judge, remarked that no such ridiculous spectacle as a pleading jury ever occurred, the defendant boldly stated that it did happen and that he would match his credibility with that of the judge.

At the argument on the defendant's motion for a new trial ten months before the habeas corpus hearing referred to above, the entire proceeding was taken down stenographically and transcribed. As revealed by the record of that argument, this is what the defendant then thought of both the trial and the trial judge: he told the court in banc that the judge had helped him out of his discussion before the jury on circumstantial evidence; that the trial judge had done a fine job of backing up his rights and even asked the trial judge to continue to do so at the argument. He admitted that the trial judge had tried to prevent him from introducing his own prior criminal record into evidence as a part of his defense and had cautioned him about its possible adverse effect. In this connection the defendant said, "You gave me all the opportunity there, I will grant

that. You were very wonderful to me in the courtroom, there's no question of that. I have no squawks about that, as far as being tried in justice." And what of the complaint about the jury's recommendation and the severe sentence? The record disclosed that the jury made no recommendation of mercy at all and the sentencing judge imposed a term substantially less than that allowed by law.[20]

There is still a third situation in the same court which illustrates how a resourceful unrepresented defendant can impose upon the trial court and lay traps calculated to ensnare the judge. In this case,[21] counsel was initially supplied to the defendant without cost to him. Thereafter, the defendant, without the knowledge or assistance of court-appointed counsel made a series of applications to the court, asking that he be supplied with law books, transcripts of cases involving other defendants charged with the same offenses, and asking for a reduction of bail. Because the defendant seemed to be by-passing counsel, the court became concerned that there might be dissatisfaction with the appointment or some other circumstance might be present interfering with the lawyer-client relationship. Accordingly, the defendant and his counsel were brought into open court and inquiry was made by the judge respecting the situation. At this interview, the defendant told the judge that his lawyer was competent, useful and satisfactory but that he had concluded to try the case by himself. The court then advised the defendant of the advantages of representation and offered to replace counsel with another of defendant's choosing if that was desired. The defendant rejected this offer by saying that he was satisfied with his lawyer but only needed him in an advisory capacity. Thereafter, the defendant and his advisory lawyer disagreed as to what should or should not be done and by mutual consent another competent and skillful lawyer was substituted in place of the original. The defendant apparently changed his mind again and this time allowed his second lawyer to conduct the defense for him, although he interfered with the trial and even insisted on cross-examining at one point.

Following the defendant's conviction, he, acting as his own counsel, applied for a writ of habeas corpus.[22] In his petition for the writ, defendant averred, among other things, that his counsel had been incompetent and unfaithful and had failed to subpoena witnesses. He complained that the court had never advised him of his

20. Com. *ex rel.* Marchillo v. Myers, C.P., Erie County, 289 Sept. Sessions, 1963.

21. Com. v. Wilson, Q.S., Erie County, 95-99 November Term, 1960.

22. Com. *ex rel.* Wilson v. Reeder, C.P. Erie County, (694 February Sessions 1963)

rights or given him the rights to which he was entitled. Yet the record disclosed a lengthy interview between the court and the defendant in which he was fully told what his rights were, and the trial record disclosed that the sole witness whom the defendant wished to call had, in fact, been subpoenaed by his trial counsel and that virtually every request made by the defendant, except that he be discharged, was granted.

From the cases just discussed it can be seen that even representation by counsel at the initial stages of the proceedings sometimes complicates matters, for a defendant often insists upon cross-examining witnesses, arguing to the jury, raising objections, and in generally interfering with the orderly conduct of the trial even though his lawyer is present to act in his behalf. In this there is no clearly defined course which a trial judge may follow with safety, and the situation can become perilously acute if unethical counsel cooperates with the defendant and advises him in secret how to proceed. A startling example of the chaos which such conduct can create appears in the record of the Communist conspiracy trials presided by Judge Medina in 1949,[23] a case which probably provided the script for a number of criminal cases which followed in other jurisdictions.

In that case, Eugene Dennis, one of the defendants, discharged his lawyer before the jury had been completed even though the judge advised him that he might, by so doing, sacrifice some of his rights. What happened thereafter justified the United State's Attorney's fear that this was a device to enable Dennis to inject improper matters in the case.[24] In opening to the jury Dennis frequently ignored the issues, enlarged on the virtues of the Communist party and discussed an economic depression which, he said, had already begun in this country. He refused to conclude his arguments on objections when commanded to do so by the judge and this evoked an utterance by Judge Medina which laid the ground rules which both the judge and the defendants later followed to the hilt. "I suppose," said the judge, "that you are just daring me to do something. You gentlemen can be just as disorderly, just as unruly as you choose, but you will not goad me into taking hasty action which may create a prejudicial atmosphere." The extent to which counsel and the defendants participated in the disgraceful process of corrupting the cause of justice can be seen in Judge Medina's memorandum accompanying his order holding some of counsel and Dennis for contempt. In it he related that the defendants

23. U.S. v. Foster, C. 128-87, U.S. Dist. Ct., Southern Dist. of N.Y.

24. See HAWTHORNE DANIEL, BIOGRAPHY OF JUDGE MEDINA, p. 241.

(in the contempt proceeding) had disregarded repeated warnings of the court; had made insulting insinuations and charges against the trial judge; and made continuous and repeated objections to evidence notwithstanding it had been ruled at the outset that all objections and exceptions would inure to the benefit of all defendants; had persisted in making long, repetitious, and unsubstantial arguments, objections, and protests, working in shifts, accompanied by shouting, sneering, and snickering; had disregarded repeatedly and flagrantly the orders of the court not to argue without permission and to desist from further arguments or comments; had disregarded rulings on evidence, asked questions on excluded matters, accused the court of race prejudice without cause, and generally conducted themselves in a most provocative manner in an endeavor to call forth some intemperate or undignified response from the court.

Nor was Dennis the only defendant guilty of misconduct. Gilbert Green, although represented by counsel, frequently volunteered statements in angry, sarcastic voice before the jury, implying that the judge was denying the defendants their rights. This came after the court had issued repeated admonitions and after there had been serious disturbances in the court in which Green had participated. As a result of this conduct, the judge had to commit him for contempt for the balance of the trial.[25] It was necessary for the judge to hold another defendant, John Gates, in contempt. This defendant refused to reveal the identity of certain persons involved in his testimony, even though the court had directed him to do so. The defendant's answer, among other things, was that he would be unable to raise his head in decent society if he ". . . became a stool pigeon under the direction of the court or anbody else." As a result of his refusal to answer, the judge was constrained to sentence him to prison for thirty days unless he earlier purged himself.[26] Not only this, but the defendant Davis, who had been represented by competent counsel throughout the trial, attempted to discharge his lawyer for the purpose of making the final summation to the jury on his own behalf. The judge refused the privilege of making the summation on the ground that Davis had repeatedly interfered with the conduct of the trial, that he had not confined his testimony to the questions asked him, that he had three times taken part in outbursts and had been disorderly and contemptuous. The judge feared, and not without reason, that to let him address the jury would be to invite similar unconscionable practices.[27]

25. U.S. v. Green, 176 F. 2d 169 (1949)

26. U.S. v. Gates, 176 F. 2d 78 (1949)

27. U.S. v Dennis, *Supra,* note 4 at p. 233.

These are extreme cases and fortunately are not representative of the average. They do illustrate, however, what can and frequently does happen. Further, there is one other factor which bears upon the problem and that is that many scrupulous self-represented defendants are thoroughly ignorant, not only of law and its processes, but of things in general, and these can cause nearly as much difficulty as the unscrupulous, schrewd and rebellious litigant. The problem here is not the occasional humerous incident such as the apocryphal story of the self-represented defendant who, when asked if he cared to challenge the jury replied, "I think I can lick the little fellow on the end seat"; the problem goes deeper than that. Such a defendant must literally be led by the hand throughout the entire trial. He must be counseled how to strike the jury, how to make an opening address, how to cross-examine, how to object to evidence, when and how he may testify, and what effect the evidence has in relation to the substantive law. A defendant of this nature, when afforded an opportunity to cross-examine, usually starts out, "He said that I stole the purse and ran; well I didn't do any such thing," or "Your honor, this man is lying and I can prove it. Just give me a chance to call my brother in Buffalo and he'll tell you I was up there at that time," or some similar form of approach. It is usually idle for the judge to instruct the defendant that he must confine himself to questions, for when the explanation is made, the defendant shakes his head in confusion and, not understanding the intricacies of such a procedure, usually replies hopelessly that he has no questions to ask. When afforded the opportunity to sum up to the jury, his speech is usually a repetition of the contention that he didn't do it, or he asks the jury to let him go on general principles, sometimes banking this plea on the lack of counsel, ignorance of court procedure and the general observation that he is a "hard-working" man with a family to support. This is pitiful in the case of a defendant who may be innocent, but it is disturbing in any case because the judge cannot escape the feeling that the trial has not performed its true function and that he has unwittingly been made a part of it.

Just what prompts litigants to refuse counsel when offered, or to neglect to hire counsel when they can to afford it, is not apparent. It may be that the lurid courtroom scenes they have seen on television have led them to the belief that they are super-pleaders or that a trial is a simple matter requiring no special skills. In the case of an innocent accused it may be that he has such a blind faith in his own innocence and the infallibility of justice that he believes he will be acquitted no matter what. In fact, there is a multitude of reasons behind the refusal of representation. Whatever

these reasons may be, it is apparent that both civil[28] and criminal litigants occasionally prefer to proceed without counsel and this always puts the judge in a delicate position. Judge Woodside of the Superior Court, in an address before the Pennsylvania Bar Association, spoke of the dilemma of appellate courts in dealing with criminal problems, but what he said was equally applicable to trial courts. "Drawing the line between the accused and the officers of his government," he said, "is a difficult and serious problem for appellate courts. If it is drawn too far in one direction, individual freedom will be lost through the abuse of governmental power. If it is drawn too far in the other direction, free government has insufficient protection against the criminals."[29]

The Sixth Amendment to the United States Constitution guarantees an accused the right to have the assistance of counsel for his defense. Article 1, § 9, of the Constitution of Pennsylvania provides that the accused has the right to be heard by himself and by counsel. Nowhere in either of these organic laws can we find any provision authorizing a court or a legislature to force counsel upon an unwilling accused, and not matter how salutary it might be from the standpoint of trial judges or the community to have every criminal defendant represented in court, defending a charge of crime is so personal and serious a matter that society has no legal or moral right to invade the cloister of the defendant's considered discretion. Thus, we have what gamblers call a *Mexican Standoff*—a balance of rights between the people and the individual which cannot be resolved except by applying the evanescent test of fairness to specific cases. It is one thing to say that an accused in a criminal case must be supplied with counsel upon request; it is another to say that he must have such counsel even though not desired.

The flood of applications for writs of habeas corpus gushing from our prisons is a clear indication that convicted criminals, at least, are well aware of the determination of the highest courts to protect and preserve human rights. More law is daily discussed in prisons than in the law schools. For this reason it is the court-wise, prison-

28. In a civil case tried by the author as judge, the plaintiffs represented themselves. One of the plaintiffs kept up a running fire of comment while the defendants' witnesses were on the stand, stating out loud, "You're a God-damned liar," etc. Throughout the case the plaintiffs addresse dthe judge as "Hey, you," or simply calling him by his last name without prefix. The judge, after a few days of this, suggested that it might be a little more respectful if the plaintiffs referred to him as "Your Honor" or, at least, as "judge." To this suggestion one plaintiff answered, "Alright, L ....."

29. Com. v. Helwig, *supra* note 16, at 380, 134 A.2d at p. 699.

wise, convict who gains the most benefit from circumscribing rules, rather than the first offender, casual offender or innocent accused. This, of course, does not argue relaxation of the strict principles of fairness, enunciated or lying dormant, which inhere to our concept of justice. It is just as offensive to invade and impair the rights of an habitual criminal as it is to trample the innocent underfoot.

While trial judges must continue to play each case by ear, appellate courts, by thoroughly understanding the problem and by precise rulings on its specific facets can be of help. In the Communist conspiracy trials mentioned above, the Second Circuit of the United States Court of Appeals, in an able opinion by Judge Learned Hand,[30] dealt somewhat with the plight of Medina and his manner of presiding over the trial. In that opinion, more was said about the conduct of counsel than of the defendants, although in dealing with the ruling refusing the defendant Davis the right to discharge his counsel and address the jury himself, there was some mention of the defendant's conduct as justification for the trial judge's action. While the setting of the case might well have justified the court in making stern and pertinent comment on the defendants' actions and in issuing pronouncement which might be of help to trial judges in the future, the court contented itself with a restrained critique.[31] Instead of pointing out that the defendants, by their own conduct, invited reprisals from the judge and created an atmosphere of pressure of such magnitude that an implied waiver of self-constructed error became manifest, the opinion was almost an apology for the judge's actions. It admitted that at times he used language short of requisite judicial gravity and pointed out that his repeated cautionary instructions to the jury would not have been enough to excuse him had he, in fact, weighed the scales against the defendants. In truth, the opinion hinted that the trial judge might have been wrong in some instances, for this was said: "The record discloses a judge, sorely tried for many months of turmoil, constantly provoked by useless bickering, exposed to offensive slights and insults, harried with interminable repetition, *who, if at times he did not conduct himself with the imperturbability of Rhadamanthus,*[32] showed considerably greater self-control and forebearance that it is given to most judges to possess." It is submitted with some diffidence that under the circumstances the court might easily and logically have said that any defendant who enters the lists with swinging sword and direct attack upon the trial judge without provocation and manifestly to prevent a calm disclosure of truth,

30. U.S. v. Dennis, 183 F. 2d 208 (1950).

31. *Id.* at 225-26.

32. *Id.* at 226, Italics supplied.

must be deemed to waive any objection he might have to any human response a mere trial judge might make to such assault. What is even more unfortunate, perhaps, is the circumstance that the Supreme Court of the United States affirmed the convictions without allowing certiorari to include the conduct of the trial within its compass.[33] Had the certiorari been broad enough to include the entire matter, we might now have available some pronouncement of value on this point from the highest court of the land. In fact, the Supreme Court ignored another chance to deal with the problem in *United States v. Aviles,*[34] where one of the defendants in the court below burst into a tirade before the jury in which he asserted that all those on trial were convicts and that some of them were then serving time in prison. The circuit court rejected the contentions of the other defendants and this was such prejudicial error as to require a new trial, holding that the trial judge's cautionary instructions were sufficient to protect them. The Supreme Court refused certiorari.[35]

Of some comfort to trial judges is the decision in **United States v. Bentvena.**[36] The trial judge in that case (MacMahon) was no panty-waist, even though the conduct of some of the defendants was calculated to upset him and trap him into reversible error. There, one of the defendants climbed into the jury box, walked along the inside of the rail from one end of the box to the other, pushing the jurors in the front row and screaming vilifications at them, the judge, and the other defendants. Another defendant, when he was being cross-examined, picked up the witness chair and hurled it at the Assistant United States Attorney, narrowly missing him. The chair was shattered against the jury box. The defendants engaged in a series of off-stage activities which were also designed to interfere with the trial. Some of them feigned accidents and illnesses; two of them claimed they had been drugged and didn't know what transpired in the courtroom; one of them feigned an attempted suicide by hanging at Detention Headquarters and the very next day feigned another attempted suicide by making inconsequential cuts on his wrists.

The judge responded with briskness to the outbursts of the two defendants who created scenes in the courtroom by having them gagged and shackled as well as holding them for contempt. A total of eleven defendants were sentenced for contempt for their behavior during trial. In affirming the convictions of all but four of the defend-

33. Dennis v. United States, 341 U.S. 494 (1951).

34. 274 F.2d 179 (1960).

35. 362 U.S. 974, (1960).

36. 319 F.2d 916 (1963).

ants, the second circuit was equally as firm as the trial judge. It held that he was justified, and indeed was forced, to resort to stern measures to obtain order in the courtroom. In so doing, this was said:

> "Law enforcement and fair trial for those accused of violations is not to be limited to the pattern chosen by defendants. The administration of criminal justice in the federal courts will not be delivered into the hands of those who could gain only from its subversion. . . . It may take two to conspire but it takes only one to throw a chair at the prosecutor."[37]

While ordinarily a paper of this sort ends with some sort of suggestion to palliate whatever evil may be under consideration, this one must trial off into nothingness, for no remedy suggests itself other than a better understanding by appellate court judges of trial problems. The second circuit in *Bentvena* put it this way:

> "It should not be the function of an appellate court with all the advantages of hindsight to substitute itself for the trial judge and to declare how it might have handled each situation or to deliver lengthy admonitions to trial judges on the properties of conducting these difficult criminal trial and the need to avoid embroilment with defendants and defense counsel despite the kind of provocation evident here."[38]

This, at least, is a recognition that the common sense doctrine of sudden emergency available to a party charged with negligence might look well in an appellate court proceeding in which a trial judge is charged with error of the kind under discussion.

Absent any other remedy, trial judges can do little more than find a sympathetic depository for their tears.

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37. U.S. v. Bentvena, Supra 35, p. 931.

38. *Id.* p. 933.