VOLUME 84 NOVEMBER 1970 NUMBER 1

HARVARD LAW REVIEW

THE SUPREME COURT 1969 TERM

FOREWORD: WAIVER OF CONSTITUTIONAL RIGHTS: DISQUIET IN THE CITADEL

Michael E. Tigar *

THERE happens, upon occasion, a judicial utterance so arresting as to require study and contemplation for what it tells us of the world in which judges dwell. Surely this has been so of the "moral pestilence of paupers, vagabonds, and possibly convicts" to which Mr. Justice Barbour referred in 1837.[1] So, too, of Mr. Justice Black's summing up for the majority in *Illinois v. Allen*,[2] holding that a trial judge confronted with an obstreperous defendant might hold the man in contempt, bind and gag him, or exclude him from his trial. Such a holding is necessary, the Justice said, to show that "our courts, palladiums of liberty as they are, cannot be treated disrespectfully . . . .", and so that they will "remain . . . citadels of justice." [3]

Allen, whose mental competence was questionable,[4] had initially refused appointed counsel in his state robbery trial, though the trial judge asked an attorney to sit with him "to protect the record." During the voir dire, Allen's examination of the first prospective juror was prolix and, the trial judge believed, irrelevant. He argued with the judge in "a most abusive and disrespectful manner," and at one point said, "When I go out for lunchtime you're going to be a corpse here." He tore up the appointed lawyer's file and threw it on the floor. Protesting the exclusion from the courtroom of members of his family who were to be witnesses in his defense, he said: "There is going to be no proceeding. I'm going to start talking and I'm going to keep on talking all through the trial. There's not going to be no trial like this. I want my sister and my friends here in court to testify for me."

* Acting Professor of Law, U.C.L.A. Law School. A.B., University of California at Berkeley, 1962; J.D., 1966.

[1] New York v. Miln, 36 U.S. (11 Pet.) 102, 142 (1837).

[2] 397 U.S. 337 (1970).

[3] *Id.* at 346–47.

[4] *Id.* at 356–57 & n.5 (Douglas, J.).

After the first of these outbursts, the trial judge ordered Allen removed from the courtroom. Relenting, the judge permitted Allen to be present for the beginning of the proceedings, but again removed him when he protested the exclusion of witnesses. Allen was present, under a promise of good behavior, during most of the presentation of his defense, which was conducted by counsel.[5]

The Illinois courts affirmed Allen's conviction. On his petition for habeas corpus, the district judge denied relief. The Court of Appeals for the Seventh Circuit reversed, holding: [6]

> No conditions may be imposed on the absolute right of a criminal defendant to be present at all stages of the proceeding. The insistence of a defendant that he exercise this right under unreasonable conditions does not amount to a waiver.

Justice Black, for the Court, disagreed. There are at least three ways, he said, in which a trial judge may seek to prevent a defendant's disruptions: binding and gagging, use of the contempt power, and exclusion from the courtroom. The Court was careful to give only a qualified endorsement to the first method [7] and noted that the second included both the civil contempt sanction of imprisonment until an assurance of good behavior is given and the criminal contempt penalty of imprisonment for a specified duration as punishment for previous disruptive conduct.[8] The power to exclude was based on the conclusion that a defendant's contumacious behavior may amount to a waiver of his sixth amendment right to confrontation: [9]

> Although mindful that courts must indulge every reasonable presumption against the loss of constitutional rights, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

---

[5] The facts are set out in the opinion of the Court of Appeals, United States *ex rel.* Allen v. Illinois, 413 F.2d 232, 233–34 (7th Cir. 1969).

[6] *Id.* at 235.

[7]

> Trying a defendant for a crime while he sits bound and gagged before the judge and jury would to an extent comply with that part of the Sixth Amendment's purposes that accords the defendant an opportunity to confront the witnesses at the trial. But even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort.

397 U.S. at 344.

[8] *Id.* at 344–45.

[9] *Id.* at 343.

Allen was not the only significant waiver case decided in the 1969 Term, and it requires consideration along with three others, *Brady v. United States*,[10] *Parker v. North Carolina*,[11] and *McMann v. Richardson*.[12] The ostensible waiver in each of these cases took place in the guilty plea process.

Brady pleaded guilty to a federal kidnaping indictment and was sentenced to fifty years imprisonment. Had he been found guilty by a jury, he might have received the death penalty. But the statute provided that the maximum punishment following a court trial or a guilty plea was life imprisonment. After Brady's guilty plea had been entered and accepted, this statutory provision was held unconstitutional by the Supreme Court in *United States v. Jackson*,[13] because it impermissibly burdened a defendant's constitutional right to jury trial. Brady claimed that by the same reasoning the statute impermissibly induced his plea of guilty in order to avoid the risk of death.

Parker had been charged with first-degree burglary, a state offense punishable by death. He pleaded guilty under a statute which provided a mandatory sentence of life imprisonment following a guilty plea. As did Brady, Parker claimed that this constituted unconstitutional inducement of the guilty plea. He also claimed that his plea was the product of a coerced confession which his assigned counsel had told him could be used in evidence against him.

In *McMann*, three New York prisoners sought habeas corpus claiming that they had pleaded guilty because they believed that their allegedly coerced confessions would be used against them. Their pleas were taken prior to the Court's decision in *Jackson v. Denno*,[14] which held that New York's system of allowing the jury to determine the voluntariness of confessions was unconstitutional since it revealed to the jury that the defendant had confessed and thereby prejudiced the determination of guilt or innocence based upon lawful evidence.

In all three cases, the Court declined to hold the pleas involuntary, though upon grounds which are difficult to sort out. In *McMann*, the Court denied petitioners a hearing on their allegations, saying that resort to federal habeas corpus was precluded because their plea of guilty, and consequent refusal to present the coerced confession claim to the state court for determination, was a deliberate bypass of orderly state proce-

---

[10] 397 U.S. 742 (1970).
[11] 397 U.S. 790 (1970).
[12] 397 U.S. 759 (1970).
[13] 390 U.S. 570 (1968).
[14] 378 U.S. 368 (1964).

dures. The Court bolstered this conclusion by observing that the forces motivating pleas of guilty are many and complex, and that the pleas in issue, though assertedly based upon fear of subjection to an unconstitutional method for determining voluntariness, were nonetheless the product of a deliberate choice, informed by counsel's advice and assistance, and therefore immune from further scrutiny.

In Parker's case, there was no issue of deliberate bypass, since the case came up on review of a state collateral attack proceeding. The Court simply held that counsel's failure to advise Parker to challenge his confession on a plea of not guilty was "well within the range of competence required of attorneys representing defendants in criminal cases,"[15] and therefore that Parker's decision to plead guilty was voluntary.

In *McMann*, *Parker*, and *Brady*, the Court went out of its way and off the record to validate a number of aspects of present-day plea bargaining, approving the practice of granting lighter sentences or reducing charges in exchange for pleas of guilty, and putting its imprimatur upon the litany of the plea as it is performed in almost every court in the land.

McMann, *Parker*, *Brady*, and *Allen* raise troubling questions about where the Court is headed now in the field of criminal justice. Taken together, they lead me to doubt that the Court appreciates the real-life events which daily occur in our criminal courts, to conclude that the earlier search for reasoned and consistent principles of waiver is now put to full flight, and to wonder at the lawyer's role in the midst of these currents of judicial thought. This Foreword concerns itself with this doubt, conclusion, and wonder. My concern for the view of the criminal process reflected in this Term's opinions is heightened by the increasingly strident challenges to the system of criminal justice. As an outgrowth of the social turmoil which attends militant challenges to existing institutions, the criminal courts have become a principal weapon for social control. The gap between the carefully cultivated image of disinterest and fairness and the reality of partisanship and inequity is becoming apparent. This Foreword addresses one discrete aspect of this gap.

I. Palladiums and Citadels I Have Known

Despite Caleb Foote's pioneering study of vagrancy statutes fourteen years ago,[16] and some recent studies demonstrating

[15] 397 U.S. at 797–98.

[16] Foote, *Vagrancy-Type Law and Its Administration*, 104 U. Pa. L. Rev. 603 (1956).

the ineffectiveness of *Miranda*[17] and similar cases,[18] the literature on the day-to-day administration of our criminal courts and their supporting police and prosecutorial agencies is most notable for its absence. This lack unfortunately isolates appellate judges from knowledge of the practical impact of their decisions. Although there was a day when Supreme Court Justices tried cases on circuit and thus could see the quality of trial-court justice first hand,[19] they have had little trial responsibility since 1869.[20] While few pretend that reinstating this practice is workable or practical, some means must be found to assure that the Court appreciates the world into which its decisions are projected and that its opinions have the impact their words appear to promise. For it remains true even after the "constitutional revolution in criminal procedure" that the lower criminal courts — where the bulk of American criminal justice is meted out — hardly call to mind images of "citadels" and "palladiums."

I think of the District of Columbia courtroom where I had my first trial — dingy wooden panelling, a desultory breeze occasionally noticeable, court officials going about their business with weary resignation. And the lawyers — most of whose business is the daily grind 'em up and spit 'em out of drunks, disorderlies, whores and vagrants — standing around and calculating how many cases at $50 per case is a healthy day's work. Ten? Sure, on a good day a man can pretend to represent ten clients, if he can plead most of them guilty and not worry about the law in the rest of the cases. For a time, I thought that things must be different elsewhere.

That was before 100 Centre Street, Manhattan. If possible, a dingier courtroom in which the men and women with business to do were mostly past caring, and the men and women — litigants — upon whom this business was to be done were mostly past hoping. Someone, in a forlorn battle to preserve the trappings of justice, had put a large plastic bag over the American flag in the corner to keep it clean. The bag itself had yellowed and was covered with grime. And in back of the judge's bench —

---

[17] Miranda v. Arizona, 384 U.S. 436 (1966).

[18] *See, e.g.*, NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT ch. 13 (1968); Medalie, Zeitz & Alexander, *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968); Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967*, 66 MICH. L. REV. 1542 (1968); Comment, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967).

[19] Summary of Events, 1 AM. L. REV. 206, 207 (1867).

[20] *See* H. HART & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 42–47 (1953); 2 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 501 (1926).

not a bench really, just the most comfortable chair in the house — an incomplete set of large aluminum letters proclaimed

IN GOD WE RUST.

In one case I was defending thirteen young people who had been arrested for disorderly conduct during a demonstration outside the National Headquarters of the Selective Service System. The information — the charging paper — was a printed form, which we challenged on the basis of a case more than forty years old decided by the District of Columbia Court of Appeals, holding an information in the same form failed to state an offense.[21] Several other disorderly conduct cases were heard after our argument, some to be tried in ten minutes time and some to be disposed of on a plea of guilty. The same or a similar defect was present in almost all the informations that morning, yet none of the lawyers — most of whom had been sitting in court during our argument — bothered to protect the record or even to make reference to the legal insufficiency of the charges against their clients. Nor did the judge or prosecutor advert to the point in any of the cases. The trials hardly deserved the name. One standard script runs thus: Police officers testified that the defendant was drunk and when stopped either (1) said a word which would accurately but colloquially describe Oedipus or (2) attempted to strike the officer. Defendants denied these assertions. Whether defendants were found guilty in 100% of the cases or some lesser percentage depended upon whose court you were in and how the judge felt.

Who was telling the truth in these cases? It is interesting to note that disorderly cases used to feature officers testifying that the defendant said "god damn" or "son of a bitch." Rumblings from appellate courts and the views of a scarce few trial judges[22] on the relatively pallid character of these remarks, taken in context, coincided with an escalation of the police version of the rhetoric of those arrested for disorderly conduct.

"In the halls of justice," Lenny Bruce used to say, "the only justice is in the halls." Maybe not in the halls either, for that is where the plea bargains and lawyer-client conversations take place.

Every lawyer who practices in the criminal courts could

[21] Hunter v. District of Columbia, 47 App. D.C. 406 (D.C. Ct. App. 1918). This case reversed the convictions of a number of suffragettes who had been demonstrating in front of the White House.

[22] *See generally* People v. Cohen, 1 Cal. App. 3d 94, 81 Cal. Rptr. 503 (1970), *appeal docketed*, 38 U.S.L.W. 3524 (U.S. June 30, 1970) (No. 1731), in which the question of whether profanity is punishable will be considered by the Court.

add his own share of such observations. But their importance is seldom recognized by those who formulate the theoretical rules under which our system of criminal justice allegedly operates.

This conclusion is not novel, but iteration of it seems wise: for the men and women caught up in them, the criminal courts are neither palladiums of liberty nor citadels of justice. Citadels, perhaps, in an older sense of the term, "a citadell, castell, or spacious fort built not onely to defend the citie, but also to keepe the same in awe and subiection." [23] Unfortunately, the constitutional revolution in criminal procedure has amounted to little more than an ornament, or golden cupola, built upon the roof of a structure found rotting and infested, assuring the gentlefolk who only pass by without entering that all is well inside.

More thoughtfully, the Court seems to some to have failed to examine the process in which its constitutional interpretations must operate. Or, less kindly, to have decided that some problems of process are simply too cumbersome to manage by means of decree, and should therefore be ignored. The Court cannot, of course, rewrite the penal codes. Its role in the rebirth of interest in the criminal law has been to superintend the reform of procedural rules in the light of constitutional principle, and to exercise some veto power on the legislative process through the "void for vagueness" and delegation of power doctrines.[24] One had hoped that in the course of this development a consistent view would emerge of the criminal process and the Court's role in it, but this has not been the case. Whatever the reason, decisions of this past Term illustrate just how far we are from a consistent statement of constitutional principle within the sphere delimited by the Court as its proper concern.

II. Some Consideration of Waiver in a Real World

The defendants in *McMann*, *Parker*, *Brady*, and *Allen* were held by the Court to have relinquished some right or rights which they concededly had; in the first three cases, the right to a trial and to remain silent were waived by their guilty pleas; in *Allen* the waiver was of the right to be present at one's trial and to con-

[23] 2 A New English Dictionary 440 (1933), quoting from a 1598 work.

[24] As to the "void for vagueness," rationale, see Giaccio v. Pennsylvania, 382 U.S. 399 (1966); Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. Pa. L. Rev. 67 (1960); and in the first amendment context, Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 Calif. L. Rev. 132, 148–51 (1966). The latest expression on the delegation of powers doctrine in the field of criminal sanctions is Gutknecht v. United States, 396 U.S. 295 (1970).

front adverse witnesses. Yet one searches the opinions in vain for a consistently applied concept of voluntariness which integrates these decisions one with another and with prior cases on waiver and consent.

It is waiver of rights that permits the system of criminal justice to work at all. Consider the model criminal trial, cast in the mold of the adversary system, with the defendant accorded a catalogue of rights, and guilt or innocence the subject of a determination made after full and contentious airing of the evidence. In this model, all evidence is collected without impairing, infringing, or disparaging the rights of everyone to be silent in the face of police interrogation, and without overriding the rights of any person to have counsel and resist interrogation under compulsory process on any available legal basis. And if someone claims that a right has been overridden or disregarded, means exist for challenging such action.

In reality, in most criminal cases, perhaps as many as ninety percent in some jurisdictions, the model has no direct relevance to real life, since the defendant cuts short the process by pleading guilty to the offense charged or some lesser included offense.[25] Other defendants shorten the process by waiving a jury trial, or by failing to raise possible defenses on procedural and technical grounds. Criminal courts are crowded now; imagine their utter breakdown in the wake of every defendant insisting on a plenary trial.

Whatever the rationale for permitting waiver, courts have applied two principles limiting its application. First, the Court held in *Johnson v. Zerbst*[26] that a waiver, to be effective, must be an "intentional relinquishment or abandonment of a known right."[27] This standard stresses the consensual, "free choice" character of waiver and its ultimate reliance upon the individual's freedom to forgo benefits or safeguards through the uncoerced exercise of his rational faculties. Whether the Court in fact has been willing to validate mythical consents and whether the image of the "free man" is grounded in demonstrable reality remain to be seen.

Second, there may be some procedural incidents of the criminal process which the accused cannot waive.[28] The Supreme

[25] THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

[26] 304 U.S. 458 (1938).

[27] *Id.* at 464. *See generally* Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262 (1966).

[28] At common law, conviction of felony might work a forfeiture of estate or corruption of blood and thereby extend its consequences beyond the accused, and

Court has said that the right to jury trial, for example, is a right not only of the accused, but of the government, and that it would not be unconstitutional to require the government's and the court's concurrence in a waiver.[29]

I will not question here whether waiver standards should be used, but rather will examine the way in which the *Johnson* standard, with its undertone of express waiver by an informed accused, has fared. The cases show that it has commonly been ignored or, what may be worse, has received a kind of token obeisance which serves only to rob its words of whatever cognitive, as opposed to emotive, significance they possess. Indeed, the insensitive application of waiver standards by American courts in the late nineteenth and early twentieth centuries was consistent with their general view of freedom of contract as the underpinning of the social order. Just as freedom of contract offered a justification for outright robbery by a fortunate few, ranging from employers extracting unconscionable concessions from their unorganized employees to merchants driving unconscionable bargains with their customers, so it has been in the criminal process the theoretical construct in whose name men are said to have voluntarily given up their liberty. Consideration begins with an analysis of selected groups of waiver cases.

A. Taking Five

In *Rogers v. United States*,[30] a witness before a federal grand jury answered a few too many questions about her association with the Communist Party, and was held to have "waived" her privilege with respect to additional details since there was no real danger of further incrimination. The privilege exists as to the disclosure of a fact which may in any degree form a link in a chain of evidence against the witness.[31] Voluntary disclosure of any such fact evinces, the argument runs, an intention not to rely upon the privilege, at least not in that forum, and not with respect to the entire subject matter to which the initial disclosure relates. The same general rule is followed with respect to all testimonial

---

thus waiver of a trial was not allowed. In some early cases the right to a jury trial is spoken of as so basic to the court's jurisdiction that it cannot be waived. *See, e.g.*, Low v. United States, 169 F. 86 (6th Cir. 1909); Dickinson v. United States, 159 F. 801 (1st Cir. 1908), *petition for cert. dismissed*, 213 U.S. 92 (1909). These cases were overruled by Patton v. United States, 281 U.S. 276 (1930).

[29] Singer v. United States, 380 U.S. 24 (1965).

[30] 340 U.S. 367 (1951).

[31] Blau v. United States, 340 U.S. 159 (1950).

privileges, constitutionally-based or not, including the lawyer-client, clergyman-penitent, and doctor-patient privileges.[32]

It is difficult to see how the concepts of "intentional" and "known" may be integrated into the *Rogers* analysis, the logic of which permits the uncounseled witness to give up a valuable right without being aware until after the fact that he is doing so. One pleasantly disposed could term this "gee, you'll wish you hadn't said that" waiver. For example, traditional federal practice, with counterparts in many states, does not permit a witness to have his attorney present in the grand jury room while he is being interrogated. True, the witness may leave to consult his attorney in the anteroom, but as *Rogers* indicates, he may not know when to stop answering questions and find out whether he is in danger of a waiver.

There have been nibbles at the edges of the *Rogers* rule. At least one court has been willing to say that where a witness before the grand jury is a prospective defendant, he may have the right to counsel and to be informed of his fifth amendment privilege.[33]

Despite this hopeful sign, experience shows that witnesses summoned before grand juries — and, no doubt, other tribunals — are remarkably unaware of the nuances of testimonial privilege and the dangers of waiver. A great many witnesses for whom genuine self-incrimination problems exist testify at grand jury sessions uncounseled by lawyers of their own and unwarned by the prosecutorial staff serving the grand jury of the harm they may do themselves by venturing against a skilled lawyer whose objective position is adverse to their own.

B. Misconduct as Waiver

Allen reflects another approach to waiver. Allen, the Court held, had by his courtroom demeanor intentionally relinquished his known right to confront the witness against him. So far as the record reveals, there had been no statement by Allen that he wished not to be present. There had been no explicit statement that he had a constitutional right to be present which

---

[32] *See generally* Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F.R.D. 161 (1969), reprinted with the Reporter's Notes. Proposed Rule 5–11, 46 F.R.D. at 280, deals with waiver of testimonial privileges. The article dealing with privileges, Article V, is at 243–84.

[33] *See* Sheridan v. Garrison, 273 F. Supp. 673 (E.D. La. 1967), *rev'd on other grounds*, 415 F.2d 699 (5th Cir. 1969), *cert. denied*, 396 U.S. 1040 (1970); *cf.* United States v. Luxenberg, 374 F.2d 241, 246 (6th Cir. 1967); Jones v. United States, 342 F.2d 863, 871–74 (D.C. Cir. 1964) (concurring opinion of four of eleven sitting judges). *But see* United States v. Levinson, 405 F.2d 971 (6th Cir. 1968), *cert. denied*, 395 U.S. 958 (1969) (no right to counsel in room).

he was in danger of waiving, although there was warning that he would be excluded if he persisted in speaking out. If one considers the question as one of transactional analysis — or similar psychiatric whizbang — the scene resembled a game of "Now I've Got You, You Son of a Bitch." [34]

Allen was held to have "forfeited," by his conduct, the right to be present. The action of the court was little different in form from a civil contempt proceeding which robs a man of his liberty until he shall do what the tribunal has commanded, except in *Allen* the right lost was not that to move about, but the right to be present at one's trial. The question of waiver is thus different from that involved in asking a defendant if he wishes to plead guilty and to relinquish his right to a trial, or inquiring whether he truly wishes not to be represented by counsel. Since the waiver is not explicitly consensual, what insures that it is "knowing" and "intentional" in the *Johnson v. Zerbst* sense? The Court's opinion does not suggest a definitive answer. Instead, the Court converts waiver into a punitive sanction, but without setting down any new standards or procedures for its application. By seeing the problem as one of waiver, and attempting to force it into the mold of the consensual waiver cases of *Johnson v. Zerbst* and its progeny, the Court did little to explain how rights should be held lost nonconsensually and nothing to help us understand its present view of the *Johnson* test.

C. Consent at the Threshold

The cases which deal with consent to search illustrate another aspect of the problem of waiver. The archetypal search and seizure consent, involving a search for tangible evidence, is given at the threshold, after an officer asks whether he can come in and look around. Most courts accept such consent as voluntary, absent a demonstration that the party was overwhelmed by "authority." [35] The Court has not yet addressed itself to the question of whether the party consenting must be informed of his rights in the matter. Here again the *Johnson* standard is dishonored, and the shadow of consent taken for its substance.

Searches conducted with the permission of a third party — a friend, relative, landlord, or employer — raise even more complicated problems. Some cases rest a finding of effective waiver upon a property rights analysis, saying that the employer or homeowner, for example, can permit police entry to the property

[34] E. BERNE, GAMES PEOPLE PLAY 85–86 (1964).

[35] *See* Bumper v. North Carolina, 391 U.S. 543 (1968) (no valid consent where officer falsely asserted he had warrant); Judd v. United States, 190 F.2d 649 (D.C. Cir. 1951) (number of armed policemen may be inherently coercive).

because it is "his." [36] These cases often interweave questions of standing to object to a search with the question of consent. Thus, absent probable cause for the search, the police may still gain evidence against *A*, a guest in the house of *B*, in two ways: *B* might consent to the search directed at *A*; or, if the search initially were directed against *B*, *A* would lack standing to object to it.[37]

A second vicarious waiver analysis rests upon such arcane concepts of agency as "apparent authority" and "implied authority." If *A* delivers a bag containing marijuana to *B*, he obviously clothes *B* with the "power" (in a physical sense) to show the bag to any police officer who asks to see it. The question is whether *A*, in turning the bag over to *B*, should be regarded in law as having consented that *B* show it to the police, or as having "assumed the risk" that he would. Courts have had little difficulty in holding that *A* does assume the risk.[38]

Both the proprietary and agency rationales lack any intelligible account of the meaning of "consent." The legal consequences which should follow from a grant of power over one's goods and interests have bedeviled the writers about agency for decades.[39] But in the field of search and seizure, little attention has been paid to deciding when the law should honor the expectations of one who entrusts an object to another.

The situation becomes murkier when one expands his view to searches not for tangible objects but for words. The law of waiver under the *Johnson* standard would simply insist that the subject of the search be informed of his rights, and that his consent be truly voluntary. However, traditional waiver formulas become inapplicable to seizures of the spoken word. It has been held for some time that the fourth amendment protects the spoken word from unreasonable seizure, and that the eavesdropper is subject to the same or similar constraints as the policeman entering through the front door to look for counterfeit money, a murder weapon, or a nickel bag of the dread weed. *Katz v. United States*,[40] which held that a man's telephone conversation in a public booth was protected by the fourth amendment, made express the unspoken rationale of earlier search and seizure cases

[36] The Court has declined to adopt this theory in its furthest reach, however, and has said, for example, that a hotel employee may not authorize search of a guest's room, Stoner v. California, 376 U.S. 483 (1964), nor a landlord permit search of a tenant's house, Chapman v. United States, 365 U.S. 610 (1961).

[37] *See* Alderman v. United States, 394 U.S. 165, 171–74 (1969).

[38] *See, e.g.*, Frazier v. Cupp, 394 U.S. 731 (1969).

[39] *See, e.g.*, Corbin, *The "Authority" of an Agent — Definition*, 34 YALE L.J. 788 (1925).

[40] 389 U.S. 347 (1967).

involving the spoken word, and turned from an analysis of the proprietary rights allegedly invaded to consideration of the reasonable expectations of privacy defeated by the search. *Katz* held, in the context of electronic bugging, that the fourth amendment protects "what [a man] seeks to preserve as private, even in an area accessible to the public." [41] The emphasis is placed on the will of the actor.

Consider the case of a man whose best friend is engaged in reporting their every conversation to the police. Or suppose an informer wins the confidence of a political leader and lays the basis for the latter's prosecution for conspiracy to riot. In each of these cases, the statements which the informer reports were made with the expectation and desire that they would remain confidential.

In *Lopez v. United States*,[42] the Court held that an Internal Revenue Service agent who implied he was willing to accept a bribe permissibly recorded the taxpayer's offer of the money. In *Hoffa v. United States*,[43] the Court upheld the use of evidence provided by an informer who infiltrated the defense camp, though it appeared the informer was under considerable pressure to cooperate or be vigorously prosecuted for his own misdeeds.[44] The rationale for finding consent in cases like *Lopez* and *Hoffa* rests not upon an express waiver of fourth amendment rights, but upon a kind of "assumption of risk" that those to whom one speaks will tell all to the government. Such a risk has always been present and is reflected by the general rule that extrajudicial statements of an accused are admissible, qualified by *Miranda* [45] and the coerced confession cases with respect to custodial statements. But surprisingly little consideration has been given to the rationale for binding a speaker to accept these risks.

To say that when *A* speaks his mind to *B*, *C*, and *D* he appoints each one his "agent" to disclose the conversation to the police may be a pleasing conceptual characterization but hardly advances rational inquiry. The answer lies in analysis of the central meaning of *Katz*: in a mass society which requires the frequent exchange of objects and information, each person must

---

[41] *Id.* at 351.

[42] 373 U.S. 427 (1963).

[43] 385 U.S. 293 (1966).

[44] The Court may consider this issue anew in the 1970 Term in United States v. White, 394 U.S. 957, *granting cert. to* 405 F.2d 838 (7th Cir. 1969). White's conversations with a government informer were surreptitiously recorded by another government agent. The Seventh Circuit, en banc, held that the informer's consent did not bind White.

[45] Miranda v. Arizona, 384 U.S. 436 (1966).

have some means, through acts of will, to protect his privacy from warrantless intrusion.

In *Frazier v. Cupp*,[46] the Supreme Court held that one to whom a duffel bag had been given by the petitioner had the power to consent to its search. As in *Lopez* and *Hoffa*, the Court spoke of the petitioner having "assumed the risk" that the consent would be given, indicating that the petitioner had no reasonable expectation that his cousin, to whom he gave the bag, would resist a police request to search. The Court also said that the cousin had "authority" to permit the search, and brushed aside as "metaphysical subtleties" the petitioner's argument that he gave his cousin only the authority to use some compartments of the duffel bag. Did the Court mean to hold that one who entrusts a tangible item to another cannot effectively bind that other to resist police intrusion which has no basis in a warrant or probable cause? If so, then how can it reconcile the holding with that in *Stoner v. California*,[47] which refused to permit a hotel room search consented to by the hotel clerk? Both *Stoner* and *Frazier* involved an undertaking between two persons concerning the privacy of, in one case, a place and, in the other, an object.

The difference, perhaps, is in the workability of a rule which would assimilate *Frazier* to *Stoner*. A policeman seeing a man in possession of property may not be expected to inquire about the interests of a third party, but the policeman can be expected to know that a hotel guest expects his room not to be entered without his permission.

But this distinction ignores the implication of *Katz*, which is that the will of the actual victim of the search is the matter of primary concern. *Frazier* casts doubt on this implication by saying that one can confer on another the authority to consent to search without intending to do so and despite efforts to avoid doing so. Thus, the Court has defined certain risks which one must assume, regardless of intent, in conveying things or words to others. To have so quickly ended the effort begun in *Katz* to let citizens define for themselves a zone of privacy is regrettable, and it does violence to the teaching of *Johnson v. Zerbst* as well, if that case is considered to have the general application which the Court's subsequent citation of it gives reason to hope.

However, if courts do make a list of risks, the list should be based on more than law enforcement convenience. Specifically, we must realize we are saying that by doing certain acts men will be taken to have agreed that their fourth amendment rights

---

[46] 394 U.S. 731, 740 (1969).
[47] 376 U.S. 483 (1964).

are to be impaired. What kinds of acts should have this significance?

May the government approach my best friend and coerce him into revealing what I have told him? Must I, in speaking with friends, take the risk of this sort of governmental arm-twisting? As *Garrity v. New Jersey*[48] held that a police officer may not be coerced into self-incrimination by threats that otherwise he will be fired, likewise in the fourth amendment field one should not be subjected to the risk of similar governmental coercion of his "agents."

What should be the effect of the presence of a third party where the reasonable expectation of the primary communicators is that of confidentiality? When a lawyer and client, or a doctor and patient, are speaking and a third person is present to aid the client's interest, his presence should not act to destroy the privilege.[49] Similarly, members of political organizations should not be forced to risk disclosure of their secret party meetings. Such a risk is sure to chill rights of association and free speech.[50]

In short, if one considers the problem of consent as one of tacit assumption of risk, it is imperative that the doctrine be limited so as to protect important confidential relationships and to minimize the constant fear of unasked governmental intrusion. Justice Jackson put it well: [51]

> Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes,

---

[48] 385 U.S. 493 (1967). *Garrity* is, of course, a fifth amendment and not a fourth amendment case. However, for purposes of the present discussion, this distinction has no operative significance.

[49] To the extent that *Hoffa* suggests a contrary view, the case should be carefully re-examined. The proposed Federal Rules of Evidence, *supra* note 32, go far toward protecting the attorney-client privilege. 46 F.R.D. at 249–57. The draftsmen, recognizing that in the practice of law and in the consultation of a lawyer, secretaries, accountants, and others may be necessary to permit the lawyer to serve the client, have given the client protection against any of these persons wagging his tongue. When one consults a lawyer, he has a legitimate expectation that what he says will be kept quiet, and it is difficult to square this expectation with the holdings that seem to say it can be undone by the unilateral action of one party to the conversation.

[50] *See generally* Askin, *Police Dossiers and Emerging Principles of First Amendment Adjudication*, 22 STAN. L. REV. 196, 200–04 (1970).

[51] Brinegar v. United States, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

> persons and possessions are subject at any hour to unheralded search and seizure by the police.

In the fourth amendment field, a primary goal should be the cultivation of the *Katz* reliance upon the power of each person to create a zone of privacy for himself. Failing that, one has need of a reasoned set of principles of assumption of risk which both protect and help create reasonable expectations about privacy.

D. Waiver by Omission

If a defense attorney fails to cross-examine a witness, neglects to raise and preserve a point, or allows the time for appeal to pass, he may be waiving constitutional rights of his client. The possibility of waiver by omission raises two questions. First, which decisions are left to counsel and which must be made by defendant? Second, what standards are used in determining whether a lawyer's inaction is "well within the range of competence required of attorneys representing defendants in criminal cases"? [52]

When a man retains a lawyer, he delegates control over a portion of his life to one in whom he reposes confidence.[53] This notion of the attorney as an "agent" [54] goes back to the Greek practice of employing a speech writer when a litigant had to address the Athenian assembly to obtain a legal judgment. The role of the lawyer remained undeveloped in eras when the law itself was less complex. Indeed, some of the colonies prohibited legal representation for money, convinced that lawyers made complex that which was simple and poisoned the well of justice through avarice, delay, and pettifoggery.[55] But to each social order, including our own, there comes eventually the notion of the lawyer as an agent conducting litigation in behalf of his client. This rise of a legal "profession" is saluted by those who view a legal system as a set of complex rules which reflect the basic power interests existing at a given moment. But though the creation of a legal profession may improve professional standards and provide a body of experts capable of explaining the intricate workings of the law,[56] it carries in its train new problems. The

---

[52] Parker v. North Carolina, 397 U.S. 790, 797–98 (1970).

[53] *See* authorities cited in Comment, *supra* note 27, at 1278–81.

[54] This concept is discussed in R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES (1953). *See also* A. CHROUST, THE RISE OF THE LEGAL PROFESSION IN AMERICA (1965).

[55] R. POUND, *supra* note 54, at 135–44; Loyd, *The Development of Set-Off*, 64 U. PA. L. REV. 541, 555 & n.58 (1916).

[56] This thesis is enthusiastically embraced in R. POUND, *supra* note 54.

concept of representation becomes the vehicle for mystifying the law and rendering it incomprehensible to the defendant.

If a man stands in open court and intelligently forfeits rights and privileges, it is not unfair to hold him solely responsible for the consequences. But if the very complexity of the law forces a man to speak through an agent, the ability of the agent to waive the rights of his principal becomes relevant. In *Fay v. Noia*,[57] the Court's majority stated that the considered choice of the litigant was necessary to effect a waiver of the right to seek federal habeas corpus relief. The issue there was Noia's failure to appeal his state criminal conviction and present his constitutional claims in the state courts. The Supreme Court recognized a limited discretion in a federal judge to deny habeas corpus relief if the applicant's inaction represented a deliberate attempt to bypass state procedures. However, it emphasized that the decision to forgo state remedies could be made by a defendant only after consultation with competent counsel and that a decision by counsel alone would not necessarily bar relief.[58]

But in *Henry v. Mississippi*,[59] the Court indicated that an intentional failure by counsel to object to the admission of illegally seized evidence would have been an effective bar to federal review. In dictum, the Court equated an intentional failure to object with a deliberate bypassing of state remedies. If such a trial strategy is unsuccessful, counsel has waived his client's right to pursue his constitutional claim in either the state or federal courts.[60]

It is difficult to reconcile the apparent inconsistency between the *Fay* insistence upon the considered choice of the litigant and the *Henry* willingness to accept the lawyer's decision as binding the client. The Ninth Circuit Court of Appeals despaired of reconciling the two statements and held that *Henry* limited *Fay*.[61] One possible distinction is that *Fay* involved "a relinquishment . . . as fundamental as a plea of guilty," while *Henry* concerned "the waiver of the right to object to introduction of evidence . . . normally within the discretion of the attorney." [62] Both rights, however, are of constitutional dimension. Furthermore, challenging an unlawful search may involve pretrial motions and

---

[57] 372 U.S. 391 (1963); *see Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1103–12 (1970).

[58] Fay v. Noia, 372 U.S. 391, 438–40 (1963).

[59] 379 U.S. 443 (1965).

[60] *Id.* at 451–53.

[61] Nelson v. California, 346 F.2d 73, 81 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965).

[62] Comment, *supra* note 27, at 1274.

hearings as well as objections to the introduction of evidence.[63] Would one say that the decision to attack an unlawful search through a pretrial procedure — in effect, a decision on whether to forgo a possible stage of review — is "basic" and requires personal waiver, while a decision to object or not during trial may be made by counsel? It is hard to justify a distinction based merely on timing.

Fay v. Noia suggests, as does *Henry*, that a lawyer is permitted to make relatively minor and understandable mistakes on behalf of his client, but not major and inexcusable ones. The question of agency will thus turn on an assessment of the significance of a procedural right to the proper defense of an accused. Interpreted in this way, *Fay* makes the issue of allocation of decisions between attorney and client nearly coextensive with that of competence of counsel. That is, minor mistakes which do not sacrifice important rights are excusable and will bind the defendant, but gross legal errors which threaten fundamental rights and raise doubts as to the qualifications of defense counsel can be disavowed by an accused. Thus, competence should be based on an analysis of the step-by-step performance of counsel in the course of representing his client; it should not depend on whether counsel has met some general standard of skill.

The *Henry* Court did say cryptically that "where circumstances are exceptional," unsuccessful trial strategy of counsel will not preclude an accused from raising a constitutional objection on appeal. But if the Court's statement were intended to have germinal significance, it has not yet borne fruit. This is unfortunate since many lawyers representing criminal defendants are not "competent" in any sense of the term. The Court's statement in *Parker* that the petitioner had representation "well within the range" of acceptable competence does not, however, illuminate the meaning of the term. Unfortunately, the statement may imply that "competence" may be assessed generally and mechanically rather than specifically and analytically. A "competent" lawyer, the Court may be saying, is a member of the bar who takes some time to talk with his client and who gives the outward appearance of attentiveness to his client's problems.

It is not so difficult, however, to give an outward appearance of competence. The litany of guilty pleas in any local criminal court is revealing. "Well, Your Honor," the lawyer's ritual though uninformative speech begins, "at this time the defendant would like to withdraw his plea of not guilty and enter

[63] *See, e.g.*, FED. R. CRIM. P. 41(e), stating the federal preference for a pretrial motion to suppress illegally seized evidence. *See also* Battle v. United States, 345 F.2d 438 (D.C. Cir. 1965).

a plea of guilty to petit larceny. I have discussed this matter fully with the defendant and the prosecuting attorney and the defendant has decided that this course is in his best interest. I have fully informed him of all his rights, and this is something he really wants to do." If such a speech even presumptively puts all lawyers within the realm of competence, we will have gone little beyond the District of Columbia Circuit's old statement that "the term 'effective' has been used by the Supreme Court to describe a procedural requirement, as contrasted with a standard of skill." [64]

If the guarantee of effective representation requires only the outward appearance of justice, few claims of ineffective assistance are likely to prevail. Furthermore, since the decisions in *McMann* and *Parker* were based on meager records indeed, the Court may be saying that counsel's misadvice must appear on the record. Such a standard would insulate from scrutiny the often crucial advice given over the telephone, in the halls and through the bars of the lockup, and would introduce an irrational distinction between those rights which a defendant forgoes in court on the record and those which he gives up because of cajolery and counsel outside the judge's presence. To make real the *Johnson* promise that no right is lost unless the loser knows it, we need a definition of waiver which identifies on the record the loss to be suffered and ensures the defendant wants to suffer it.

E. Consent in the Context of Guilty Pleas

The Court in the guilty plea cases seems to assume that the decisions of defendants are the free and voluntary acts of informed individuals. This nineteenth-century contracts law notion of consent has proven inadequate in the field of its provenance, but surprisingly few of its logical and empirical faults have been noted in the discussions of waiver in the criminal law. Legislatures and civil courts have long since recognized that the concept of the individual as a free agent is irreconcilable with the realities of American commercial life. They have developed compensating doctrines in the field of consumer law where grossly one-sided agreements are often extracted from ill-informed purchasers with little bargaining power. Courts invalidate or closely scrutinize "contracts of adhesion," emphasizing the need for "actual" consent. They note that when all sellers or lenders use the same or similar printed forms, the purchaser or borrower is

[64] Mitchell v. United States, 259 F.2d 787, 790 (D.C. Cir.), *cert. denied*, 358 U.S. 850 (1958).

without a meaningful choice. They attempt to discover whether the consumer actually understood the bargain he was making or merely signed a complex printed form which he assumed coincided with the oral explanation of the seller.[65]

Contrast the attitude of the civil courts with that of the criminal courts. Judges who would not hesitate to condemn a furniture dealer who preyed on the ignorance of his customers and exploited a superior bargaining position will routinely approve the plea bargain that results from negotiations between the state and an uninformed, powerless defendant. The contrast is less obvious in Supreme Court decisions since there is no body of federal commercial law. Nevertheless, the Court's attitude toward consent in the context of plea bargaining could seriously weaken the standard of *Johnson v. Zerbst.*

When a defendant pleads guilty, he waives the right to a jury trial and the privilege against self-incrimination. The judge must ensure that the accused knows he is forfeiting these rights and that he is doing so without coercion or unfair inducement.[66] In pleading guilty the defendant may also be forgoing a number of procedural rights which might lead to acquittal or dismissal if his case went to trial. He may be losing an opportunity to challenge an unlawful search or a coerced confession.[67] He may be giving up the chance to attack an insufficient indictment[68] or the composition of a grand jury.[69] He may be waiving the right to insist that the government produce internal documents and reports regarding the investigation that led to his indictment.[70]

Justice White, the Court's spokesman in the guilty plea cases, pays little attention to this aspect of the guilty plea process. Rather, the rhetoric of his opinions is laden with references to "admissions of guilt" and admissions that the defendant committed "the crime charged."[71] He appears to argue that once a man has admitted his guilt, consideration of the procedural errors which may have attended commencement of his prosecution becomes much less important. This reliance upon the "admission of guilt" as a universal solvent for procedural error is not the only basis of Justice White's reasoning. By his explicit refer-

---

[65] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965); Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 204–06 (2d Cir. 1955) (Frank, J., dissenting).

[66] Boykin v. Alabama, 395 U.S. 238 (1969); FED. R. CRIM. P. 11.

[67] *See, e.g.*, Parker v. North Carolina, 397 U.S. 790 (1970).

[68] *See, e.g.*, Russell v. United States, 369 U.S. 749 (1962).

[69] *See, e.g.*, Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966).

[70] *See, e.g.*, Alderman v. United States, 394 U.S. 165 (1969); United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944).

[71] *E.g.*, Parker v. North Carolina, 397 U.S. 790, 797 (1970).

ence in *Parker* to the assertedly considered choice of counsel to advise a plea of guilty, and by his references in *McMann* and *Brady* to the question of waiving procedural rights, he appears to regard a plea of guilty as a sub silentio, but effective, waiver of a full catalogue of such rights. Both rationales not only are inconsistent with the language of *Johnson v. Zerbst*, but also undermine the Court's work in establishing a set of procedural guarantees for a man ensnared in the criminal process.

Reliance upon an admission of guilt to sweep aside procedural objections such as those presented by the defendants in *McMann*, *Parker*, and *Brady* is difficult to justify. Such an approach seriously weakens the deterrent effect of exclusionary rules and other procedural protections since police and prosecutors need not worry about their conduct in the seventy to ninety percent of cases where judgment is entered on a plea of guilty.[72] This consequence is inconsistent with the principle that adjudications of guilt are reached in conformity with procedural guarantees of fairness to both the guilty and the innocent. Our system demands that guilt must be established before a fairly-selected jury and impartial judge, on evidence lawfully obtained, after notice of charges, and with a meaningful opportunity to be heard. Perhaps this list leaves out a right or two, but the point is clear: we often depart from an insistence that the criminal process determine what happened in a real, external world, and we do so in the service of a number of social goals including minimizing the possibility of convicting those who are in fact innocent, deterring official misconduct, and advancing a number of other auxiliary policies reflected in rules of evidence and in other procedural rules. These guaranteed rights are at least as essential to the integrity of the criminal process as its function of convicting the guilty. In fact, they should be superior to any interest in a higher conviction rate, given the intent and language of the portions of the Constitution which deal with the criminal process.[73]

Moreover, the notion that a guilty plea cures prior procedural

---

[72] *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 & n.1 (1970). Judge Bazelon has explored the subject of plea bargaining with characteristic thoroughness in Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969). Many of my own thoughts on the subject were the product of discussions with Robert Weinberg and Barbara A. Babcock (now Barbara A. Bowman). *See* Weinberg & Babcock, Book Review, 76 YALE L.J. 612 (1967) (reviewing D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966)). Obviously, the scope of the present treatment of this subject is sharply limited, and the many other issues raised in the foregoing works are worthy of serious attention.

[73] *See* Sutherland, *Crime and Confession*, 79 HARV. L. REV. 21 (1965).

defects creates an arbitrary distinction since the decision to plead guilty is not based solely on the prospects for excluding evidence or challenging the indictment process. The decision may turn upon such factors as the defendant's insistence upon trial, the willingness of his attorney to press the matter to litigation, and the entire network of irrational pressures which experience shows dominate the decisions of a criminal defendant from the moment he enters the criminal process.

Finally, one can not always ascribe to a defendant who pleads guilty the intention to forgo a set of procedural rights far larger than those to which explicit reference is made at the time of plea. The Court's reasoning assumes that counsel in *McMann* knew that he could challenge not only the confession coerced from his client but also the New York procedure for testing the voluntariness of that confession. It assumes that Brady's and Parker's lawyers were aware of the possible unconstitutionality of a system in which the accused would risk death by going to trial. Supposedly, after carefully weighing the chances of successful attack against the risks of more severe punishment, the attorneys advised their clients to plead guilty. The assent of the client may not even be necessary, since so much emphasis is placed on the role of counsel relative to that of the client. Although the record does not indicate what factors influenced the decisions of the attorneys in *McMann*, *Parker*, and *Brady*, observation of the day-to-day operation of the criminal courts suggests that the supposition underlying the Court's opinion is erroneous. Too many criminal attorneys are not skilled legal practitioners, well versed in the law relating to confessions, searches, and seizures, who carefully assess the strength of the prosecutor's case before recommending a course of action to their clients. Assuming that a decision to plead guilty is always, or even usually, based on the advice of a diligent and informed counsel emasculates the concepts of "known right" and "intentional relinquishment."

A meaningful definition of "known right" would at least require that a defendant be made aware of the rights he impliedly waives by pleading guilty. The Court has been careful to ensure that an accused knows his rights during the custodial interrogation stage of the criminal process.[74] He must be advised of his right to remain silent, his right to have an attorney present during interrogation, and his right to appointed counsel if he is indigent. Furthermore, the Court has created a strong presumption against the ability of defendants to waive these rights.[75] Contrast this scrupulous regard for the rights of the accused

[74] *See* Miranda v. Arizona, 384 U.S. 436 (1966).

[75] *Id. See also* Carnley v. Cochran, 369 U.S. 506 (1962).

during the early stages of the criminal process with the Court's virtual abdication of responsibility at the pleading stage, where the defendant need only be told that he has a right to a jury trial.

There is a second aspect to the "known right" problem — the difficulty of knowing what you are getting as a defendant who pleads guilty. Every well negotiated guilty plea is based on the parties' assessments of the chances for success of particular legal and factual defenses. The Court in *McMann*, *Parker*, and *Brady* draws the curtain over this process and leaves the bargaining to the lawyers. The litany of the plea may include only the defendant's statement that he is voluntarily waiving his rights to a trial. In shielding the plea-taking process from inquiry, the Court effectively forecloses appellate judicial intervention in all but a handful of the seventy to ninety percent of criminal cases which end in a plea of guilty. In this way the plea is in danger of becoming a mere ritual which sanctifies a criminal process that dispenses "justice" with only pro forma participation from an ignorant and mystified defendant.

If the *Johnson* concept of waiver is to have any real meaning in the plea bargaining context, lawyers and judges must ensure that decisions to plead guilty are made by defendants who are fully aware of the rights and privileges they forgo by not insisting on a trial. At a minimum, a defendant should be asked by the court whether he knows the elements of the offense with which he is charged and understands what the government would have to prove under the indictment. He should be asked how many conferences he has had with his lawyer and how long each conference lasted. He should be asked whether he has been shown a copy of the police report and any other prosecution evidence which might indicate the strength of the case against him. He should be asked if he knows what the trial would involve in terms of procedural rights, and he should be given a brief explanation of what those rights are and how they would operate. The judge should then question the lawyer carefully about the factors involved in pleading his client guilty, including the availability of legal defenses such as unlawful search, coerced confession, and sufficiency of the indictment. The judge must be an active participant in the process of informing the defendant, ensuring that the lawyer and defendant have taken current judicial decisions into account and weighed the possibility of their application. The defense and prosecuting attorneys should be asked to reveal the nature and extent of their conversations concerning the case, including their relative assessments of the legal and factual problems and the reasons they were led to agree on a plea to a lesser charge. If there have been judicial or prosecutorial assurances of a particular sentencing consideration, based for example upon

a pre-plea probation report, then these should be spread on the record. If there have in fact been no such assurances, then this fact should be made of record.

Throughout the process, the defendant should be encouraged to ask questions in order to ensure that he understands and ratifies his lawyer's decisions. If at any point it appears that the lawyer has not given adequate consideration to a possible defense, or that he has not sufficiently demystified the legal issues, the plea process should be terminated, subject to renewal, with the assurance that all statements by the defendant are inadmissible in a subsequent trial. Similarly, if it appears that an attorney has completely overborne the will of his client, the process should be halted.[76]

One element which the trial court should surely not insist upon is the defendant's assertion that he *is* guilty, as opposed to a statement that he regards the potential evidence for and against him pessimistically enough to accept the consequences of an adjudication of guilt.[77] The Court's failure to insist in the sphere of guilty pleas upon the processual and structural character of a determination of guilt — an insistence which runs through the criminal process and is reflected in many rules which frustrate the search for real world truth — defies a logical explanation.

* * *

The failure of this Term's waiver decisions to continue the work begun in *Miranda*, to seek an understanding of the meaning

---

[76] The judge may also be faced with the problem of defendants who plead guilty because of legal consequences which can be avoided by other means. For example, a jailed defendant, who would demand a trial were he not incarcerated, may plead guilty in return for a sentence equalling "time served." Clearly, the judge should refuse to accept the plea and order the defendant bailed instead. The fact that a judge would be willing to free the accused in return for a plea of guilty indicates that there is no reason to detain him pending trial. *See* Weinberg & Babcock, Book Review, *supra* note 72.

[77] *See* McCoy v. United States, 363 F.2d 306, 308–09 (D.C. Cir. 1966). Rule 11 of the Federal Rules of Criminal Procedure requires the trial judge taking a plea to satisfy himself that there is a factual basis for it. However, this requirement, even if it is also one of due process, *see* Boykin v. Alabama, 395 U.S. 238 (1969), does not contradict what is said in the text. The trial judge's inquiry presumably looks to the evidence which the prosecutor has in his possession, and the proof the defendant would be able to marshal in opposition. Here, as in the trial itself, the concern is not so much "did certain conduct take place in the external world?", but "is the combination of testimony, admissible documents and objects, and judicially-noticed matters that can be produced sufficient to satisfy a trier that a certain degree of probability exists that certain facts occurred in the real world?" *See generally* J. MICHAEL & M. ADLER, THE NATURE OF JUDICIAL PROOF (1931). Much of the confusion could be eliminated from discussions of the "admission of guilt" aspect of guilty pleas by a much more liberal policy of accepting pleas of nolo contendere.

of consent, and to integrate the concept of waiver with the basic premises of the system of criminal justice, is regrettable. These decisions ignore the real world in which criminal defendants are handled, thus making it easier for the system of criminal justice to ignore its shortcomings and to reduce the pressure generated by dockets crowded with the cases of alienated, dispossessed, and desperate men and women.

When rights are deemed waived through inadvertence, ignorance, attribution to conduct of assertive significance it will not reasonably bear, and emphasis on the actions of surrogates and agents, the rules of criminal procedure have lost most of their meaning. To be sure, it may prove impossible for courts to determine whether a surrender of rights is truly "voluntary." The bourgeois archetype, the free man, is gone from amongst us in jurisprudence as well as economic relations.[78] But we can ensure that decisions are not coerced by pressures which the criminal process itself creates or which result from discriminations within the reach of established constitutional protections. That far we should surely go.

III. Have Our Illusions a Future?

Learned Hand once said, "After now some dozen years of experience I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death." [79] Indeed, an understanding of the workings of criminal justice is incomplete without a notion of its fearfulness. The man who is facing trial for a serious crime may be little comforted by the reminder that he is entitled to the due process his peers customarily receive. Instead, he may react like Thomas More upon discovering that the king had commuted his sentence of hanging, drawing, and quartering to a mere beheading: "God forbid the king should use any more such mercy to any of my friends, and God bless all my posterity from such pardons." [80]

The vignette illustrates a fundamental division of our day—the conflict of perspective. The perspective of the judicial system, with its formal hierarchy of rights and remedies, is not that of the individual defendant subject to the very real lash of the system's sanctions. But it is the former viewpoint, that of the illusory Palladium, that pervades the recent decisions of the

---

[78] *See generally* A. Schaff, A Philosophy of Man (1963).

[79] Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 Ass'n of the Bar of the City of New York Lectures on Legal Topics 87, 105 (1926).

[80] The Trial of Sir Thomas More, [1809] 1 Howell's State Trials 385, 394 (1535).

Court when it speaks against disruption and impropriety,[81] frames metaphysical concepts of waiver, and summons us to obedience at penalty of contempt.[82] The rules of procedure have really become Platonic forms transcending the reality of the everyday world.

Let us, however, lower our focus for a moment to the man caught up in the system. He seldom either knows or cares about the subtleties of criminal procedure or elevated constitutional ideals. But he knows what in fact the criminal process is doing, or can do, to him and his family. And, as a heightened sense of injustice steals across the face of America and finds devotees in the inner city, the factory, and the campus, he is often conscious of what that process is doing to his community, his class, or his race as well. It palters in a double sense, therefore, to admonish him to observe the arcane rituals of the courtroom and to entrust his future to the remote world of judges and lawyers — only to discover at the end of the process that his rights have mysteriously evanesced through "waiver." As he becomes less patient and more aware of the gulf between the real world and the imaginary city of procedural rights bespoken by Justice Black, there will doubtless be more assertive behavior in court. As the government continues to prosecute dissentient political conduct as criminal,

[81] The problem of courtroom disruption, while the subject of renewed interest by the American Bar Association (which held two widely publicized panel discussions on the subject at its convention in St. Louis in August, 1970) and the American College of Trial Lawyers (*see* The American College of Trial Lawyers, Report and Recommendations on Disruption of the Judicial Process (1970)), is certainly not novel. One is struck, as he leafs through records of trials in England and America, by the frequency with which defendants and lawyers cast aside formalism and spoke their minds about the process in which they were engaged. *See, e.g.*, The Trial of William Penn and William Mead, [1816] 6 Howell's State Trials 951, 955–61 (1670); The Trial of George Gordon, [1814] 21 Howell's State Trials 485 (1781). The theory was apparently that the trial was not merely the business of the lawyers and the judge, but also of the defendant, the jury, and even the public at large. Some residue of this sentiment informs the sixth amendment right to public trial. *See* 6 J. WIGMORE, EVIDENCE § 1834 (3d ed. 1940).

[82] Both the procedural and substantive aspects of the contempt power merit a careful analysis. The rights to notice, a hearing, a jury trial, and impartial tribunal are all in jeopardy under certain contempt procedures presently available. *See, e.g.*, Harris v. United States, 382 U.S. 162 (1965).

The substance of the contempt power must also be reexamined, as it is the last common law crime in our law, giving the judge the power to make as well as enforce detailed rules of conduct. *In re* McConnell, 370 U.S. 230 (1962), suggests some limitations on the power. But more thought must be given to the problem of warning a potential contemner of the conduct that is expected of him and the sanctions for disobedience. *See* Illinois v. Allen, 397 U.S. 337, 350 (1970) (Brennan, J., concurring):

> Of course, no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior.

the proportion of such defendants who know of the promise of that city will increase. As more young lawyers despair of integrating their sense of right and wrong into the lifestyle of the corporate practitioner, they will venture into the criminal courts.

If there is hope for change, it lies in a sense of injustice, informed by past Court decisions and filtered through the perspective of the individual defendant. First, we should expect to see more activity by defendants who demand to understand the proceedings and to be informed of the rule or rules at issue. They will wish to speak for themselves and not entirely through counsel, and their language will be the vigorous speech of the streets, not the accepted courtroom litany. Lawyers, troubled by losing the control they had always assumed to be an essential ingredient of the adversary system, will have to learn that their detachment is now suspect, serving too often to remove their performance from the scrutiny of their clients and, with the recent waiver decisions, to insulate it from judicial review. Rituals will bend.

Second, the new perspective will have practical implications for jury procedures. Defendants may ask that juries be permitted to participate in the questioning of witnesses, clarifying any lingering uncertainties or doubts. This practice has honorable antecedents in older English and American trials [83] but has fallen out of use in American jurisdictions. The "men of the country" become increasingly important as the system itself becomes suspect, for they are presumably less insulated from the real world than the forbidding men in black robes and business suits and presumably less tempted to manipulate clients and concepts for their own benefit. A judgment by the community, moreover, seems inherently more trustworthy than one rendered in a contest of champions. With regard to the role of both defendant and jury, then, there is needed an assault on the old procedural forms, to see whether the courtroom can accommodate the sensibilities of those who are most profoundly affected by what goes on there.

This procedural assault is especially important because of the seriousness of the substantive issues that are presently being discussed. Indeed, at the root of the harsh debate over *Illinois v. Allen* and related cases is a factual dispute about the true nature of our criminal process. If one accepts Justice Black's view that American courts today are palladiums and citadels, then to preserve and protect them in their present condition is

[83] Juror participation in trials, to the extent of asking questions and raising issues, is evident in The Trial of George Gordon, [1814] 21 Howell's State Trials 485, 512–15 (1781); *see* The Trial of William Penn and William Mead, [1816] 6 Howell's State Trials 951, 961–62 (1670).

logically a primary task. But if one believes that the courts in their day-to-day operation are the means by which a disproportionate number of the nation's poor and powerless are dealt with arbitrarily, then one's primary insistence will be upon fairness and respect for personal rights. And if one further believes that the judicial system in the hands of a hostile government is used as a weapon to repress dissent, then his anger and frustration will be channeled into dramatizing this fact and attempting to cast aside procedural formalisms which mask injustice and make it easier to inflict.

From commanders of power both public and private we hear more and more stridently the claim that order must have primacy even over justice; by such an assertion is meant that the speaker prefers that the existing constellation of political and economic power be preserved. From alienated and dispossessed there comes an increasing insistence that the formal guarantees of fairness are primary, and there is a growing willingness to insist upon these guarantees militantly and even disruptively. In such a time, to speak of accommodation of order to justice becomes more and more beside the point, for in the real world they are more and more perceived in counterposition. The causes of and prospects for this increasing tension must be debated elsewhere. But it should be clear that our discussion of the criminal process treads close upon the fundamental social issues of our time. To have neglected this truth, through abstraction, heedlessness, or forejudgment, should be the occasion of regret.