THE RIGHT TO DEFEND PRO SE IN CRIMINAL PROCEEDINGS

I. INTRODUCTION

The right to counsel is a modern-day reality in the prosecution of serious crimes.[1] Nevertheless, a small but visible minority[2] of criminal defendants asks to conduct its own defense. Whatever motivates a criminal defendant to seek to act *pro se*,[3] the issue of voluntary self-

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1. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Supreme Court held that the right to counsel extends to all cases in which the defendant faces possible incarceration. *See* note 100 *infra*.

2. Although precise data on the number of *pro se* defendants is not available, it appears that very few criminal defendants choose to represent themselves. *See* 1 L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 89 (1965).

A Minnesota survey revealed that attempted waiver of counsel by indigents was rare. Most estimates were that less than three percent of the defendants attempted to defend *pro se*, and this figure was reduced after the trial judge fully explained to the defendants the importance of defense counsel. *See* Kamisar & Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 MINN. L. REV. 1, 36-37 (1963).

Much higher percentages of waiver of counsel requests, however, have been reported from some federal district courts. *See* Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 584 (1963).

3. *Pro se* means "for himself." Another term, *in propria persona*, meaning "in one's own proper person," is often used interchangeably with *pro se*.

Different reasons have been offered to explain why a defendant would want to defend *pro se*. One reason recently suggested is that of political motivation. *See* note 4 *infra*. Several other reasons have been suggested. The defendant may believe that he can do a better job than counsel. *See, e.g.*, Burstein v. United States, 178 F.2d 665 (9th Cir. 1950). Sometimes the defendant may want to plead guilty to "get it over with." *See* W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 204 (1955) [hereinafter cited as BEANEY]. *See also* Moore v. Michigan, 355 U.S. 155 (1957); note 100 *infra*. The defendant also may believe that by defending *pro se* he will, if convicted, receive a lighter sentence, "a hope which has often been planted by the district attorney to save the time and the expense of trial." BEANEY 204. Other defendants may have a blind faith in their own innocence and in the infallibility of the judicial system. *See* Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE U.L. REV. 245, 255 (1964). A defendant may regard a *pro se* defense as a means to invoke the jury's or the court's sympathy. *See, e.g.*, Commonwealth v. Helwig, 184 Pa. Super. 370, 378, 134 A.2d 694, 698 (1957). For a general discussion of the tactical advantages of a *pro se* defense, see Comment, *Self-Representation in Criminal Trials: The Dilemma of the* Pro Se *Defendant*, 59 CALIF. L. REV. 1479, 1504-07 (1971) [hereinafter cited as *Self-Representation*]. Finally, it has even been suggested

representation in criminal trials has been presented often to American courts.[4]

The right[5] of a criminal defendant to defend *pro se* at trial has strong historical antecedents in nations with common law systems.[6] The right has been described as "absolute and primary,"[7] "basic and fundamental,"[8] and "inherent."[9] Writers and courts disagree, however, whether the right is protected by the United States Constitution.[10]

In the federal courts, a criminal defendant has an express statutory right to defend *pro se*.[11] While the existence of a statutory right does

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that "Perry Mason" and "Owen Marshall" have created a "TV syndrome." *See* Garcia, *Defense* Pro Se, 23 U. MIAMI L. REV. 551, 552 (1969).

4. In recent years the issue has arisen frequently in so-called "political" trials, prime examples of which are the prosecutions of Angela Davis and Bobby Seale. *See* Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969), *rev'd on other grounds*, 461 F.2d 345 (7th Cir. 1972); People v. Davis, No. 3744 (Cal. Super. Ct., Marin County, June 4, 1972), *cited in Self-Representation* 1480 n.6, in which a co-defendant requested to defend *pro se*; defendant Davis was allowed to participate as co-counsel, *see* note 53 *infra*. *See also* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972) (appeal by seven of the so-called "D.C. Nine"). For a discussion of the *pro se* right as colored by political considerations, see *Self-Representation* 1502-04.

5. Some courts have used the term "*pro se* right" without holding that the "right" is founded on any constitutional or statutory provision. *See, e.g.*, People v. Sharp, 7 Cal. 3d 448, 461, 499 P.2d 489, 497, 103 Cal. Rptr. 233, 241 (1972). Since many courts have adopted this terminology, it will be used in this Note with the understanding that the term "*pro se* right" does not assume that the legal ability to defend *pro se* necessarily has a constitutional or statutory basis.

6. In thirteenth-century England, for example, the judicial procedure "required of a litigant that he should appear before the court in his own person and conduct his own cause in his own words." 1 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH COMMON LAW 211 (2d ed. 1899).

In the United States, the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 92, provided "that in all the courts of the United States, the parties may plead and manage their own causes personally . . . ."

Thus the court in United States v. Davis, 260 F. Supp. 1009, 1018 (E.D. Tenn.), *aff'd*, 365 F.2d 251 (6th Cir. 1966), noted that the *pro se* right has "long been recognized."

7. United States v. Plattner, 330 F.2d 271, 274 (2d Cir. 1964).

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

9. People v. Sinko, 21 Ill. 2d 23, 25, 171 N.E.2d 9, 10 (1960).

10. *See, e.g.*, Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175 (1970) [hereinafter cited as Grano]; Note, People v. Sharp*: Death Knell for* Pro Se *Representation in Criminal Trials in California?*, 24 HASTINGS L.J. 431 (1973); *Self-Representation*; notes 25-27 *infra* and accompanying text.

11. "In all courts of the United States the parties may plead and conduct their own causes personally or by counsel . . . ." 28 U.S.C. § 1654 (1970). *See also*

not render moot any inquiry into the constitutional status of the *pro se* right,[12] it often allows a federal court to avoid a final resolution of the constitutional question.[13]

The constitutions of thirty-six states appear to guarantee the right of criminal defendants to proceed *pro se*.[14] In the recent case of *People v. Sharp*,[15] however, the California Supreme Court construed the language of the California constitution to deny what previously had been interpreted as a constitutional right of self-representation.[16]

FED. R. CRIM. P. 44(a) (emphasis added):

> Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, *unless he waives such appointment.*

Prior to a 1966 amendment, the rule was more explicit:

> If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel . . . *unless he elects to proceed without counsel* . . . .

FED. R. CRIM. P. 44, 327 U.S. 866 (1945) (emphasis added).

12. At least one writer believes that a constitutional, as opposed to a statutory, *pro se* right is of more value to a defendant. Garcia, *Defense* Pro Se, 23 U. MIAMI L. REV. 551, 554 (1969). The purely statutory *pro se* right is so burdened with limitations that it has been suggested that the right can be effective only if grounded in the federal constitution. *See Self-Representation* 1483.

13. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1123 (D.C. Cir. 1972): "In sum, whether or not the right of *pro se* representation has a constitutional foundation it is patently a statutory right . . . ."

14. Some states allow the accused the right to be heard, or to defend, in person *and* by counsel: ARIZ. CONST. art. 2, § 24; ARK. CONST. art. 2, § 10; COLO. CONST. art. 2, § 16; CONN. CONST. art. 1, § 8; DEL. CONST. art. 1, § 7; IDAHO CONST. art. 1, § 13; ILL. CONST. art. 1, § 8; IND. CONST. art. 1, § 13; KY. CONST. § 11; MO. CONST. art. 1, § 18(a); MONT. CONST. art. 3, § 16; NEV. CONST. art. 1, § 8; N.H. CONST. pt. 1, art. 15; N.M. CONST. art. 2, § 14; N.Y. CONST. art. 1, § 6; N.D. CONST. art. 1, § 13; OHIO CONST. art. 1, § 10; OKLA. CONST. art. 2, § 20; ORE. CONST. art. 1, § 11; PA. CONST. art. 1, § 9; S.D. CONST. art. 6, § 7; TENN. CONST. art. 1, § 9; UTAH CONST. art. 1, § 12; VT. CONST. ch. 1, art. 10; WASH. CONST. art. 1, § 22; WIS. CONST. art. 1, § 7; *see* LA. CONST. art. 1, § 9. Others grant the right to defend in person *or* by counsel: KAN. CONST. BILL OF RIGHTS § 10; MASS. CONST. pt. 1, art. 12; NEB. CONST. art. 1, § 11. Still other state constitutions provide that the accused has the right to defend either by himself, by counsel, or both: ALA. CONST. art. 1, § 6; FLA. CONST. art. 1, § 16; ME. CONST. art. 1, § 6; MISS. CONST. art. 3, § 26; S.C. CONST. art. 1, § 18; TEX. CONST. art. 1, § 10.

15. 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).

16. CAL. CONST. art. 1, § 13 (1879), granting a criminal defendant "the right . . . to appear and defend, in person and with counsel," previously had been read as conferring upon an accused a constitutional right to defend *pro se*. *See, e.g.*, People v. Carter, 66 Cal. 2d 666, 427 P.2d 214, 58 Cal. Rptr. 614 (1967); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Jackson, 186 Cal. App. 2d 307, 8 Cal. Rptr. 849 (1960). In People v. Sharp, 7 Cal. 3d 448, 499 P.2d 489, 103 Cal.

A resolution of the federal constitutional status of the *pro se* right is, therefore, of interest not only to the fourteen states without constitutional *pro se* provisions, but to the above mentioned states[17] as well, since a federal constitutional *pro se* right may be applicable to state prosecutions.[18]

The United States Supreme Court has never ruled directly on the constitutionality of the *pro se* right. It has noted, however, that at a minimum, due process does not prohibit the *pro se* defense.[19] The Court suggested in *Adams v. United States ex rel. McCann*[20] that "correlative" to the sixth amendment right to counsel is the *right* to proceed without counsel.[21] That suggestion, however, has never been

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Rptr. 233 (1972), the California Supreme Court expressly rejected that reading and held that there was no state constitutional right to defend *pro se*.

Section 13 was amended on June 6, 1972, effective June 7, 1972. The new constitutional language, which grants a defendant merely the right "to be personally present with counsel," cannot logically be construed as conferring any constitutional *pro se* right. People v. Sharp, 7 Cal. 3d 448, 463, 499 P.2d 489, 498-99, 103 Cal. Rptr. 233, 242-43 (1972). The amended constitutional provision was not applicable to the *Sharp* decision, since the "proceedings . . . were all had before the [amendment's] effective date . . . ." *Id.* at 464, 499 P.2d at 499, 103 Cal. Rptr. at 243.

For a discussion of nonlegal or extralegal factors that may underlie the *Sharp* decision as well as the constitutional amendment, see notes 147-50 *infra* and accompanying text. For a discussion of the *Sharp* decision itself, see *Death Knell, supra* note 10; notes 124-35 *infra* and accompanying text.

17. *See* note 14 *supra* and accompanying text.

18. *See* Moore v. Michigan, 355 U.S. 155 (1957); Carter v. Illinois, 329 U.S. 173 (1946); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); United States *ex rel.* Hyde v. McMann, 263 F.2d 940 (2d Cir.), *cert. denied*, 360 U.S. 937 (1959); *cf.* Bute v. Illinois, 333 U.S. 640, 678 (1948): "[The] Constitutional standard of fairness does not depend on what court the defendant is in."

19. *See, e.g.*, Carter v. Illinois, 329 U.S. 173, 174 (1946):

> Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt.

Accord, Moore v. Michigan, 355 U.S. 155, 161 (1957). In United States v. Davis, 260 F. Supp. 1009, 1019 (E.D. Tenn.), *aff'd*, 365 F.2d 251 (6th Cir. 1966) (emphasis original) the court stated:

> All that has really been said by the Supreme Court is that the Sixth Amendment does not *prohibit* the right of self-representation.

Davis did not, however, pass on the constitutionality of the *pro se* right, and held only that the right, whatever its basis, is qualified.

20. 317 U.S. 269 (1942).

21. The Court stated:

> The right to assistance of counsel and the correlative *right* to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . . [T]he

the basis for a holding by the Court.[22] Moreover, a statement made in a subsequent Supreme Court decision may have weakened the Court's earlier "correlative right" language: "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[23]

The federal courts of appeals are split on the *pro se* question. Some, relying on the language found in *Adams*,[24] have held that an accused's right to defend *pro se* is of constitutional stature.[25] Others have decided

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> Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open.

Id. at 279 (emphasis added). Reference to this "correlative right" was made in subsequent cases as well. *See* Moore v. Michigan, 355 U.S. 155, 161 (1957); Carter v. Illinois, 329 U.S. 173, 174 (1946).

22. The Court consistently has denied certiorari in cases raising this issue. *See, e.g.*, United States *ex rel.* Davis v. McMann, 386 F.2d 611 (2d Cir. 1967), *cert. denied*, 390 U.S. 958 (1968); United States v. Llanes, 374 F.2d 712 (2d Cir.), *cert. denied*, 388 U.S. 917 (1967); United States v. Burkeen, 355 F.2d 241 (6th Cir.), *cert. denied*, 384 U.S. 957 (1966); United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966); Cleveland v. United States, 322 F.2d 401 (D.C. Cir.), *cert. denied*, 375 U.S. 884 (1963); United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); Coleman v. Smyth, 166 F. Supp. 934 (E.D. Va.), *appeal dismissed*, 260 F.2d 518 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959).

23. Singer v. United States, 380 U.S. 24, 34-35 (1965). The *Singer* rationale has been viewed as one of the major obstacles to recognition of a constitutional *pro se* right. *See Self-Representation* 1488.

24. *See* note 21 *supra*.

25. The Second Circuit is the most unequivocal in its assertion of a constitutional *pro se* right. Its current position was foreshadowed in United States v. Private Brands, Inc., 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied*, 335 U.S. 957 (1958), which found it to be "well settled as a general principle that an accused has the *constitutional* right to dispense with a lawyer's help and conduct his own defense . . . ." (emphasis added). Then, in the leading case of United States v. Plattner, 330 F.2d 271 (2d Cir. 1964), the court found the *pro se* right to be implicit in the "bundle of rights" provided by the fifth amendment due process and sixth amendment right-to-counsel guarantees.

> The right to counsel and the right to defend *pro se* in criminal cases form a single, inseparable bundle of rights, two fases [*sic*] of the same coin. Thus we find the choice between the two sometimes discussed in terms of a waiver of the right to counsel, and sometimes in terms of an election to have a lawyer or to defend *pro se*. Viewed in this light the problem is simplicity itself.

Id. at 276. The Second Circuit affirmed its *Plattner* position shortly thereafter, declaring that "the [*pro se*] right derives, not from legislative enactments or judicial rules, but from the Federal Constitution." United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

The Fifth Circuit has found the *pro se* right to be constitutionally protected on

that the right is purely statutory.[26] In *United States v. Dougherty*,[27] however, the Court of Appeals for the District of Columbia Circuit, previously convinced of the right's solely statutory basis,[28] seemed inclined to reconsider the question.[29]

Viewed from both the federal and state level, then, it is apparent that the criminal defendant's *pro se* right receives varying degrees of respect according to the tribunal in which it is asserted. *United States v. Dougherty*[30] and *People v. Sharp*,[31] considered along with a

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two grounds: as "correlative" to the sixth amendment right to counsel, Juelich v. United States, 342 F.2d 29 (5th Cir. 1965), and as implicit in the fifth amendment's due process clause, MacKenna v. Ellis, 263 F.2d 35 (5th Cir.), *cert. denied*, 360 U.S. 935 (1959).

For other circuits' recognition of a constitutional basis for the *pro se* right, see Lowe v. United States, 418 F.2d 100, 103 (7th Cir. 1969), *cert. denied*, 397 U.S. 1048 (1970); United States v. Sternman, 415 F.2d 1165, 1169 (6th Cir. 1969); Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969).

26. In Brown v. United States, 264 F.2d 363, 365 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959), the court stated: "The truth is that the right is statutory in character, and does not rise to the dignity of one conferred and guaranteed by the Constitution." *Accord*, Van Nattan v. United States, 357 F.2d 161 (10th Cir. 1966); Butler v. United States, 317 F.2d 249 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963).

The Supreme Court arguably implied that the *pro se* right is solely statutory in Price v. Johnston, 334 U.S. 266, 285-86 (1948).

27. 473 F.2d 1113 (D.C. Cir. 1972).

28. *See* note 26 *supra* and accompanying text.

29. In *Dougherty* the court insisted that its decision in Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959), left the constitutional question unresolved. While the *Brown* court's comments regarding the constitutionality of the *pro se* right technically may be dicta, the court used emphatic language to suggest that the *pro se* right is purely statutory. *See* note 26 *supra*. The *Brown* decision has been cited for the proposition that no federal constitutional *pro se* right exists. *See, e.g.*, Comment, *The Right to Defend* Pro Se, 3 TEXAS TECH. U.L. REV. 89, 90 n.9 (1971). Since *Brown* was decided before many of the other circuits held in favor of a constitutional *pro se* right, note 25 *supra*, it is possible that *Dougherty* is a partial reflection of the cogency of the arguments advanced in those later cases. The *Dougherty* court acknowledged the "constitutional aura" of the right, but found simply that the *Dougherty* case could be resolved by reference to the "patently statutory" *pro se* right. United States v. Dougherty, 473 F.2d 1113, 1123 (D.C. Cir. 1972). The court concluded that the statutory *pro se* right must be recognized if asserted timely and accompanied by a valid waiver of counsel, noting that a mere fear by the trial judge of *potential* disruptive behavior by a *pro se* defendant is insufficient ground for denying the right. Because the court reversed the defendants' convictions on the ground that their statutory *pro se* right had been violated, the court's discussion of the constitutional basis for the right is, of course, dictum.

30. 473 F.2d 1113 (D.C. Cir. 1972).

31. 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972). *See* note 16 *supra* and accompanying text. For a detailed discussion of the *Sharp* case, see notes 124-35 *infra* and accompanying text.

recent California constitutional amendment,[32] emphasize the continuing disagreement regarding the constitutional basis for granting a *pro se* request.

II. Historical Analysis

Self-representation by a criminal defendant was the commonplace mode of defense during the Colonial Period, and was a right often conferred specifically.[33] This apparently firm historical footing for a *pro se* right[34] suggests that the absence of explicit reference to self-representation in the federal constitution requires explanation. One author states that the right is so engrained in our history that it simply has been taken for granted.[35]

Another possible explanation notes that the Judiciary Act of 1789,[36] granting the statutory *pro se* right, was signed one day before the sixth amendment was proposed. The explanation suggests that had the sixth amendment guarantee of the right to counsel been intended to alter the generally recognized *pro se* right, some discussion of the matter would have occurred on the floor of Congress.[37] None

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32. *See* note 16 *supra.*

33. For example, see the following passages, quoted in People v. Sharp, 7 Cal. 3d 448, 454, 499 P.2d 489, 492, 103 Cal. Rptr. 233, 235 (1972): Chapter XXIII of the Concessions and Agreements of West New Jersey (1677), stating that "all persons have free liberty to plead his own cause, if he please;" the Pennsylvania Frame of Government in 1682, providing "That, in all courts all persons of all persuasions may . . . personally plead their own cause themselves; or, if unable, by their friend;" the Georgia Constitution of 1777, which referred to the "inherent privilege of every freeman, the liberty to plead his own cause."

34. Arguably, what the provisions in note 33 *supra* sought to guarantee was simply a right to defend and not a right to defend *pro se.* Thus the *Sharp* court noted:

> There can be no denial that . . . a person accused of wrong-doing was and is entitled to defend against such charges . . . . Although the right to defend is fundamental, our concern is with the manner in which that fundamental right is to be exercised.

7 Cal. 3d at 453, 499 P.2d at 491-92, 103 Cal. Rptr. at 235-36.

Nevertheless, the cited colonial provisions seem so clearly to confer a *right* to defend *pro se* that it is difficult to understand how the *Sharp* court was able to "discern . . . only vague notions of a fundamental right of self-representation" from an examination of them. *Id.* at 454, 499 P.2d at 492, 103 Cal. Rptr. at 236. At a minimum, the provisions easily could be viewed as reflecting the importance the colonists attached to the right. Hence, the *Sharp* court's somewhat cursory rejection of the historical significance of these passages is, at the very least, questionable.

35. Beaney 209.

36. Ch. 20, § 35, 1 Stat. 92 (1789). *See* note 6 *supra.*

37. Beaney 28.

did.[38] Thus the Second Circuit Court of Appeals in *United States v. Plattner*[39] reasoned that in passing the sixth amendment, Congress merely acknowledged its awareness of the layman's lack of legal expertise; hence, to aid the criminal defendant, the right to counsel was supplied, an action "surely not intended to limit in any way the absolute and primary right to conduct one's own defense *in propria persona.*"[40]

While the *Plattner* court's historical interpretation is plausible, it can be argued instead that the different treatment accorded the right to counsel and the right of self-representation, the former being placed in the Constitution and the latter being left in statutory form, was deliberate and hence expressive of an intent *not* to make self-representation a constitutional right.[41]

In contrast to the absence of any reference to a *pro se* right in the federal constitution, the constitutions of many states appear to grant that right to criminal defendants.[42] An analysis of one of these constitutional provisions, the Tennessee provision permitting a defendant "to be heard by himself,"[43] was presented in 1871 by the Tennessee

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38. *Id.*

39. 330 F.2d 271 (2d Cir. 1964). *See* note 25 *supra.*

40. 330 F.2d at 274. This statement apparently seems illogical to one commentator, who states:

> After all, to defend *pro se* is, for whatever reason, *not* to defend through counsel. These procedures are related only in that they are antagonistic to each other in the usual situation . . . . Thus, if the right to counsel is indeed "one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty" . . . it is difficult to conceive how the right to defend *pro se,* necessarily *not* "one of the safeguards" could, by virtue of this opposite relationship alone, be a constitutional right . . . .

48 N.C.L. REV. 678, 682 (1970). Another author states, however:

> The problem with the logic supporting a view of the right to defend *pro se* as merely statutory lies in the failure to recognize that the *fundamental* right being protected in the Sixth Amendment is the defendant's right to an opportunity to effectively present his cause in court. The right to counsel is simply *one* of the safeguards provided to insure that a defendant will have his cause adequately presented. It is not the only safeguard and is not antagonistic to the right of the defendant to defend for himself. The right to counsel is but a tool available to the accused seeking to effectively defend himself.

Comment, *The Right to Defend* Pro Se, 3 TEX. TECH. U.L. REV. 89, 91 n.10 (1971) (emphasis original).

41. *Self-Representation* 1487.

42. *See* note 14 *supra.*

43. TENN. CONST. art. 1, § 9, *quoted in* Wilson v. State, 50 Tenn. 232, 234 (1871).

Supreme Court in *Wilson v. State*.[44] At that time a criminal defendant had no right to be sworn as a witness in Tennessee,[45] as a result of which he often had no means by which to offer his explanation of the facts underlying the charges against him. The *Wilson* court therefore reasoned that the Tennessee constitutional provision permitting a defendant to be heard in person was intended only to guarantee that a defendant would have some mode of communication by which he could "*explain* the case made against him, in his own way."[46] One author suggests that if this were the objective of the early state constitutions, then the rationale behind the self-representation provisions no longer obtains, since a defendant is now entitled to be a witness.[47]

In the final analysis, it must be realized that the right to counsel received relatively little attention from the early colonial governments.[48] Thus, although the question of self-representation was con-

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44. 50 Tenn. 232 (1871).

45. The purpose of this rule apparently was to protect the defendant from cross-examination, which was believed to violate his privilege against self-incrimination. *See* Grano 1193-94.

46. 50 Tenn. at 242 (emphasis added). The court recognized that in some cases only the accused himself was qualified to explain the circumstances of the alleged offense. In commenting upon the Tennessee constitutional provision, the court stated:

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

Id. at 241. It is by no means clear, however, that the court was convinced that the constitutional clause permitting the defendant to be heard in person was intended to confer upon him any right to conduct his entire defense.

47. Grano 1194.

> Hence, it convincingly can be contended that permitting an accused to testify satisfies the concerns expressed by the early Americans who wrote the state constitutions.

Id. The potential difficulty with this argument is that this historical analysis seeks simply to ascertain whether a constitutional *pro se* right did exist, not whether it would be created were the constitutions to be rewritten today.

48. BEANEY 22-24, 27. Beaney offers the following explanation for this lack of attention:

> The logical inference to be drawn is that the states were satisfied with their existing criminal procedure and assumed that most criminal prosecutions

sidered,[49] there is no evidence that any attention was given to the issue of waiver of counsel as a prerequisite to a *pro se* defense.[50] Since it is this issue that confronts modern legal scholars,[51] any historical analysis of the *pro se* right may be viewed at best as inconclusive.[52]

III. ASSERTING THE PRO SE RIGHT

Judicial treatment of a criminal defendant's request to proceed *pro se* at trial differs according to the time at which the request is made. Therefore, whether a court will grant the request may depend on whether the trial already has commenced.

A. *Asserting the* Pro Se *Right Prior to Trial*

A defendant who wishes to proceed *pro se*[53] must unequivocally

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would continue to be undertaken by state governments. Hence other rights seemed of greater importance and more worthy of demand.

Id. at 23.

49. *See* note 33 *supra* and accompanying text.

50. Grano 1194.

51. Whatever the status of the *pro se* right, it is agreed that a defendant, in order to claim the right, must effect a valid waiver of his constitutional right to counsel. *See* notes 55-64 *infra* and accompanying text.

52. At least two authors hold this opinion. *See* Grano 1192-93; *Self-Representation* 1487.

Nor is an examination of the English common law very helpful. An accused was allowed to defend himself in sixteenth- and seventeenth-century England. BEANEY 8-12; J. GRANT, OUR COMMON LAW CONSTITUTION 5-9 (1960). At that time, however, the right to counsel had not yet been recognized. Thus, while the practice of proceeding *pro se* may well have been tantamount to a right, the courts never spoke of a *right* to defend *pro se*. *See* Grano 1190-92.

53. The rights to proceed *pro se* and to be represented by counsel "cannot be exercised at the same time." United States v. Mitchell, 137 F.2d 1006, 1010 (2d Cir. 1943). Consequently, the defendant is put to an election to appear either *pro se* or by counsel. Duke v. United States, 255 F.2d 721, 725 (9th Cir. 1958); Shelton v. United States, 205 F.2d 806, 813 (5th Cir.), *petition for cert. dismissed*, 346 U.S. 892 (1953), *motion to vacate denied*, 349 U.S. 943 (1955); Foster v. State, 148 Tex. Crim. 372, 187 S.W.2d 575 (1945); 48 N.C.L. REV. 678, 684 (1970).

The belief is that it would be unfair to allow a defendant to gain the advantages of a hybrid of the two rights. Despite the traditional view that it would be "undesirable" to allow a defendant to participate as co-counsel, Brasier v. Jeary, 256 F.2d 474, 478 (8th Cir.), *cert. denied*, 358 U.S. 867 (1958), one author regards participation as co-counsel as an ideal means of reconciling the two rights:

> No conflict exists between the fundamental values of fairness to the individual and reliability of the guilt-determining process in cases where the defendant wants to participate actively in the conduct of his defense but also desires the assistance of counsel.

Self-Representation 1482. Angela Davis expanded on this belief in arguing her cause

assert his *pro se* right.[54] If he does so before the trial begins, the *pro se* right often is characterized as "unqualified."[55]

The "unqualified" right is not, however, totally without restrictions. Since the *pro se* right must be construed to give full effect to the sixth amendment right to counsel,[56] the *pro se* right, even if asserted before the trial begins, is curtailed to the extent that a defendant must effect a valid waiver[57] of counsel before he will be allowed to proceed *pro se*:

> The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.[58]

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to be appointed co-counsel:

> [M]y life is at stake in this case . . . . I don't think I should be forced to remain mute, [a] face behind counsel table, an abstraction. I should be able to do precisely the kind of things that would tend to allow us to put forth the most efficacious type defense . . . . I'm talking about being able to make arguments, . . . motions, . . . objections, and being able to examine witnesses when it becomes clear that I am the most competent person . . . to do so.

Transcript of pretrial proceedings at 39-40, People v. Davis, No. 3744 (Cal. Super. Ct., Marin County, June 4, 1972), *cited in Self-Representation* 1506. The court granted Davis the rare privilege of appearing as co-counsel, although it emphasized that its decision did not rest on any *right* to so appear. *Self-Representation* 1480.

54. *See, e.g.*, United States *ex rel.* Jackson v. Follette, 425 F.2d 257 (2d Cir. 1970); United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); United States v. Gutterman, 147 F.2d 540 (2d Cir. 1945); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943).

55. The term "unqualified" is used in the sense that, assuming the defendant effects a valid waiver of counsel, the court must grant the defendant's *pro se* request. *See, e.g.*, United States v. Bentvena, 319 F.2d 916, 938 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); Butler v. United States, 317 F.2d 249 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951). This is in contrast to the "qualified" *pro se* right discussed in notes 79-85 *infra* and accompanying text.

56. Recent emphasis on the right to counsel may weaken the argument that the *pro se* right is protected by the federal constitution. *See* notes 99-103 *infra* and accompanying text.

57. "Waiver" has been defined as "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The ease of establishing a valid waiver varies with the particular right involved. For example, the right to counsel cannot be waived without notice of its existence, while the right to cross-examine a witness is waived simply by not exercising it. *See generally* Grano 1208.

58. Johnson v. Zerbst, 304 U.S. 458, 465 (1938). *See also* Powell v. Alabama, 287 U.S. 45 (1932).

Since the courts must indulge in "every reasonable presumption"[59] against the waiver of constitutional rights, a trial judge must "investigate as long and as thoroughly as the circumstances of the case before him demand"[60] in order to determine whether a defendant has effected a valid waiver of counsel.[61]

The Supreme Court views a defendant's waiver of counsel as valid "if he knows what he is doing and his choice is made with eyes open."[62] The defendant need not, however, prove that he can meet the dangers of the case successfully,[63] and the fact that a *pro se* defense turns

59. Glasser v. United States, 315 U.S. 60, 70 (1942); Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

60. Von Moltke v. Gillies, 332 U.S. 708, 723-24 (1948).

> It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to counsel] at every stage of the proceedings.

Id. at 722.

61. The court in United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964), which held the *pro se* right to be constitutionally grounded, *see* note 25 *supra*, similarly restricted the right by requiring that a trial judge "conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice."

In United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971), the trial judge had failed to conduct the requisite inquiry. Since there consequently was no evidence showing a knowing and intelligent waiver of counsel, the court reversed the *pro se* defendant's conviction.

62. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942). The *Plattner* court expressly adopted this test. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964). Thus, in United States v. Spencer, 439 F.2d 1047, 1050 (2d Cir. 1971), the court held the defendant's waiver of counsel valid, noting the trial judge's conclusion that the defendant's "eyes are wide open and he knows what he is doing."

In Lowe v. United States, 418 F.2d 100 (7th Cir. 1969), *cert. denied*, 397 U.S. 1048 (1970), the trial court repeatedly advised the petitioner of his right to counsel and explained to him the seriousness of the charge and the potential twenty-five year sentence. Petitioner, who had received most of his eleven years of schooling in a reformatory, consistently responded that he realized what a lawyer could do for him but nevertheless wanted to waive counsel and enter a guilty plea. The court, adopting the *Plattner* view of a constitutional *pro se* right, held the waiver of counsel to be valid.

63. *See, e.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); Coleman v. Smyth, 166 F. Supp. 934 (E.D. Va.), *appeal dismissed*, 260 F.2d 518 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959); People v. Crovedi, 65 Cal. 2d 199, 205, 417 P.2d 868, 872, 53 Cal. Rptr. 284, 288 (1966). *See also* People v. Addison, 256 Cal. App. 2d 18, 24, 63 Cal. Rptr. 626, 629 (1967):

> If the defendant wants to venture into the unknown, he must be allowed to do so, if he is aware of the dangers that lurk therein. He need not demonstrate that he can meet them.

out to be ineffective is irrelevant to the issue of whether an intelligent waiver of counsel was made.[64]

While the cases have established that a valid waiver of counsel requires that the defendant have at least an intelligent appreciation of the consequences of his *pro se* choice,[65] what constitutes an intelligent appreciation is far from clear.[66] Therefore, the development of uniform and objective guidelines to aid in this determination is desirable.

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64. *See, e.g.*, United States v. Duty, 447 F.2d 449 (2d Cir. 1971); Hodge v. United States, 414 F.2d 1040 (9th Cir. 1969).

65. Moore v. Michigan, 355 U.S. 155, 160-62 (1957); von Moltke v. Gillies, 332 U.S. 708, 724 (1948); Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); Johnson v. Zerbst, 304 U.S. 458, 468 (1938); United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).

In two circuit court cases which found a constitutional *pro se* right, the courts did not articulate any "intelligent appreciation" requirement. It appears clear, however, that the condition was met in each case. *See* United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); MacKenna v. Ellis, 263 F.2d 35 (5th Cir.), *cert. denied*, 360 U.S. 935 (1959).

See also Placencia v. State, 268 N.E.2d 613 (Ind. 1971), in which the court accepted as effective the defendant's waiver of counsel, "that decision *appearing* to have been knowingly, voluntarily and intelligently made." *Id.* at 614 (emphasis added).

66. The test appears to be substantially subjective. *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458, 464 (1938), stating that what constitutes an intelligent waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

A mere declaration of waiver clearly will not suffice, and an *appreciation* encompasses far more than mere *exposure* to the consequences of the *pro se* choice. Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1144 (1965). Justice Murphy stated in Carter v. Illinois, 329 U.S. 173, 186 (1946):

> It is no excuse that the individual is willing to forego certain basic rights, unless we are certain that he has a full and intelligent comprehension of what he is doing.

Thus one author misunderstands the *pro se* right and wrongly assumes that *any* waiver of counsel, competent or not, is acceptable. Grano 1200-01.

Whatever definition of "intelligent appreciation" is used, a defendant's mental competence bears heavily on his *ability* to comprehend the consequences of a *pro se* choice. Various reasons have been found for concluding that a defendant is incompetent to waive counsel. *See, e.g.*, Sanders v. United States, 373 U.S. 1 (1963) (defendant mentally incompetent because of narcotics administered in jail); McNeal v. Culver, 365 U.S. 109 (1961) (mentally ill defendant); Williams v. Huff, 146 F.2d 867 (D.C. Cir. 1945) (minor defendant presumed to lack capacity); United States *ex rel.* Simon v. Maroney, 228 F. Supp. 800 (W.D. Pa. 1964) (defendant possessed low I.Q.); United States v. Vargas, 124 F. Supp. 195 (D.P.R. 1954) (defendant had little education and was unable to speak English). *See also Self-Representation* 1490-91 (suggesting that the question of competence ultimately reduces to a determination whether a fundamentally unfair trial will result because of the defendant's apparent level of mental abilities).

A defendant's lack of an intelligent appreciation of the consequences of his *pro*

In *von Moltke v. Gillies*[67] Justice Black formulated a strict waiver of counsel standard for guilty plea situations[68] that would ensure a defendant's appreciation of the consequences of his choice.[69] Although the *von Moltke* standard has not been widely accepted,[70] the importance of attaining reliable guilt-determination[71] should favor the adoption of a stringent waiver of counsel standard.[72] Thus, whether a defendant's failure to appreciate the consequences of a *pro se* choice results from mental incompetence[73] or from the existence of an intricate and complex case,[74] a strict waiver of counsel standard similar to the *von Moltke* proposal would afford a uniform and objective method by which to evaluate the defendant's understanding of the possible conse-

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se choice also may result simply from the existence of a case so complex that no *pro se* defendant could understand its intricacies. Thus, in Rice v. Olson, 324 U.S. 786, 789 (1945), the Supreme Court refused to find a valid waiver of counsel, noting that the defendant's defense involved a question "obviously beyond the capacity of even an intelligent and educated layman . . . ." *See also* Commonwealth *ex rel.* McCray v. Rundle, 415 Pa. 65, 202 A.2d 303 (1964); Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175 (1964).

67. 332 U.S. 708 (1948).

68. *Id.* at 724:

> [A valid waiver] must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.

Some courts have regarded this standard as too stringent. In Arnold v. United States, 414 F.2d 1056, 1058 (9th Cir. 1969), for example, the court refused to apply the *von Moltke* formulation, declaring that it "suggests a standard of perfection. Applied literally, there could never be a competent waiver of . . . counsel." Instead, the court viewed the standard as merely "directory to trial courts, emphasizing the importance of careful inquiry before a waiver of the assistance of counsel is accepted." *Id.* In Carter v. State, 243 Ind. 584, 187 N.E.2d 482 (1963), the Indiana Supreme Court did not feel bound by *von Moltke* since Justice Black's waiver standard was not supported by a majority of the Supreme Court. For a discussion of the subsequent history of the *von Moltke* standard, see Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1142-45 (1965).

69. Although the defendant's purported waiver of counsel in *von Moltke* was made in connection with her entering a guilty plea rather than attempting to proceed *pro se*, the suggested waiver requirements are totally adaptable to waiver as it relates to *pro se* requests.

70. *See* note 68 *supra.*

71. *See* notes 96-98 *infra* and accompanying text.

72. The California waiver of counsel standard, note 135 *infra*, is similar in many respects to the *von Moltke* formulation.

73. *See* note 66 *supra.*

74. *Id.*

quences of a *pro se* defense.[75] Furthermore, a defendant who meets the standard will have an intelligent awareness of what he must combat, an awareness which presumably will reflect his ability to conduct an adequate defense.[76] Arguably, only such a "fully competent" defendant,[77] though he may well be a rare individual,[78] should be allowed to proceed *pro se.*

B. *Asserting the* Pro Se *Right After Trial Has Commenced*

Additional qualifications attach to a *pro se* request when the defendant seeks to dismiss counsel and continue *pro se* after the trial has begun.[79] In this situation the ultimate disposition of the defendant's request rests in the sound discretion of the trial court, which must balance the defendant's legitimate interests in proceeding *pro se* against the possibility that a *pro se* defense would disrupt the trial proceedings[80] and hence frustrate the public interest[81] in achieving an

75. In these situations, defendants would have to be represented by counsel. *See* notes 122-23 *infra* and accompanying text.

76. Even if the *pro se* defense turns out to be totally inadequate, it has been argued that the resulting conviction must be upheld in order to protect the *pro se* right from abuse by *pro se* defendants seeking reversal on the ground that they presented inadequate defenses, and that only where a "travesty of justice" has occurred should due process compel a reversal. Note, *The Right of an Accused to Proceed Without Counsel,* 49 MINN. L. REV. 1133, 1147 (1965).

77. One author has recommended classifying defendants in three categories of competence: submarginal, marginal, and fully competent. Within this framework, only the fully competent defendant would be permitted to waive counsel and proceed *pro se. Id.* at 1145.

78. *Id.* The *Sharp* court acknowledged that in "rare instances" a denial of the *pro se* right "may truly offend the concept of ordered liberty." 7 Cal. 3d at 460, 499 P.2d at 497, 103 Cal. Rptr. at 241.

79. One case states that the right to proceed *pro se* may be "waived" by the acceptance of counsel. United States v. Conder, 423 F.2d 904 (6th Cir. 1970). Whether this was the actual basis of the court's holding is open to question, however, for the court's notation that the trial judge was justified in concluding that the defendant's *pro se* participation "would only serve to confuse an already complicated trial," *id.* at 908, suggests that the lower court's denial of the defendant's *pro se* request was based on traditional factors. *See Self-Representation* 1491-92; notes 80-83 *infra* and accompanying text.

80. *See, e.g.,* United States v. Private Brands, Inc., 250 F.2d 554, 557 (2d Cir. 1957), *cert. denied,* 335 U.S. 957 (1958): "[A]n accused's right to represent himself is not so absolute that it must be recognized when to do so would disrupt the court's business." *See also* United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied,* 384 U.S. 1007 (1966); Juelich v. United States, 342 F.2d 29 (5th Cir. 1965); United States v. Bentvena, 319 F.2d 916 (2d Cir.), *cert. denied,* 375 U.S. 940 (1963); Butler v. United States, 317 F.2d 249 (8th Cir.), *cert. denied,*

accurate determination of guilt or innocence. Consequently, courts have refused *pro se* requests made during trial when the case appeared too complicated[82] or when the trial simply would have become too confused.[83]

While maintaining order in trial proceedings arguably may not justify the distinction between a trial court's lack of discretion in ruling on a *pro se* request made before the trial begins and the court's recognized discretion in considering a request made after the commencement of trial,[84] the courts nevertheless have affirmed this distinction.[85]

IV. THE PRO SE DEFENDANT AT TRIAL

A defendant who is allowed to proceed *pro se* can expect little, if any, special treatment from the court. While one state court has held that a trial judge must "actively direct" the trial by preventing the

375 U.S. 838 (1963); United States v. Dennis, 183 F.2d 201 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951); United States v. Gutterman, 147 F.2d 540 (2d Cir. 1945); United States v. Mitchell, 137 F.2d 1006 (2d Cir. 1943); Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969), *rev'd on other grounds*, 461 F.2d 345 (7th Cir. 1972); United States v. Birrell, 286 F. Supp. 885 (S.D.N.Y. 1968); State v. White, 86 N.J. Super. 410, 207 A.2d 178 (1965).

In United States v. Plattner, 330 F.2d 271 (2d Cir. 1964), which held the *pro se* right to be constitutionally protected, *see* note 25 *supra*, the court noted:

> We do not reach the case where a defendant in the midst of a criminal trial seeks to dismiss his lawyer and for the balance of the trial manage and conduct his own defense *pro se*.

Id. at 277.

81. Brown v. United States, 264 F.2d 363, 369 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959) (concurring opinion): "It is axiomatic that more than the rights of an accused are involved in a criminal case." *See* notes 96-98 *infra* and accompanying text.

82. *See, e.g.*, Butler v. United States, 317 F.2d 249, 258 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963).

83. United States v. Bentvena, 319 F.2d 916, 937-38 (2d Cir.), *cert. denied*, 375 U.S. 940 (1963); United States v. Dennis, 183 F.2d 201, 233-34 (2d Cir. 1950), *aff'd on other grounds*, 341 U.S. 494 (1951); Seale v. Hoffman, 306 F. Supp. 330 (N.D. Ill. 1969), *rev'd on other grounds*, 461 F.2d 345 (7th Cir. 1972).

84. At least two authors argue that the confusion and delay caused by a *pro se* defense will result regardless of when the right is asserted. *See* Grano 1179-84; Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1138 (1965).

85. To at least one author, the continued recognition of this "absolute-discretionary" dichotomy detracts from the constitutional *pro se* argument:

> [The dichotomy] imparts to the right to defend *pro se* an evanescent quality not entirely consistent with the actual and alleged constitutional underpinnings of the right, nor with notions of individual autonomy.

48 N.C.L. REV. 678, 687 (1970).

introduction of totally irrelevant evidence "so as to protect the ultimate purpose of the trial,"[86] a court generally has no obligation to allow the *pro se* defendant to proceed any differently than would his attorney.[87] The defendant does not "acquire the right to have the court act as his counsel."[88] Nor is the court required to explain potential defenses[89] or give legal advice[90] to him. In short, the *pro se* defendant "assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken."[91]

A defendant may forfeit his *pro se* right by engaging in disruptive conduct during the trial. Even if the *pro se* right is recognized by the federal constitution, the right clearly would "not extend so far as to permit subversion of the core concept of a trial."[92] Hence, dilatory or destructive behavior will terminate exercise of the right.[93]

V. THE CONSTITUTIONAL DISPUTE

A. *The Arguments*

The federal constitution does not confer any express *pro se* right.[94] That the Supreme Court has never held the right to be implicit in the Constitution[95] can be attributed in large part to due process considerations. One of the basic objectives of a criminal prosecution is to ensure the reliability of the guilt-determining process,[96] reducing to

86. Grubbs v. State, 265 N.E.2d 40, 43 (Ind. 1970).

87. *Cf.* O'Brien v. United States, 376 F.2d 538, 542 (1st Cir. 1967), *vacated on other grounds*, 391 U.S. 367 (1968). *See* cases cited notes 88-91 *infra.*

88. Burstein v. United States, 178 F.2d 665, 670 (9th Cir. 1949).

89. Michener v. United States, 181 F.2d 911, 918 (8th Cir. 1950).

90. State v. Miller, 292 S.W. 440 (Mo. 1927).

91. People v. Mattson, 51 Cal. 2d 777, 794, 336 P.2d 937, 949 (1959).

92. United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972).

93. *See, e.g.*, Illinois v. Allen, 397 U.S. 337 (1970); United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972). *See generally Self-Representation* 1491-94. Fear of potential disruption is insufficient, however, to justify denial of a *pro se* request asserted before trial commences. United States v. Dougherty, *supra.*

94. *Cf.* note 41 *supra* and accompanying text.

95. This fact apparently influenced the California Supreme Court's decision in *Sharp*, which denied the existence of any federal constitutional *pro se* right:

> In almost 200 years of constitutional interpretation and construction the Supreme Court has not on any occasion held that the right of self-representation in a criminal trial is constitutionally compelled.

7 Cal. 3d at 457, 499 P.2d at 494, 103 Cal. Rptr. at 238.

96. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 346 (1957) [hereinafter cited as Kadish].

a minimum the possibility that any innocent individual will be punished:[97]

> It is not of crucial importance whether the individual tried is in fact guilty or innocent, but it is of crucial concern that the integrity of the process of ascertaining guilt or innocence never be impaired. If in this effort to insure that none but those guilty be convicted, many guilty go free, the price is not too great in the long view of democratic government. If there is any consideration basic to all civilized procedures it is this . . . .[98]

Since professional representation at trial presumably minimizes the possibility of convicting an innocent defendant,[99] the trend has been to find an increasing number of situations in which the availability of counsel is a requisite of constitutional due process.[100] This expansion

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97. Thus Kadish states: "This consideration [of reliable guilt-determination] gives meaning to the great bulk of procedures that have become part of the due process of law . . . ." *Id.*

98. *Id.*

99. *See, e.g.*, Justice Sutherland's now classic statements in Powell v. Alabama, 287 U.S. 45, 68-69 (1932):

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step of the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

The *Sharp* court obviously agreed: "Ideally this opportunity [to best defend against the charges] is to be realized through the availability of competent counsel . . . ." 7 Cal. 3d at 461, 499 P.2d at 497, 103 Cal. Rptr. at 241. *See also* Grano 1195; *Self-Representation* 1481.

Thus, the California appellate court in People v. Marcus, 133 Cal. App. 2d 579, 284 P.2d 848 (1955), reasoned that the denial of the defendant's *pro se* request did not result in a miscarriage of justice since the defendant was far more "ably" represented by counsel than he would have been had he defended himself.

100. The development of the right to counsel as a constitutionally recognized right began with Powell v. Alabama, 287 U.S. 45, 71 (1932), in which the Court held:

> All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel as a necessary requisite of due process of law . . . .

See also Moore v. Michigan, 355 U.S. 155, 158-59 (1957) (unrepresented defendant's conviction for murder reversed after Court learned that his voluntary guilty plea

of the right to counsel arguably detracts from the persuasiveness of any argument favoring a constitutional *pro se* right.[101] Since the grant of a *pro se* request is contingent upon a defendant's ability to effect a valid waiver of counsel,[102] the *pro se* right may be viewed as subservient and secondary to the right to counsel.[103]

It nevertheless can be argued that the recent expansion of the right to counsel does not necessarily dictate for due process purposes a corresponding diminution of the *pro se* right,[104] especially when one considers the elements of human dignity and autonomy which influenced the Second Circuit's decision in *United States v. Plattner*.[105] The *Plattner* court reasoned that the recent emphasis on the right to counsel does not detract from the *pro se* right but, instead, merely represents the "more enlightened views" of a "later generation."[106]

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was made in an attempt to "have [the trial] all over, to get to the institution . . . [in order] to be examined" since he complained of there being "something wrong with his head"); United States v. Davis, 260 F. Supp. 1009 (E.D. Tenn.), *aff'd*, 365 F.2d 251 (6th Cir. 1966) (defendant with erratic mental history not allowed to discharge counsel and proceed *pro se*).

The right-to-counsel cases, starting with *Powell* and Betts v. Brady, 316 U.S. 455 (1942), led to the historic decision in Gideon v. Wainwright, 372 U.S. 335 (1963), which applied the sixth amendment right to counsel to state proceedings, thus assuring the availability of counsel to all defendants charged with a serious crime. The Supreme Court recently clarified *Gideon* in Argersinger v. Hamlin, 407 U.S. 25 (1972), which held that the right to counsel extends to all criminal defendants who face possible incarceration. Thus, in order to ascertain whether counsel must be offered pursuant to *Argersinger*

> the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term.

Id. at 42 (concurring opinion).

101. *See, e.g.*, People v. Sharp, 7 Cal. 3d 448, 461, 499 P.2d 489, 497, 103 Cal. Rptr. 233, 241 (1972):

> [S]ince the right to competent counsel now has generally become available and the quality of counsel's performance is subject to checks and supervisions, there do not exist the same fundamental reasons for enlarging the areas of self-representation.

102. *See* notes 57-66 *supra* and accompanying text.

103. Thus, to the *Sharp* court at least, the necessity of waiver weakens the cogency of the constitutional *pro se* argument. 7 Cal. 3d at 453, 455, 499 P.2d at 491, 493, 103 Cal. Rptr. at 235, 237.

104. 48 N.C.L. REV. 678, 681-82 n.29 (1970).

105. 330 F.2d 271 (2d Cir. 1964). *See* notes 109-21 *infra* and accompanying text.

106. 330 F.2d at 274, *citing* Gideon v. Wainright, 372 U.S. 335 (1963). The court continued:

> Indeed, and strangely enough, there would probably have been no denial of

Furthermore, the requirement that a valid waiver of counsel must be effected before a *pro se* request will be granted arguably is simply an inevitable consequence of the fact that the rights to defend *pro se* and by counsel both protect a single, fundamental goal—the defendant's right to effectively present his cause.[107] Thus the *Plattner* court referred to a "single, inseparable bundle of rights, two fases [*sic*] of the same coin"[108] in which the *pro se* right is complementary rather than subservient to the right to counsel.

In the final analysis, the constitutional *pro se* argument may hinge upon the existence within the concept of due process of a "subtle and elusive"[109] value that ensures respect for human dignity and autonomy.[110] "[R]espect for individual autonomy requires that [a defendant] be allowed to go to jail under his own banner if he so desires . . . ."[111]

> Plattner's right to act *pro se* had the court not been so accustomed in these recent years to assign Legal Aid counsel or other lawyers to defend those indigent defendants who had no means to pay counsel of their own choosing.

Id.

107. *See* note 40 *supra* and accompanying text.

108. 330 F.2d at 276.

109. Kadish 347. *See also id.* at 357-58.

110. [Underscoring this value] is the notion of man's dignity, which is denigrated equally by procedures that fail to respect his intrinsic privacy or that entail the imposition of shocking brutality upon him. The ideal of man's individuality, which, after all, is what infuses meaning into the concept of freedom, is an emotional and personal as well as an intellectual affair. . . . Where society's sanctioned procedures exhibit a disdain for the value of the human personality, that ideal is not likely to flourish.

Id. at 347. *See also* MacKenna v. Ellis, 263 F.2d 35, 41 (5th Cir.), *cert. denied*, 360 U.S. 935 (1959); United States *ex rel.* Maldonado v. Denno, 239 F. Supp. 851, 855 (S.D.N.Y.), *aff'd*, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 348 U.S. 1007 (1966); Capetta v. State, 204 So. 2d 913, 916 (Fla. App. 1967); Browne v. State, 24 Wis. 2d 491, 511, 129 N.W.2d 175, 184 (1964):

> [D]ue process also requires that throughout the criminal process the state must treat a defendant as a person possessing human dignity . . . and, in most instances, a defendant would be denied this treatment if counsel were imposed upon him against his wishes.

The Supreme Court may have been alluding to this notion when it stated in Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942), that "the Constitution does not force a lawyer upon a defendant." *See also* Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQUESNE L. REV. 245, 256 (1964): "[D]efending 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."

111. United States *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966). *Accord*, Coleman v. Smyth, 166 F. Supp. 934 (E.D. Va.), *appeal dismissed*, 260 F.2d 518 (4th Cir. 1958), *cert. denied*, 359 U.S. 946 (1959); People v. Crovedi, 65 Cal. 2d 199, 205, 417 P.2d 868, 872, 53 Cal. Rptr.

Although the values of reliable guilt-determination and respect for a defendant's dignity and autonomy may at times conflict,[112] that due process may encompass both values is neither illogical nor surprising. If both are encompassed by due process,[113] the *pro se* right arguably assumes the same constitutional stature as its right-to-counsel counterpart.[114]

The Supreme Court has acknowledged that a defendant's individual dignity in exercising his "free choice [as] a self-determining individual"[115] must be respected.[116] Thus, although "an accused must have the *means* of presenting his best defense,"[117] his right to forego counsel and defend *pro se* "rest[s] on considerations that go to the substance of an accused's position before the law."[118] Consequently, counsel cannot

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284, 288 (1966).

The Court of Appeals for the District of Columbia Circuit stated in United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972):

> Even if the defendant will likely lose the case anyway, he has the right—as he suffers whatever consequences there may be—to the knowledge that it was the claim that he put forward that was considered and rejected, and to the knowledge that in our free society, devoted to the ideal of individual worth, he was not deprived of his free will to make his own choice, in his hour of trial, to handle his own case.

112. *See* notes 138-41 *infra* and accompanying text.

113. Kadish 346-47.

114. If the *pro se* right is *not* accepted as implicit in the fifth amendment due process requirement, then constitutional *pro se* advocates must rely on the argument that the ability to waive the sixth amendment right to counsel implies a constitutional right of self-representation. The Supreme Court, however, apparently met this argument directly in Singer v. United States, 380 U.S. 24, 34-35 (1965). *See* note 23 *supra* and accompanying text.

115. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 281 (1942).

116. Thus the Court has stated:

> To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Id. at 280.

117. *Id.* at 279 (emphasis added). The *Sharp* court recognized that state constitutional provisions relating to representation at trial are designed for the "purpose of *affording* to an accused the *opportunity* to best defend against the charges . . . ." 7 Cal. 3d at 460, 499 P.2d at 497, 103 Cal. Rptr. at 241 (emphasis added, original emphasis deleted).

118. Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942); *cf.* United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972):

> [The right to waive counsel and defend *pro se*] is designed to safeguard the dignity and autonomy of those whose circumstances or activities have thrust them involuntarily into the criminal process. An accused has a fundamental right to confront his accusers and his "country," to present himself and his position to the jury not merely as a witness or through a "mouthpiece," but as a man on trial who elects to plead his own cause. He is not obliged to seek

be "forced" upon a competent defendant[119] when it is not desired,[120] since to do so would "imprison" the defendant in his rights.[121] When

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what counsel would record as a victory but what he sees as tantamount to condemnation or doubt rather than vindication.

119. Carter v. Illinois, 329 U.S. 173, 174-75 (1946), in noting that the opportunity to meet an accusation contemplates the right to counsel, added the following caveat:

> This does not, however, mean that the accused may not make his own defense . . . . Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant.

The *Sharp* court attempted to avoid this language, insisting that since counsel cannot be compelled "under *all* circumstances," it obviously could be required in *some* circumstances. 7 Cal. 3d at 456, 499 P.2d at 494, 103 Cal. Rptr. at 238 (original emphasis). Assuming the *Sharp* court was not referring to cases in which the accused cannot effect a valid waiver of counsel, its literal interpretation of the *Carter* language is misleading. Taken in context, *Carter* simply seems to express the view that the right to counsel is not to be misunderstood as eliminating the possibility of a competent criminal defendant presenting his own defense. The Court was not suggesting, as the *Sharp* court implies, that even in the case of a competent *pro se* defendant there are circumstances in which counsel may be forced upon the defendant.

120. The discussion here assumes that the defendant is competent to proceed *pro se*. When he is not competent to defend himself, the defendant must be represented by counsel. The distinction to be made is that while counsel cannot be "forced" upon an unwilling defendant merely because the right to counsel exists, it *can* be "forced" if the circumstances indicate that only through the assistance of counsel will a fair trial be afforded. *See* note 122 *infra* and accompanying text.

121. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942):

> [T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters . . . .
>
> [T]o deny [the accused] in the exercise of his free choice of the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.

Contrary to this philosophy, however, one author advocates a system of mandatory representation. Apparently concerned more with the number of post-trial appeals than with the recognition of individual rights, the author's proposed system of "universal representation" would render *any* right to defend *pro se* "non-existent." Grano 1264. Another author recommends automatic provision of counsel at the beginning of every criminal case but would allow the defendant subsequently to assert his *pro se* right if he so desired. Note, *The Right of an Accused to Proceed Without Counsel,* 49 MINN. L. REV. 1133, 1150-51 (1965). *See also* ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PROVIDING DEFENSE SERVICES § 7.3 (Approved Draft, 1968):

> No waiver of counsel should be accepted unless it is in writing and of record. If a person who has not seen a lawyer indicates his intention to waive the assistance of counsel, a lawyer should be provided to consult with him. No waiver should be accepted unless he has at least once conferred with a lawyer. If a waiver is accepted, the offer should be renewed at each subsequent stage of the proceedings at which the defendant appears without counsel.

the defendant cannot establish his competence to proceed *pro se*, however, counsel can justifiably be "forced" upon him,[122] since allowing a defendant to proceed without an adequate awareness of the consequences of his *pro se* choice could cause serious harm to the defendant, to those who share an interest in his freedom, and to the integrity of the judicial system as a truth-determining process. Moreover, allowing an incompetent defendant to proceed without counsel arguably would violate constitutional due process guarantees.[123]

B. People v. Sharp

In *People v. Sharp*[124] the California Supreme Court was faced with the contentions that the *pro se* right was of constitutional dimensions, that the trial court's refusal to permit the defendant to proceed *pro se*[125]

122. *See* People v. Burson, 11 Ill. 2d 360, 143 N.E.2d 239 (1957); McCann v. Maxwell, 174 Ohio St. 282, 189 N.E.2d 143 (1963); State v. Kolocotronis, 73 Wash. 2d 92, 436 P.2d 774 (1968); Note, *The Right of an Accused to Proceed Without Counsel*, 49 MINN. L. REV. 1133, 1144-45 (1965); 48 N.C.L. REV. 678, 683 (1970).

Even when a defendant is not seeking to proceed *pro se*, counsel may be "forced" upon him when it is clear that he is using the right to counsel merely to interfere with and subvert the orderly administration of justice. *See, e.g.*, United States v. Abbamonte, 348 F.2d 700 (2d Cir. 1965), *cert. denied*, 382 U.S. 982 (1966), in which the court, after the defendant had dismissed counsel twice before trial, finally insisted on the appointment of a third lawyer to prevent further delay. The court noted that it could have ordered the defendant to proceed *pro se* on the basis of United States v. Arlen, 252 F.2d 491 (2d Cir. 1958), although one might question whether ordering a defendant to proceed *pro se* would result in a denial of due process of law. United States v. Abbamonte, *supra*, at 703. *See* text accompanying note 128 *infra*. In Relerford v. United States, 309 F.2d 706, 708 (9th Cir. 1962), the court refused to play a "cat and mouse" game with the defendant: "The constitutional guarantee of the right . . . [to] counsel is not thus to be turned into a weapon whereby a defendant can prevent his case from ever being brought to trial."

123. *Cf., e.g.*, Betts v. Brady, 316 U.S. 455, 473 (1942): "[T]he Fourteenth Amendment prohibits the conviction . . . of one whose trial is offensive to the common and fundamental ideas of fairness and right . . . ." *See also* Smith v. O'Grady, 312 U.S. 329 (1941); People v. Lee, 249 Cal. App. 2d 234, 57 Cal. Rptr. 281 (1967); People v. Shields, 232 Cal. App. 2d 716, 43 Cal. Rptr. 188 (1965); BEANEY 114; Garcia, *Defense* Pro Se, 23 U. MIAMI L. REV. 551, 557 n.33 (1969).

124. 7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972).

125. On the day of the trial the public defender assigned to represent the defendant informed the trial court of the defendant's desire to proceed *pro se*. The court made an inquiry which disclosed that the forty-eight year-old defendant had an eleventh-grade education. The defendant claimed to have some "knowledge of the law," and stated that he had already prepared briefs and planned his defense. The California Supreme Court viewed these contentions as "little more than bare claims . . . . In short, defendant's showing consisted, in the main, of a self-serving opinion that he could adequately represent himself." *Id.* at 452 n.2, 499 P.2d at 491 n.2, 103

was therefore erroneous, and that the error was prejudicial to the defendant. The court concluded that its survey and analysis of several colonial constitutions lent no historical support to the argument that the *pro se* right is protected by the federal constitution,[126] and noted that the Supreme Court has yet to find the *pro se* right implicit in the Constitution.[127] The court then held that the California constitution could not logically be read to confer any *pro se* right,[128] and rejected the view that the California due process clause compelled its recognition.[129]

The *Sharp* court's due process discussion is clothed in terms of "fairness,"[130] a term which may be used in either an objective or subjective sense. Thus, the due process goal of reliable guilt-determination presumes an objective fairness in the sense that what a trial seeks to discover is the truth, while the interest in protecting individual autonomy represents a subjective standard of fairness that favors a proceeding that is fair in the defendant's eyes. Although the *Sharp* court apparently acknowledged the potential force of subjective considerations,[131] it rejected the theory that the subjective standard of fairness is protected by due process.[132] The court's decision thus clearly accords priority to the goal of achieving reliable guilt-determination through legal representation.

Cal. Rptr. at 235 n.2. When the defendant asked the trial court to appoint advisory counsel, stating that an attorney could be "positively" helpful to him, the court denied the defendant's *pro se* request.

126. *See* notes 33-34 *supra* and accompanying text.

127. 7 Cal. 3d at 457, 499 P.2d at 494, 103 Cal. Rptr. at 238. *See* note 95 *supra* and accompanying text.

128. *See* note 16 *supra* and accompanying text.

129. 7 Cal. 3d at 460, 499 P.2d at 496-97, 103 Cal. Rptr. at 240-41.

130. The court stated: "It is clear that the assurance of a fair trial is constitutionally founded in due process." *Id.* at 459, 499 P.2d at 496, 103 Cal. Rptr. at 240. The Supreme Court also has referred to the concept of "fairness." *See, e.g.*, Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942): "The public conscience must be satisfied that fairness dominates the administration of justice."

131. *See* note 78 *supra*. One author who favors the abolition of self-representation, *see* note 121 *supra*, nevertheless concedes: "If the accused is to lose his freedom —or his life—perhaps it should be by the process that seems fairest to him." Grano 1195-96.

132. The court stated:

> An unfair trial cannot result . . . merely because an accused, who is of a mind to represent himself, is denied that right. The fairness of a trial is not to be predicated on any purported right of an accused to proceedings which are planned, directed or conducted by him . . . .

7 Cal. 3d at 460, 499 P.2d at 496, 103 Cal. Rptr. at 240.

The *Sharp* court emphasized that its holding was limited only to a rejection of the *constitutional pro se* argument, noting that its decision did "not purport to hold . . . that an accused is not entitled to represent himself in a proper case, but only that such a right is not a constitutionally protected one."[133] The court summarized the implications of this holding:

> [I]n reviewing . . . a court's [denial of] a motion to defend pro se, we will not regard the error, if any, as one of constitutional dimensions. This conclusion will relieve, in large part, the dilemma faced by a trial court when called upon to pass on a motion for the claimed constitutional right of self-representation under circumstances where, to grant it, might well infringe upon the accused's constitutional right to be represented by counsel.[134]

Thus the *Sharp* decision leaves the *pro se* right procedurally intact.[135]

C. Pro Se *and the Right to Counsel as Coexisting Rights*

The *Sharp* decision attempts to reduce the question of the constitutional status of the *pro se* right to a determination whether due process guarantees objective or subjective fairness. To state the question in either-or terms,[136] however, ignores the possibility that due process may recognize *both* the values of reliable guilt-determination (objective

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133. *Id.* at 461, 499 P.2d at 497, 103 Cal. Rptr. at 241.

134. *Id.* at 461-62, 499 P.2d at 498, 103 Cal. Rptr. at 242 (footnote omitted).

135. We have heretofore set forth standards by which a trial court may determine the competency of an accused who wishes to represent himself as a condition for granting such a motion . . . and we do not now depart therefrom.

Id. at 461, 499 P.2d at 497-98, 103 Cal. Rptr. at 241-42.

The California waiver of counsel standards are set forth in People v. Floyd, 1 Cal. 3d 694, 703, 464 P.2d 64, 68, 83 Cal. Rptr. 608, 612 (1970). Pursuant thereto, a defendant's waiver will be effective only if he has an intelligent conception of the consequences of his choice and understands the nature of the offense, the available pleas and defenses, and the possible punishments. *Cf.* notes 65-78 *supra* and accompanying text.

136. Stating the question in either-or terms may be an erroneous formulation of the problem. Does the Constitution guarantee only the *opportunity* to an objectively fair trial, or an objectively fair trial itself? When phrased in this manner, it is arguable that what is guaranteed is the objectively fair trial itself. *See* Grano 1202-03. Yet the question may be put another way: May counsel be forced upon a defendant to ensure objectivity, or must the defendant's subjective choice of procedure be respected? When thus reduced to terms of *imposition* as opposed to *choice*, the objective standard loses much of its appeal. The sixth amendment "tenders" counsel, Carter v. Illinois, 329 U.S. 173, 175 (1946); it does not impose it. *See* notes 115-21 *supra* and accompanying text.

fairness) and respect for individual choice (subjective fairness), values which may conflict in any given case.

The vast majority of criminal defendants desire counsel,[137] and in these cases there obviously is no conflict at all. Similarly, no conflict will exist when a *pro se* defense does not preclude an accurate determination of guilt or innocence. In some situations, however, a *pro se* defense will jeopardize the attainment of a reliable guilt-determination.[138] In these cases, the values of reliable guilt-determination and the defendant's individual dignity in electing to proceed *pro se* clearly would clash. Resolution of this conflict will require a balancing of the two competing values, but such a balancing undoubtedly will be difficult.[139]

One author suggests that what is called for is not a *resolution* but rather an *accommodation* of the conflicting values.[140] In the process of accommodation, the stringency of the waiver of counsel standard employed will determine whether the two values can be reconciled or whether the defendant's *pro se* request must be denied.[141] Consequently, attention must be directed towards articulating a waiver of counsel

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137. *See* note 2 *supra.*

138. Thus, an innocent *pro se* defendant could be convicted simply because he did not realize the intricacies of his case and hence lacked the skill and knowledge by which to prove his innocence.

139. "The difficulty here does not come from ignorance, but from the absence of any standard, for values are incommensurable." L. HAND, THE SPIRIT OF LIBERTY 161 (1952). The same thought had been expressed earlier:

> Thinkers have complained with justice of the lack of any formula whereby preference can be determined when values are conflicting. There is no common denominator to which it is possible to reduce them.

B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE 56-57 (1928).

140. Kadish 348-49; *cf.* C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 165-66 (1928):

> [T]he protection both of rights of the individual and of those of society rests not so often on formulas, as to which there may be agreement, but on a correct appreciation of social conditions and a true appraisal of the actual effect of conduct.

141. Since a defendant must effect a valid waiver of his right to counsel before he can proceed *pro se,* society can attempt to assure itself of a minimally acceptable probability of achieving reliable guilt-determination by predicting what factors will indicate a defendant's ability to conduct an adequate defense and then setting its waiver of counsel requirements accordingly. When a defendant cannot effect a valid waiver of counsel, the accommodation process will have determined that *in that particular case* the defendant must accept counsel, and the objective of reliable guilt-determination will not have been compromised. Yet for those defendants who effect a valid waiver of counsel, the waiver standards will have successfully accommodated *both* values to the case at hand.

standard as a means of ascertaining the point at which the *pro se* right may be exercised.

VI. PROCEDURAL RAMIFICATIONS OF PRO SE

A. *Trial Procedure and Constitutional* Pro Se

Implementing a constitutional *pro se* right arguably may involve some alteration in present trial procedures. A court may be required to notify the defendant of his constitutional right to defend himself,[142] whereas no notice requirement attaches to the statutory *pro se* right.[143] Furthermore, while the wrongful denial of a statutory *pro se* right results in reversal only if prejudice is shown,[144] an erroneous denial of a constitutional *pro se* right may well require automatic reversal.[145]

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142. If the Constitution does confer a *pro se* right, then acceptance of counsel necessarily implies that the *pro se* right is being "waived." Consequently, an intelligent waiver of the *pro se* right implies at a minimum that a defendant must be cognizant of the right. 48 N.C.L. REV. 678, 681 (1970).

Thus, the court in United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964), held that in all cases the court must explain to each defendant that he has the choice between a *pro se* defense and the assistance of counsel, that a lawyer will be provided if the defendant cannot afford to retain his own counsel, that although the court strongly advises the retention of counsel, the defendant nevertheless may seek to proceed *pro se*, and that the defendant will be given reasonable time to make his choice. *See also* Brown v. United States, 264 F.2d 363, 370 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959) (Bazelon, J., dissenting) (arguing that the Supreme Court's decision in Adams v. United States *ex rel.* McCann, 317 U.S. 269 (1942), requires the trial judge to inform each defendant of his constitutional right to defend *pro se*).

143. *See, e.g.*, Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959).

144. *See, e.g.*, Butler v. United States, 317 F.2d 249 (8th Cir.), *cert. denied*, 375 U.S. 838 (1963); Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959); Cantor v. United States, 217 F.2d 536 (2d Cir. 1954).

145. *See, e.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); United States v. Davis, 260 F. Supp. 1009 (E.D. Tenn.), *aff'd*, 365 F.2d 251 (6th Cir. 1966).

While the Supreme Court indicated in Chapman v. California, 386 U.S. 18 (1967), that a denial of a constitutional right need result in reversal only if prejudice is shown, it would seem that where the right denied is the right to defend *pro se*, it would be impossible to ascertain the degree of prejudice sustained. *See* 48 N.C.L. REV. 678, 680 (1970); Comment, *The Right to Defend* Pro Se, 3 TEX. TECH. U.L. REV. 89, 93 n.19 (1971); *cf.* Hamilton v. Alabama, 368 U.S. 52, 55 (1961), in which the Court, reversing a conviction in a capital case in which the defendant was without counsel at arraignment, contrary to his right to counsel under Alabama law, remarked that "the degree of prejudice can never be known."

B. *Procedural Efficiency and Pro Se*

Although a trial judge theoretically owes little, if any, special duty to a *pro se* defendant,[146] there can be little doubt that *pro se* proceedings adversely affect the efficient operation of today's overburdened criminal trial courts.[147] Thus the delay and confusion inherent in *pro se* proceedings may have influenced current judicial and legislative attitudes regarding the right. For example, the California legislature clearly expressed the factors which motivated its proposed constitutional amendment precluding any possible basis for a constitutional *pro se* right:[148]

> [P]ersons representing themselves cause unnecessary delays in the trials of charges against them; . . . trials are extended by such persons representing themselves; and . . . orderly trial procedures are disrupted. Self-representation places a heavy burden upon the administration of criminal justice without any advantages accruing to those persons who desire to represent themselves.[149]

The problem of procedural inefficiency is serious, and there is dispute concerning the priority to be accorded the problem.[150] Yet

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The possibility of automatic reversal has been criticized on the ground that if no harm is shown but a new trial nevertheless is awarded, a defendant is benefited with a windfall. 48 N.C.L. REV. 678, 681 (1970). The possibility of automatic reversal, however, can be viewed more as a safeguard than a danger, for it should force the trial courts to perform their duties diligently. Since a defendant must unequivocally assert his desire to proceed *pro se*, *see* note 54 *supra* and accompanying text, the court will be put on notice to conduct a thorough investigation of the defendant's ability to effect a competent waiver of counsel. *See, e.g.*, Burstein v. United States, 178 F.2d 665 (9th Cir. 1949), in which the defendant clearly asserted his desire to proceed *pro se*, which the trial court finally, albeit reluctantly, granted. On appeal, the Ninth Circuit ruled that the trial court had properly heeded the defendant's *pro se* request, that the defendant had effectively waived counsel, and that he therefore would not be heard to complain that his right to counsel had been denied. Thus, if the trial court abides by the proper judicial procedure, the necessity to resort to automatic reversal should not arise on any large scale.

146. *See* notes 86-91 *supra* and accompanying text.

147. *See, e.g.*, United States v. Dougherty, 473 F.2d 1113, 1124 (D.C. Cir. 1972):

> Given the general likelihood that *pro se* defendants have only rudimentary acquaintanceship with the rules of evidence and courtroom protocol, a measure of unorthodoxy, confusion and delay is likely, perhaps inevitable, in *pro se* cases.

See generally Self-Representation 1509-12.

148. The constitutional amendment has been ratified. CAL. CONST. art. I, § 13. *See* note 16 *supra.*

149. People v. Sharp, 7 Cal. 3d 448, 463, 499 P.2d 489, 499, 103 Cal. Rptr. 233, 243 (1972), *quoting* ch. 1800, § 6, [1971] Cal. Stat. 3898.

150. Chief Justice Burger, for instance, has stated:

the time-consuming nature of a trial that meets due process standards results from a conscious choice of adherence to rules that are fair over expediency in the determination of guilt or innocence;[151] hence, it would not seem justifiable to avoid potential procedural inefficiencies in trial proceedings by denying legitimate substantive rights.[152] Thus, allowing considerations of procedural efficiency to affect any decision bearing upon the constitutional status of the *pro se* right arguably is prohibited by the federal constitution. Indeed, the due process clause itself may well represent a recognition of and response to man's vulnerability to the appeal of speed and efficiency:

> [T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.[153]

> The challenges to our system of justice are collosal [*sic*] and immediate and we must assign priorities. I would begin by giving priority to methods and machinery, to procedure and techniques, to management and administration of judicial resources.

Matthews, *Burger's Court: Process Before Substance of Justice*, St. Louis Post-Dispatch, Nov. 5, 1972, § B, at 3, col. 3. Judge Bazelon of the District of Columbia Circuit, however, acknowledged that "efficiency is nice, but it's really beside the point." *Id.* He continued:

> The judicial process is at its core a fundamentally inefficient process.
>
> . . . .
>
> This does not mean we should not do everything we can to achieve reform and speed the process of justice. We simply should not make efficiency our top priority.

Id. Thus it is interesting to note that in Brown v. United States, 264 F.2d 363 (D.C. Cir.), *cert. denied*, 360 U.S. 911 (1959), *see* note 26 *supra*, then Judge Burger concurred with the majority, which believed the *pro se* right to be merely statutory, while Judge Bazelon dissented, insisting on the right's constitutional stature.

151. *Cf.* text accompanying note 153 *infra*.

152. The court in United States v. Dougherty, 473 F.2d 1113, 1124-25 (D.C. Cir. 1972), recognizing the problems to be resolved, *see* note 147 *supra* and accompanying text, suggested that many, if not all, of them can be eased by providing amicus counsel for the *pro se* defendant:

> The energy and time toll on the trial judge, as fairness calls him to articulate ground rules and reasons that need not be explained to an experienced trial counsel, can be relieved, at least in part, by appointment of an amicus curiae to assist the defendant.

153. Stanley v. Illinois, 405 U.S. 645, 656 (1972).