DUE PROCESS v. DEFENSE COUNSEL'S UNILATERAL WAIVER OF THE DEFENDANT'S RIGHT TO TESTIFY

*By Seth Dawson**

Introduction

During the course of his murder trial[1] Roger Dale Smith was prevented from addressing the jury which eventually recommended that he be sentenced to death. Although Smith repeatedly informed his counsel that he wanted to testify, counsel refused this request for a tactical reason: Smith had a history of violent crimes that might have precluded the possibility of a manslaughter verdict if brought out on cross-examination.[2]

Persisting in his effort to testify, Smith then requested the court to permit him to proceed as his own counsel, to appoint a new attorney, or to allow him to testify over the objection of his attorney.[3] The trial judge denied the motion on the ground that Smith's right to testify had been waived by his attorney.[4] The trial court's ruling was essentially

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1. People v. Smith, Criminal No. 23657 (Super. Ct., San Bernadino County, Cal. Dec. 24, 1970).

2. *Id.*, record at 1979.

3. *Id.*, record at 1882-85.

4. *Id.*, record at 1890:

Defense Counsel: "Mr. Smith wishes me to ask this question: That if he wishes to testify and I refuse to call him, does he still have a Constitutional right to testify in his own behalf."

The Court: "No. In my opinion, with the law being clear that the attorney has the primary obligation and responsibility to conduct the presentation of the defense case, he would not have a right to testify over the objection of his counsel. It would constitute a waiver."

On appeal the California District Court of Appeal, in an unpublished opinion, upheld the trial judge's ruling, holding that the trial attorney has the unilateral authority to waive the defendant's right to tesify and that Smith was not prejudiced by the waiver. People v. Smith, 4 Criminal No. 5740 (Feb. 21, 1974). After the California Supreme Court denied Smith's petition for hearing, the waiver issue in his case was raised in a petition for a writ of habeas corpus in federal court. Although the federal magistrate's preliminary memorandum contended that the refusal to permit Smith to testify over the advice of his counsel was reversible error and that the harmless error rule was not ap-

correct under present law. As a general rule defense counsel is permitted to waive his client's right to testify, even though the defendant expressly desires to take the witness stand, unless it can be shown on appeal that the attorney's decision was incompetently made.[5]

The purpose of this note is to demonstrate that the right of a criminal defendant to testify in his own behalf has become an essential element of the due process guaranteed by the Fifth and Fourteenth Amendments to the federal Constitution. This note concludes that the right has assumed such fundamental importance that due process requires that a defendant be permitted to testify even against counsel's advice to the contrary. Essential to this analysis is a discussion of the historical development of the right to testify, including its emergence as a primary element of due process, an examination of the case law concerning waiver of this important right, and an analysis of the policy considerations affecting waiver of the right to testify.

At the outset the issue addressed here should be distinguished from issues raised in related situations. This note does not consider situations where a defendant decides not to testify due to fear of impeachment on cross-examination,[6] threatens to disrupt the proceedings,[7] or fails to assert promptly his desire to testify against counsel's advice.[8] In these circumstances different considerations apply.[9] This note considers only those situations where a defendant timely asserts, against the advice of his counsel, his desire to speak in his own behalf.

I. The Nature of the Right to Testify

Issues concerning waiver of the right to testify are largely determined by how the right to testify is characterized, since "a waiver of a constitutional right or privilege [is] measured against a higher stand-

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plicable, the federal district judge, in another unpublished opinion, denied the petition, finding that if any error was made it was harmless beyond a reasonable doubt under Chapman v. California, 386 U.S. 18 (1967). Smith v. Britt, D.C. No. 74-3123 (Cal. Cent. Dist. Ct., Nov. 18, 1975). Smith is presently appealing this decision to the Ninth Circuit Court of Appeals. Smith v. Britt, C.A. No. 76-2228.

5. See note 83 *infra.*

6. *See* United States v. O'Day, 467 F.2d 1387, 1388 (9th Cir. 1972), *cert. denied.* 410 U.S. 912 (1973); State v. Clemmons, 460 S.W.2d 541, 545 (Mo. 1970); *cf.* Harris v. New York, 401 U.S. 222 (1971).

7. *See* Sims v. Lane, 411 F.2d 661, 665 (7th Cir. 1969), *cert. denied,* 396 U.S. 943 (1969). *Compare* United States v. Ives, 504 F.2d 935, 941 (9th Cir. 1974), *vacated on other grounds,* 421 U.S. 944 (1975), *with* United States v. Bentvena, 319 F.2d 916, 944 (2d Cir. 1963), *cert. denied,* 375 U.S. 940 (1963).

8. State v. Tillery, 107 Ariz. 34, 36-38, 481 P.2d 271, 273-74 (1971), *cert. denied,* 404 U.S. 847 (1971); People v. Mosqueda, 5 Cal. App. 3d 540, 545, 85 Cal. Rptr. 346, 349 (1970); State v. Kremens, 57 N.J. 309, 311-13, 272 A.2d 537, 538-59 (1971).

9. See notes 6-8 *supra.*

ard than a waiver of a right or privilege not guaranteed by the Constitution."[10] For this reason the historical development of the right must be traced.

A. Common Law

Only in recent times has a criminal defendant enjoyed the opportunity to testify in his own defense. For centuries the English common law displayed great aversion toward the testimony of all parties to an action,[11] to the extent that parties were considered incapable of being competent witnesses.[12] In civil cases the rule of disqualification of parties appears to have been well established by the end of the sixteenth century.[13] The primary justification for the rule was that the testimony of any party would inevitably be biased.[14] In the seventeenth century the rule of disqualification was applied in civil cases to interested nonparty witnesses under this same rationale.[15]

The application of the rule of disqualification to criminal defendants was a later development. In the sixteenth century the accused was required to conduct his own defense without the assistance of either witnesses or counsel.[16] Consequently, the criminal trials of Elizabethan England were described as "a long argument between the prisoner and the counsel for the Crown, in which they grappled with each other's arguments with the utmost eagerness and closeness of reasoning."[17] Through this process the defendant could offer by way of explanation material that later courts would characterize as "testimony."[18]

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10. United States v. Ives, 504 F.2d 935, 940 (9th Cir. 1974). A fundamental constitutional right, as opposed to a mere statutory or constitutional right, is not subject to unilateral waiver by defense counsel. See notes 85-96 and accompanying text *infra*.

11. *See* Ferguson v. Georgia, 365 U.S. 570, 573-83 (1961); Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U.L.Q. 454 (1962).

12. 1 J. WIGMORE, EVIDENCE 990-91 (2d ed. 1923); 1 E. COKE, ON LITTLETON 6. b. 7. a. (1832).

13. 9 W. HOLDSWORTH, HISTORY OF ENGLISH LAW 194 (1926).

14. *See, e.g.*, 1 E. COKE. ON LITTLETON 6. b. (1832): "[I]n an information upon the statute of usury, the partie to the usurious contract shall not be admitted to be a witness against the usurer, for in effect he should be *testis in propria causa*, and should avoyd his owne bonds and assurances, and discharge himselfe of the money borrowed; and though he commonly raise up an informer to exhibit the information, yet in *rei veritate* he is the partie."

15. 1 J. WIGMORE, EVIDENCE 990-91 (2d ed. 1923). Interested nonparty witnesses included those who had a financial interest in the outcome of the trial, as opposed to relatives or servants of the parties. *Id.* at 991-92; C. MCCORMICK, EVIDENCE 142 (2d ed. 1972). Interested nonparty witnesses also included the victims of crimes. 1 E. COKE, ON LITTLETON 6. b. (1832). See note 14 *supra*.

16. 1 J. STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 350 (1883).

17. *Id.* at 326.

18. *See* 1 J. WIGMORE, EVIDENCE 995 (2d ed. 1923).

In the late seventeenth century Parliament enacted a statute permitting a defendant who was accused of treason to call witnesses on his behalf,[19] and by 1701 this rule was extended to a defendant accused of any felony.[20] A distinction, however, was maintained between the defendant and his witnesses; only the latter were permitted to testify.[21] The rationale for this distinction lay in the disqualification for interest rule, which was predicated upon the traditional irrebuttable presumption that an interested party would testify only in accordance with his own interest rather than in accordance with the truth. The criminal defendant was, of course, an interested party, and the common law "shuddered at the idea of any person testifying who had the least interest."[22] As one court succinctly stated, the common law could not conceive of a person who "sweareth to his own [interest] and changeth not."[23] The testimony of the accused was disqualified upon the theory that the frailty of human nature and the overpowering desire for freedom would ordinarily induce a person charged with a crime, if permitted to testify, to swear falsely.[24] In this regard, Sir James Stephen strenuously argued that "it is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion."[25]

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19. An Act for regulating of Trials in Cases of Treason and Misprision of Treason, 7 Will. 3, c. 3, § 1, at 593 (1695): "[E]very such Person so accused and indicted, arraigned or tried for any such Treason, as aforesaid, or for Misprision of such Treason, from and after the said Time, shall be received and admitted to make his and their full Defense, by Counsel learned in the Law, and to make any Proof that he or they can produce by lawful Witness or Witnesses, who shall then be upon Oath, for his and their just Defence in that Behalf. . . ."

20. An Act for punishing of Accessories to Felonies, and Receivers of stolen Goods, and to prevent the wilful burning and destroying of Ships, 1 Anne, St. 2, c. 9, § 3, at 118 (1701): "And be it further enacted by the Authority aforesaid, That from and after the said twelfth Day of February one thousand seven hundred and two, all and every Person and Persons, who shall be produced or appear as a Witness or Witnesses on the Behalf of the Prisoner, upon any Trial for Treason or Felony, before he or she be admitted to depose, or give any Manner of Evidence, shall first take an Oath to depose the Truth, the whole Truth, and nothing but the Truth, in such Manner, as the Witnesses for the Queen are by law obliged to do; and if convicted of any wilful Perjury in such Evidence, shall suffer all the Punishments, Penalties, Forfeitures and Disabilities, which by any of the Laws and Statutes of this Realm are and may be inflicted upon Persons convicted of wilful Perjury."

21. 1 J. WIGMORE, EVIDENCE 996 (2d ed. 1923).

22. State v. Barrows, 76 Me. 401, 409 (1884).

23. State v. Wilcox, 206 N.C. 691, 693, 175 S.E. 122, 123 (1934).

24. *Id.*

25. J. STEPHEN, A GENERAL VIEW OF THE CRIMINAL LAW OF ENGLAND 202 (1863).

This antipathy toward the testimony of criminal defendants permeated the English common law at the time this country was founded. It was, therefore, only natural for the rule of disqualification to be adopted by our own common law. In *The King v. Lukens*,[26] one of the first American decisions on the issue of disqualification for interest, the Pennsylvania Supreme Court refused to accept the defendant as a witness, holding that the issue there in question "must be proved by indifferent witnesses."[27] Subsequent decisions perpetuated the policy of prohibiting criminal defendants from testifying in their own behalf into the nineteenth century.[28]

The harsh rule of disqualification for interest, however, was not without its vigorous critics. Jeremy Bentham led a movement for evidentiary reform in England, arguing for rules of evidence that would not limit but promote the search for truth.[29] The essence of this position was that "all evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals."[30] The telling force of this argument is reflected in the number of statutes that were eventually enacted abolishing the disqualification for interest rule.[31] Through these statutes the criminal defendant was again able to participate actively in his own defense.

B. Statutory Origins

Parties were first permitted to testify in their own behalf only in civil actions.[32] Lord Brougham's Act of 1851 abolished the rule disqualifying parties to a civil action from testifying;[33] the qualification of criminal defendants to give sworn testimony did not come until later. In 1859 the state of Maine apparently enacted the first statute making defendants accused of certain specified crimes competent witnesses.[34]

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26. 1 U.S. (1 Dall.) 5 (1762).

27. *Id.* at 6.

28. *See, e.g.*, Batre v. State, 18 Ala. 119 (1850); Whelchell v. State, 23 Ind. 89 (1864); State v. Laffer, 38 Iowa 422 (1874); State v. Bixby, 39 Iowa 465 (1874).

29. 5 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 34-77 (Hunt & Clarke ed. 1827).

30. T. MACAULAY, LEGISLATIVE MINUTES 127-28 (1835).

31. See notes 32-36 and accompanying text *infra*.

32. An Act for the more easy Recovery of Small Debts and Demands in England, 9 & 10 Vict., c. 95, § 83, at 305 (1846).

33. An Act to Amend the Law of Evidence, 14 & 15 Vict., c. 99, § 2, at 813 (1851).

34. ME. PUB. LAWS, ch. 104 (1859): "No respondent in a criminal prosecution or proceeding at law, for libel, nuisance, simple assault, simple assault and battery, or for the violation of any municipal or police ordinance, offering himself as a witness, shall be excluded from testifying, and all laws inconsistent herewith are repealed."

Maine then enacted a general competency statute for criminal defendants in 1864, the first such statute in the English-speaking world.[35] By 1884, only twenty years later, a majority of the states and the federal government had followed Maine's example.[36]

The federal statute establishing the competency of a criminal defendant as a witness is typical of many contemporary statutory provisions:

> In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him.[37]

In contrast to the self-contained nature of the federal provision, the competency statutes in some states are drafted more circuitously. In California, for example, the penal code provides that the competency rules for criminal trials shall be the same as those for civil trials,[38] and the California Evidence Code merely provides that parties to an action are not excluded from being competent witnesses.[39] Some states, such as Arizona, have made the right to testify a constitutional as well as statutory guarantee.[40] Whatever the form of the enactment, the effect is that the defendant enjoys the same competency to testify as all other witnesses.

Under contemporary statutes the jury is to evaluate the testimony of a defendant in the same manner as the testimony of other witnesses.[41] Although free from an irrebuttable presumption of unreliability, a defendant's testimony, like that of any other witness, is still sub-

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35. ME. PUB. LAWS, ch. 280 (1864): "Sec. 1. In the trial of all indictments, complaints and other proceedings against persons charged with the commission of crimes or offences, the person so charged shall at his own request, but not otherwise, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury under instructions of the court.

"Sec. 2. Nothing herein contained shall be construed as compelling any such person to testify." *See also* ME. REV. STAT. ANN. tit. 15, § 1315 (Cum. Supp. 1975).

36. *See* Ferguson v. Georgia, 365 U.S. 570, 577 n.6 (1961). For a concise discussion of the development of the accused's right to testify in Maine and England, see Popper, *History and Development of the Accused's Right to Testify*, 1962 WASH. U.L.Q. 454 (1962). Appendix 1 to this note contains a table of current state competency statutes regarding criminal defendants as witnesses.

37. 18 U.S.C. § 3481 (1970).

38. CAL. PEN. CODE § 1321 (West 1970).

39. CAL. EVID. CODE § 700 *et seq.* (West 1966).

40. ARIZ. CONST. art. 2, § 24: "In criminal prosecutions, the accused shall have the right to . . . testify in his own behalf . . . ." *See also* ARIZ. REV. STAT. ANN. § 13-163 (1956).

41. *See, e.g.*, People v. Steinfeld, 38 Cal. App. 2d 280, 101 P.2d 89 (1940); Ivey v. State, 132 Fla. 36, 180 So. 368 (1938); People v. Shapiro, 308 N.Y. 453, 126 N.E.2d 559 (1955); State v. Austin, 20 N.C. App. 539, 202 S.E.2d 293 (1974), *rev'd on other grounds*, 285 N.C. 364, 204 S.E.2d 675 (1974).

ject to vigorous cross-examination. Whether the testimony remains credible after such cross-examination is properly a determination for the finder of fact, since "[n]o witness including a defendant who elects to testify in his own behalf is entitled to a false aura of veracity."[42]

C. Due Process Stirrings

There is a growing recognition that the right to testify has transcended its statutory origins and is now emerging as a constitutionally protected right, inherent in the ever-broadening concept of due process. As shown below, the constitutional dimension of the right to testify is derived from its inclusion in the rights to be heard and to be represented by counsel. Although cases discussing the right to counsel and the right to be heard do not directly determine who may waive the right to testify, they do establish that the right to testify is an essential element of due process. Such a characterization of this right is an important preliminary determination in deciding who may waive it.

1. Ferguson v. Georgia

In *Ferguson v. Georgia*,[43] the United States Supreme Court strongly implied that the right of a criminal defendant to testify in his own behalf is an essential element of due process under the Fourteenth Amendment. The case involved two Georgia statutes—one making a criminal defendant incompetent to testify as a witness in his own behalf, the other granting the trial court discretion in permitting defense counsel to question a defendant who is making an unsworn statement before the jury. Writing for the majority, Justice Brennan found that Georgia could not, consistent with due process, "deny [the defendant] the right to have his counsel question him to elicit his statement."[44] To deny such an opportunity would deprive the accused of guidance of counsel at the hour of trial.[45]

Although the Court's holding did not expressly touch upon the companion statute, which disqualified a criminal defendant as a sworn witness, the narrow holding of the Court all but established as an element of due process the right of the defendant to testify in his own behalf. For if it is a denial of due process not to permit the defendant to be examined directly by his attorney, then surely it is an even greater denial of due process to refuse the defendant any opportunity to testify

42. People v. Beagle, 6 Cal. 3d 441, 453, 492 P.2d 1, 8, 99 Cal. Rptr. 313, 320 (1972); *cf.* Harris v. New York, 401 U.S. 222 (1971).

43. 365 U.S. 570 (1961).

44. *Id.* at 596.

45. 365 U.S. at 594. Without such assistance "he may fail properly to introduce, or to introduce at all, what may be a perfect defense." *Id.* at 595.

in his own behalf. Similarly, in *Brooks v. Tennessee*[46] the Court held that a defendant is deprived of "the guiding hand of counsel" where he is compelled by state procedure to testify before any other defense witness has done so or else waive the opportunity to testify at all.[47] Logically, the due process right to be examined by one's attorney and the right to testify at the time selected by one's counsel rest upon the assumption that there is a constitutional right to testify.

This view finds support in the concurring opinion of Justice Clark, joined by Justice Frankfurter, in *Ferguson.* The two justices did not "hesitate to state that [in their view Georgia's incompetency statute] does not meet the requirements of due process . . . ."[48] They noted that when an incompetency statute comes under the Court's scrutiny again, the "predictable" result is that it will be declared unconstitutional.[49] As Justice Frankfurter concluded in his separate opinion, "I have no difficulty in moving from the Court's oblique [opinion] to the candid determination that [the incompetency statute] is unconstitutional."[50]

Given the implication of the majority opinion in *Ferguson,* and the analysis contained in the concurring opinions, most courts have interpreted *Ferguson* as establishing that the right of a criminal defendant to testify in his own behalf is an essential element of due process.[51] The Supreme Court itself has cited *Ferguson* for this very proposition:

> This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right . . . to testify on his own behalf . . . .[52]

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46. 406 U.S. 605, 612-13 (1972).

47. Counsel must be able to assess the evidence prior to recommending whether to put the defendant on the stand. *See id.* at 609-10.

48. Ferguson v. Georgia, 365 U.S. 570, 602 (1961) (Clark and Frankfurter, JJ., concurring).

49. *Id.* at 603.

50. 365 U.S. at 601 (Clark and Frankfurter, JJ., concurring).

51. The right to testify on one's own behalf is "merely one of many rights guaranteed by the Fourteenth Amendment to the federal Constitution to insure a fair trial." People v. Mosqueda, 5 Cal. App. 3d 540, 545, 85 Cal. Rptr. 346, 349 (1970), *citing* Ferguson v. Georgia; *accord,* Pigg v. State, 253 Ind. 329, 330, 253 N.E.2d 266, 267 (1969); Reagon v. State, 253 Ind. 143, 151-52, 251 N.E.2d 829, 834 (1969) (dissenting opinion); People v. Farrar, 36 Mich. App. 294, 304-05 n.20, 193 N.W.2d 363, 369 n.20 (1972); People v. Rolston, 31 Mich. App. 200, 206, 187 N.W.2d 454, 457 (1971); People v. Hall, 19 Mich. App. 95, 114-15 n.17, 172 N.W.2d 473, 483 n.17 (1969). "*Ferguson* . . . establishes that a state law which precludes the accused in a penal cause from testifying in his own behalf violates the constitutional guaranty of the due process of law." People v. Hernandez, 94 P.R.R. 111, 116 (1967); *cf.* Fowle v. United States, 410 F.2d 48, 53 (9th Cir. 1969).

52. Faretta v. California, 422 U.S. 806, 819-20 n.15 (1975).

A few courts have read *Ferguson* narrowly, maintaining that the common law rule of disqualification for interest and its statutory abrogation "conclusively demonstrate that the right of a criminal defendant to testify in his own behalf is a statutory right and not a constitutional right."[53] What these decisions fail to consider is that due process is an ever-expanding concept.

> It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.[54]

As an ever-broadening concept, due process includes those procedural safeguards that are considered to be essential to a fair judicial system. Due process has been interpreted to include safeguards not specifically contained in the Constitution[55] or not in existence at the time of its adoption.[56] Hence, although the right of the accused to testify in his own behalf was not recognized at the time of the adoption of the Fifth and Fourteenth Amendments, this alone does not prevent its subsequent inclusion in the framework of essential procedural safeguards protected by the due process clause of the Fifth and Fourteenth Amendments.

2. *The Right to be Heard*

By now the importance of the defendant's interest in testifying in his own behalf has grown to such proportions that it must be considered a requirement of due process regardless of which test is used to determine whether a particular right is an element of due process.[57]

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53. State v. Hutchinson, 458 S.W.2d 553, 554 (Mo. 1970); *accord,* State v. McKenzie, 17 Md. App. 563, 576, 303 A.2d 406, 413 (1973).

54. Wolf v. Colorado, 338 U.S. 25, 27 (1949); *cf.* Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

55. *See, e.g.,* In re Winship, 397 U.S. 358 (1970) (due process includes reasonable doubt standard in criminal cases); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule as part of due process).

56. *See, e.g.,* Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule in criminal cases). Due process has also been extended to apply to proceedings unknown at the time the Constitution was written. *See, e.g.,* Morrissey v. Brewer, 408 U.S. 471 (1972) (parole revocation); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare termination hearings).

57. Such tests include whether the right (1) reflects "a fundamental principle of liberty and justice which inheres in the very idea of free government" (Twining v. New Jersey, 211 U.S. 78, 106 (1908)); (2) "is implicit in the concept of ordered liberty" (Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled on other grounds* in Benton v. Maryland, 395 U.S. 784 (1969)); (3) is part of "those canons of decency and fairness which express the notions of justice" (Rochin v. California, 342 U.S. 165, 169 (1952), *quoting* Malinski v. New York, 324 U.S. 401, 417 (1945)); or (4) is based

> Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data.[58]

The realization of these weighty goals is seriously if not totally impaired if the accused is not afforded the opportunity to answer personally the government's charges against him and to relate his version of the facts.[59]

It has been recognized that the Constitution requires the accused be given the "fullest opportunity to meet [and deny] the accusation against him"[60] and to present evidence[61] and witnesses on his behalf.[62] In essence, "[t]he fundamental requisite of due process of law is the opportunity to be heard."[63] As a primary element of the right to be heard, "it is basic to due process that an accused person have a fair opportunity to tell his story in a fair trial."[64] Accordingly, in its broadest sense the right to be heard is equivalent to the basic right to present a defense, and firmly embedded in the right to be heard is the specific right to offer oneself as a witness in court.[65]

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upon those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" (Herbert v. Louisiana, 272 U.S. 312, 316 (1926)).

58. *In re* Gault, 387 U.S. 1, 20-21 (1967).

59. The defendant's testimony is uniquely valuable. The defendant is often an eyewitness to the crime he allegedly committed, and his testimony has special relevance with respect to issues of his intent and state of mind at the time of the offense and affirmative defenses such as self-defense. Moreover, it would seem that in many cases the defendant's primary exculpatory evidence consists in his own testimony, corroborated by whatever detail he can muster.

60. Walder v. United States, 347 U.S. 62, 65 (1954).

61. Jenkins v. McKeithen, 395 U.S. 411, 429 (1969).

62. Washington v. Texas, 388 U.S. 14, 18-19 (1967).

63. Grannis v. Ordean, 234 U.S. 385, 394 (1914); *accord*, Specht v. Patterson, 386 U.S. 605, 610 (1967); Holden v. Hardy, 169 U.S. 366, 390-91 (1898). "Where a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). This right to be heard must be granted "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

64. MacKenna v. Ellis, 280 F.2d 592, 595 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

65. The defendant's "opportunity to be heard in his defense—a right to his day in court—[is] basic in our system of jurisprudence; and these rights include, as a minimum, a right . . . to offer testimony . . . ." *In re* Oliver, 333 U.S. 257, 273 (1948),

In a trilogy of cases the Supreme Court has held that the right to testify extends to parole and probation revocation proceedings and to welfare termination hearings.[66] This extension of the right to testify to proceedings tangential to the trial process must be predicated upon the fact that the right to testify also inheres at trial.

3. The Constitutionl Basis of the Right to Testify: A Fundamental Right

There is growing conviction in the courts that the right to testify is not merely a statutory right. By way of dictum, for example, many courts have explicitly stated what has been implicitly assumed for some time: that "[w]hether the defendant is to testify is . . . a matter of constitutional right."[67] In view of the above discussion, it is difficult to imagine that a statute declaring criminal defendants to be incompetent as witnesses could withstand a constitutional challenge. "Such a restriction upon an accused's right to introduce evidence can scarcely be squared with present-day notions of due process. It is all but impossible to conceive of a trial as fair where the defendant is denied any right to testify on his own behalf."[68]

Although the argument that the right to testify is a fundamental component of due process appears to be compelling, there has as yet been no definitive determination that the right is a constitutional one. In fact, the Seventh Circuit Court of Appeals has expressly held that no federal question was raised by a habeas corpus petitioner who asserted that he was denied the right to testify on his own behalf.[69] Rec-

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cited with approval in Chambers v. Mississippi, 410 U.S. 284, 294 (1973). It is basic to a defendant's right to be heard to be able to testify as to whether he did or did not commit the crime for which he was charged. Moore v. Florida, 276 So. 2d 504 (Fla. Ct. App. 1973).

66. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (parole revocation); Goldberg v. Kelly, 397 U.S. 254, 269 (1970) (welfare recipient facing termination of assistance "must be allowed to state his position orally"). *Cf.* Goss v. Lopez, 419 U.S. 565, 581 (1975) (student facing suspension from school entitled to present his case at a disciplinary hearing).

67. Brooks v. Tennessee, 406 U.S. 605, 612 (1972); *accord,* United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969); Fowle v. United States, 410 F.2d 48, 53 (9th Cir. 1969); Poe v. United States, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd,* 352 F.2d 639 (D.C. Cir. 1965); Taylor v. State, 51 Ala. App. 573, 578, 287 So. 2d 889, 894 (1973), *rev'd on other grounds,* 291 Ala. 756, 287 So. 2d 901 (1973); People v. Steinfield, 38 Cal. App. 2d 280, 282, 101 P.2d 89, 90 (1940); Mathis v. State, 471 S.W.2d 396, 397 (Tex. Crim. App. 1971). See note 96 *infra. Cf.* Harris v. New York, 401 U.S. 222, 225 (1971) ("Every criminal defendant is privileged to testify in his own defense . . . ."); Rickey v. United States, 242 F.2d 583, 586 (5th Cir. 1957).

68. B. SCHWARTZ, CONSTITUTIONAL LAW 221 (1972); *cf.* Note, 3 HOFSTRA L. REV. 839, 842-45 (1975).

69. Sims v. Lane, 411 F.2d 661, 664 (7th Cir. 1969). In *Sims* the court held that

ognition that the right to testify is guaranteed by the constitution is essential because it greatly affects the determination of who may waive that right.[70] It may also affect the accused's perceptions of the fairness of the criminal justice process.

A single indication of the fundamental importance of the right is the grave consequences that befall a defendant who does not exercise it.[71] The position that this right occupies in the panoply of due process safeguards has been addressed above.[72] The fundamental nature of the defendant's right to testify is further reflected in the judicial recognition that it is a "basic constitutional safeguard,"[73] "of inestimable value."[74] The right has been recognized "as having an importance similar to the right to be present at one's trial and to present a defense."[75] Its protection is therefore "fundamental to our judicial process,"[76] giving rise to "an obligation on the part of both the court and trial counsel to inform the accused of his right to testify, if he so desires."[77] Consequently, one court has stated that "as a matter of law, a defendant is always vouchsafed the constitutional right to testify."[78] For a trial judge to arbitrarily deny the defendant the right to testify in his own behalf is to deprive the defendant of his right to a fair trial.[79] Other evidence of the fundamental nature of the defendant's right to testify is found in cases which imply that protection of the right is more crucial than is the right to counsel itself. The Supreme Court has held that in welfare termination hearings, and parole and probation revocation hearings, the right to be heard must be granted, although there is not necessarily a right to counsel in such proceedings.[80]

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the right to testify is purely statutory and noted that "[n]o case has been brought to our attention to support petitioner's contention that the Fourteenth Amendment accords a defendant in a state court a federal constitutional right to testify." *Id.*

70. See notes 90-106 and accompanying text *infra.*

71. See notes 111-113 and accompanying text *infra.*

72. See notes 44-68 and accompanying text *supra.*

73. Fowle v. United States, 410 F.2d 48, 53 (9th Cir. 1969).

74. Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955), *aff'd in part, rev'd in part,* 355 U.S. 66 (1957).

75. United States v. Bentvena, 319 F.2d 916, 943 (2d Cir. 1963).

76. United States v. Ives, 504 F.2d 935, 941 (9th Cir. 1974).

77. Poe v. United States, 233 F. Supp. 173, 176 (D.D.C. 1964), *aff'd,* 352 F.2d 639 (D.C. Cir. 1965).

78. United States v. McCord, 420 F.2d 255, 257 (D.C. Cir. 1969).

79. People v. Rakiec, 260 App. Div. 452, 457, 23 N.Y.S.2d 607, 612 (1940); People v. Rosenzweig, 135 Misc. Rep. 324, 325, 239 N.Y.S. 358, 359 (1929); *cf.* United States v. Looper, 419 F.2d 1405 (4th Cir. 1969) (reversible error to deny defendant the right to testify because he refuses to take religious oath).

80. Gagnon v. Scarpelli, 411 U.S. 778, 786 (1973) (probation revocation); Morrissey v. Brewer, 408 U.S. 471, 489 (1972) (parole revocation); Goldberg v. Kelly, 397

As indicated in the next section, if the right to testify is a fundamental constitutional right, it cannot be waived by counsel over his client's objection.

II. Waiver of the Right to Testify

Courts have distinguished between the defendant's right to a day in court and the concomitant right to have a say in that court.[81] As a result of this distinction, defense counsel has not been allowed to unilaterally waive the defendant's right to a jury trial,[82] but has been allowed to unilaterally waive the defendant's right to testify. Because this waiver is viewed merely as a decision of trial tactics, appellate review in the majority of jurisdictions is limited to the issue of the competency of counsel,[83] and reversible error is seldom found.[84]

The minority view, as explained below, recognizes the fundamental importance of the right to testify and holds that it cannot be unilaterally waived by defense counsel. This view strengthens the accused's right to testify by acknowledging it as a personal constitutional guarantee.

A. Waiver of the Fundamental Right to Testify

A fundamental right is not subject to unilateral waiver by defense

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U.S. 254, 268-70 (1970); *cf.* Goss v. Lopez, 419 U.S. 565, 581 (1975) (school suspension hearing).

81. In *In re* Oliver, 333 U.S. 257, 273 (1948) the Court stated that the right to a trial and to be heard in person are "basic" due process rights.

82. Patton v. United States, 281 U.S. 276, 312 (1930); *see* Brookhart v. Janis, 384 U.S. 1, 6-7 (1966). Yet the chances of obtaining a fair trial are severely restricted if the defendant does not testify. See notes 111-113 and accompanying text *infra*.

83. *See, e.g.*, Sims v. Lane, 411 F.2d 661, 664 (7th Cir. 1969); Hayes v. Russell, 405 F.2d 859, 860 (6th Cir. 1969); Hudgins v. United States, 340 F.2d 391, 396 (3rd Cir. 1965); United States v. Garguilo, 324 F.2d 795, 797 (2d Cir. 1963); Newsom v. Smyth, 261 F.2d 452, 454 (4th Cir. 1958); Palakiko v. Harper, 209 F.2d 75, 83 (9th Cir. 1953); Casey v. Overlade, 129 F. Supp. 433, 434 (N.D. Ind. 1955); United States v. Cameron, 84 F. Supp. 289, 290 (S.D. Miss. 1949); People v. Gutkowsky, 219 Cal. App. 2d 223, 226-27, 33 Cal. Rptr. 79, 81-82 (1963); State v. McKenzie, 17 Md. App. 563, 582-83, 303 A.2d 406, 418-19 (1973); Commonwealth v. Claudy, 367 Pa. 130, 133, 79 A.2d 785, 786 (1951); *Ex parte* Lovelady, 207 S.W.2d 396, 401 (Tex. Crim. App. 1947); Washington v. Turner, 17 Utah 2d 361, 412 P.2d 449 (1966).

84. One of the few situations in which a conviction may be set aside is when defense counsel keeps the defendant off the stand because of a misconception of the law. *See* Poe v. United States, 233 F. Supp. 173, 177-78 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

In California the standard for determining whether counsel was incompetent is whether the trial was reduced to a farce or sham through the attorney's lack of competence, diligence, or knowledge of the law. People v. Ibarra, 60 Cal. 2d 460, 464, 386 P.2d 487, 490, 34 Cal. Rptr. 863, 866 (1963).

counsel;[85] waiver must be made with the consent of the accused.[86] Examples of the fundamental rights of criminal defendants include the decisions to plead guilty,[87] to obtain the assistance of counsel,[88] to refrain from self-incrimination,[89] to request a jury trial,[90] and to appeal a conviction.[91] Some courts have held that the right to testify is "such an inherently personal fundamental right that it can be waived only by the defendant and not by his attorney."[92]

In *Poe v. United States*,[93] defense counsel induced the defendant not to testify because counsel mistakenly believed that the prosecution could use certain prior statements of the defendant to impeach him. Since the prior statements were in fact inadmissible, Circuit Court Judge J. Skelly Wright held that the free exercise of the right to testify had been unjustifiably denied:

> The right to testify is personal to the accused. He must make the ultimate decision on whether or not to take the stand. In this regard it is unlike other decisions, which are often called "trial decisions," where it is counsel who decides whether to cross examine a particular witness or introduce a particular document. Here it is the accused who must decide and it is the duty of counsel to present to him the relevant information on which he may make an intelligent decision.[94]

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85. *See, e.g.*, Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1973); State v. McKenzie, 17 Md. App. 563, 584, 303 A.2d 406, 418 (1973); Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1213, 1216 (1970); Note, *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038, 1111 (1970); Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1267 (1966). Other constitutional commentators describe the same dichotomy between rights that may be waived by counsel unilaterally and those that may be waived only with the defendant's consent in terms of the allocation of "decision-making responsibility." White, *Federal Habeas Corpus: The Impact of the Failure to Assert a Constitutional Claim at Trial*, 58 VA. L. REV. 67, 69 (1972).

86. See note 85 *supra*.

87. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

88. Miranda v. Arizona, 384 U.S. 436, 475-76 (1966).

89. *Id.*

90. Patton v. United States, 281 U.S. 276, 312 (1930).

91. Fay v. Noia, 372 U.S. 391, 439 (1963).

92. Winters v. Cook, 489 F.2d 174, 179 (5th Cir. 1973) (dictum).

93. 233 F. Supp. 173 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

94. 233 F. Supp. at 176; *cf.* United States v. Haynes, 81 F. Supp. 63, 70 (W.D. Pa. 1948) (holding that where counsel represents two defendants and one desires to testify, it is the duty of the court to receive the testimony even though defense counsel advises the defendant not to testify). *But see* United States v. Poe, 352 F.2d 639, 641 (D.C. Cir. 1965), wherein the circuit court, in affirming the district court's opinion in *Poe*, curiously stated: "Counsel has chosen to disclose his reason [for not placing the defendant on the stand]. If he had not disclosed it, or if he had indicated that his reason was a weakness in Poe's personality or a bad record, neither the District Court nor this court suggests that counsel's decision could have been questioned in any proceed-

In another case, *People v. Robles*,[95] the California Supreme Court noted that an attorney controls the course of a trial but cannot independently waive the defendant's right to testify:

> We are satisfied that the right to testify in one's own behalf is of such fundamental importance that a defendant who timely demands to take the stand contrary to the advice given by his counsel has the right to give an exposition of his defense before a jury . . . . The defendant's insistence upon testifying may in the final analysis be harmful to his case, but the right is of such importance that every defendant should have it in a criminal case. Although normally the decision whether a defendant should testify is within the competence of the trial attorney . . . where, as here, a defendant insists that he wants to testify, he cannot be deprived of that opportunity.[96]

The ultimate choice of whether to waive the right to testify should be made by the defendant with the advice of competent counsel.[97] But to be valid a waiver must be an "intentional relinquishment or abandonment of a known right or privilege,"[98] and it seems evident that an accused who protests counsel's decision not to put him on the stand is not waiving that right.[99] This conclusion is further supported by the

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ing in any court. Counsel therefore remain free to keep defendants from testifying whenever counsel see fit. Any suggestion to the contrary is chimerical."

95. 2 Cal. 3d 205, 215, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970).

96. *Id.; accord*, Donnelly v. State, 516 P.2d 396, 402 (Alaska 1973); Hughes v. State, 513 P.2d 1115, 1118-19 (Alaska 1973); State v. Noble, 109 Ariz. 539, 541, 514 P.2d 460, 462 (1973); State v. Martin, 102 Ariz. 142, 147, 426 P.2d 639, 644 (1967); Ingle v. State, 546 P.2d 598, 600 (Nev. 1976) (new trial granted where "appellant, having been fully advised of the consequences, made a timely, knowing and voluntary rejection of counsel's advice, and asserted his privilege to testify . . . ." but was denied that opportunity); People v. Guillen, 37 Cal. App. 3d 976, 984, 113 Cal. Rptr. 43, 48 (1974); People v. Blye, 233 Cal. App. 2d 143, 149, 43 Cal. Rptr. 231, 236 (1965); People v. Brown, 54 Ill. 2d 21, 23-24, 294 N.E.2d 285, 287 (1973); *cf.* State v. Harper, 57 Wis. 2d 543, 550, 205 N.W.2d 1, 5 (1973) ("trial counsel cannot, without his client's express consent . . . require his client to take the stand in his own behalf").

97. This practice has been informally established in a number of courts. *See* Y. KAMISAR, W. LEFAVE AND J. ISRAEL, MODERN CRIMINAL PROCEDURE 1541 (4th ed. 1974). For example, in Parsons v. United States, 404 F.2d 888 (5th Cir. 1968), the court held that the defendant's right to testify had not been denied where counsel advised the defendant not to testify, but said he was free to disregard such advice according to his own wishes. It is also proper for the judge to advise a defendant to follow counsel's advice not to testify, as long as the final decision is left to the defendant. United States v. Von Roeder, 435 F.2d 1004, 1008-10 (10th Cir. 1970), *vacated on other grounds sub nom.* Schreiner v. United States, 404 U.S. 67 (1971); *accord*, State v. Worley, 383 S.W.2d 529, 532 (Mo. 1964).

98. Johnson v. Zerbst, 304 U.S. 458, 464 (1938), *cited with approval in* Barker v. Wingo, 407 U.S. 514, 525 (1972).

99. Authority to waive a fundamental right of the client cannot be implied from the attorney-client relationship. Bommarito v. Southern Canning Co., 208 F.2d 56, 60-61 (8th Cir. 1953); *accord*, Himmelfarb v. United States, 175 F.2d 924, 931 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949) ("In absence of express authority, an attorney

policy of indulging "every reasonable presumption against waiver of fundamental constitutional rights,"[100] particularly "those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial."[101] Thus, no waiver should be found where a defendant, over his counsel's objection, timely asserts his right to testify in his own behalf.

B. The Problem of Prejudice

The question of who may waive the right to testify should not turn upon whether counsel's decision was competently made or whether the defendant was actually prejudiced. Mere absence of prejudice does not suffice to protect a fundamental right.[102] For "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ."[103] and "[t]here is automatic reversal of a judgment of conviction if a defendant has been denied . . . the right to testify . . . ."[104] Consequently, the right should be granted despite competent counsel's advice not to testify.[105] The right should

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has no power to surrender substantial legal rights of his client."); *cf.* Breen v. Beto, 421 F.2d 945, 949 (5th Cir. 1970); Gallegos v. Turner, 256 F. Supp. 670, 676 (D. Utah 1966), *aff'd on other grounds*, 386 F.2d 440 (10th Cir. 1967), *cert. denied*, 390 U.S. 1045 (1968); United States v. El Rancho Adolphus Products, 140 F. Supp. 645, 649 (M.D. Pa. 1956), *aff'd on other grounds sub nom.* United States v. Hohensee, 243 F.2d 367 (3d Cir. 1956), *cert. denied*, 353 U.S. 976 (1957); *In re* Coggins, 13 Wash. App. 736, 537 P.2d 287, 290 (1975).

Even the defendant's continual disruption of the courtroom does not necessarily constitute a waiver of the right to testify. United States v. Bentvena, 319 F.2d 916, 944 (2d Cir. 1963), *cert. denied*, 375 U.S. 940 (1963).

100. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The question of an effective waiver of a federal constitutional right is governed by federal standards. Boykin v. Alabama, 395 U.S. 238, 243 (1969). "A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the question by federal courts on habeas, for waiver affecting federal rights is a federal question." Fay v. Noia, 372 U.S. 391, 439 (1963).

101. Schneckloth v. Bustamonte, 412 U.S. 218, 237 (1973).

102. Brookhart v. Janis, 384 U.S. 1, 3 (1966).

103. Chapman v. California, 386 U.S. 18, 23 (1967); *cf.* Snyder v. Massachusetts, 291 U.S. 97, 116 (1934) ("[C]onstitutional privileges . . . may be conferred so explicitly as to leave no room for an inquiry whether prejudice to a defendant has been wrought through their denial.").

104. R. TRAYNOR, THE RIDDLE OF HARMLESS ERROR 57 (1970). Where a defendant is improperly denied the right to testify, the question whether his story is credible is for a jury, not the court to decide. United States v. Bentvena, 319 F.2d 916, 944 (2d Cir. 1963) ("Whether the jury would have believed him is immaterial; he should have had the opportunity to present his version of the facts."); Rickey v. United States, 242 F.2d 583, 586 (5th Cir. 1957); *cf.* Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 628 (1944).

105. Hughes v. State, 513 P.2d 1115, 1118-19 (Alaska 1973).

be granted even though it is "in the final analysis . . . harmful to [the defendant's] case,"[106] or even "fatal to his chances of acquittal."[107]

If the right to testify is not regarded as a fundamental constitutional right, it is still doubtful that its denial can be routinely dismissed as harmless error. In *Chapman v. California*[108] the Supreme Court found that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."[109] Under that standard, the defendant's failure to take the stand can seldom be considered harmless.[110] For if he does not testify, his silence will often prompt the jury to believe him guilty.[111] Indeed, the failure to exercise the right severely reduces the possibility of a fair trial.

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106. People v. Robles, 2 Cal. 3d 205, 215, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970). The defense to the murder charge against Robles was that he was insane and drugged at the time of the offense and that he therefore lacked the capacity to commit the crime. However, the defendant was permitted to testify, over the objection of his counsel, that he intended to and did kill the victim, that he was aware of the consequences at the time of the killing, that he was not affected by any drugs at the time, and that he was not mentally ill.

107. People v. Blye, 233 Cal. App. 2d 143, 149, 43 Cal. Rptr. 231, 236 (1965). *Cf.* Faretta v. California, 422 U.S. 806, 834 (1975): "The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'" See notes 117-125 and accompanying text *infra*.

108. 386 U.S. 18 (1967).

109. *Id.* at 24.

110. One of the rare situations in which a denial of the right to testify may be harmless is where the defendant intends, in effect, to convict himself. Such an intention should raise substantial questions as to whether the defendant is competent to stand trial. People v. Robles, 2 Cal. 3d 205, 215, 466 P.2d 710, 716, 85 Cal. Rptr. 166, 172 (1970). Even if the defendant is allowed to testify in such a case, the bizarre nature of the defendant's self-incrimination may bolster an insanity defense.

111. C. MCCORMICK, EVIDENCE 89 (2d ed. 1972). An accused who does not testify is undoubtedly prejudiced severely. Fowle v. United States, 410 F.2d 48, 54 (9th Cir. 1969). "The importance the jury attaches to the accused's not taking the stand and denying his guilt cannot be overemphasized." Poe v. United States, 233 F. Supp. 173, 177 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965). If the defendant does not testify, "a prejudicial presumption is bound to arise. Jurors have brains, and consciously or unconsciously, they are sure to ask themselves, If this fellow is innocent why doesn't he get up there and say so?" Levy, *Some Comments on the Trial of a Criminal Case*, 10 REC. ASS'N B.N.Y. 203, 212 (1955). "If the defendant does not testify, there must be the most compelling of reasons. Obviously, no lawyer will assume that the presumption of innocence and the instruction upon failure to testify will satisfy the natural feeling of the jury and of us all that an innocent man will be anxious to present his defense in person on the stand." Robinson, *The Defendant as Witness*, 29 DICTA 266 (1952). "In certain cases, such as charges of receiving, and possession of stolen goods, the facts are so peculiarly within the accused's knowledge, that failure to go into the witness box would be a most damning circumstance in the minds of the jury." Leighton, *The Accused as a Witness*, 13 CAN. B. REV. 336, 338 (1935). Consequently, "[t]here

> In 99 per cent . . . of all the criminal cases tried in the eighty-six judicial districts of the federal level [in 1956] defendants who did not take the stand were convicted by juries . . . . The fact of the matter is that a defendant who does not take the stand does not in reality enjoy any longer the presumption of innocence.[112]

In short, "[a] defendant who has been denied an opportunity to be heard in his defense has lost something indispensable, however convincing the ex parte showing . . . ."[113]

Prejudicial as the failure to testify may be, its disastrous effect is normally aggravated by yet another factor. In *Chapman v. California*,[114] the Court held that the error complained of—improper commentary by the prosecutor—was especially harmful because the defendants had not taken the stand to refute the allegations against them.[115] When the prosecutor's evidence is combined with the equally fatal inferences that are drawn against a defendant who does not personally protest his innocence it is virtually certain that a guilty verdict will result.[116]

III. Policy Considerations Affecting Waiver of the Right to Testify

Aside from the legal argument that the right of a defendant to testify in his own behalf is a fundamental right and therefore cannot be waived by counsel without the defendant's consent, several policy considerations that compel the same conclusion should be acknowledged. Our conception of fairness to the individual requires that a criminal defendant be permitted to have his say in a court of law. As a practical matter, moreover, the general practice among expert criminal attorneys is to permit the defendant to testify even against their advice to the contrary.

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is a clear consensus among prosecutors and defense attorneys that the likelihood of conviction is increased enormously when the defendant does not take the stand." Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966); *accord*, Note, *To Take the Stand or Not to Take the Stand: The Dilemma of the Defendant With a Criminal Record*, 4 COLUM. J.L. & SOC. PROB. 215, 221-22 (1968).

112. Williams, *The Trial of a Criminal Case*, 29 N.Y. ST. B.J. 36, 42 (1957). "The number of defendants who fail to testify and who are yet acquitted must be almost negligible." United States v. Grunewald, 233 F.2d 556, 579 (2d Cir. 1956) (dissenting opinion, *quoting* C. MCCORMICK, EVIDENCE 280 (1954 ed.).

113. Snyder v. Massachusetts, 291 U.S. 97, 116 (1934).

114. 386 U.S. 18 (1967).

115. *Id.* at 25-26.

116. Denial of the right to testify is thus most prejudicial when evidence of guilt is most weighty. Poe v. United States, 233 F. Supp. 173, 177 (D.D.C. 1964), *aff'd*, 352 F.2d 639 (D.C. Cir. 1965).

A. Considerations of Human Dignity

The underlying rationale for permitting the accused to make the final decision as to fundamental matters of trial strategy is respect for the individual and his right to make those decisions that critically affect his life and liberty.[117] Certainly if a defendant accepts the services of an attorney the latter must be free to make technical judgments requiring expert skills and experience. But accepting services from an attorney should not require the defendant to forfeit all control over his defense. It is the defendant who suffers the consequences of a conviction. Our legal system requires that crucial decisions be made by the individual, if competent, not for him by somebody else.[118] "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."[119]

In *Faretta v. California*[120] the Supreme Court held that a defendant has a constitutional right to defend himself so long as the decision is knowingly and intelligently made. "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[121] Thus,

> [a]n accused has a fundamental right to confront his accusers and . . . to present himself and his position to the jury not merely as a witness . . . but as a man on trial who elects to plead his own cause. . . . A defendant has the moral right to stand alone in his hour of trial . . . . 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 . . . .[122]

If the right to testify in one's own behalf is to have any meaning, it cannot be taken away from a defendant who feels the human instinct to meet the accusations against him despite counsel's advice that unfortunate consequences may result. A defendant should be recognized as having a basic right to plead his case before his peers, and neither

117. Respect for the individual is "the lifeblood of the law." Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring).

118. An analogy is found in medicine where the patient must be permitted to make the fundamental decisions as to what the doctor does with him. *Compare* ABA PROJ. ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 234 (1970) *with* L. ELDREDGE, TRIALS OF A PHILADELPHIA LAWYER 221 (1968).

119. Faretta v. California, 422 U.S. 806, 833-34 (1975).

120. *Id.* at 834-36.

121. 422 U.S. at 819-20.

122. United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972).

the court nor defense counsel should be permitted to deprive a defendant of that right to exercise his free will.[123]

Additionally, if the defendant is denied the opportunity to testify and is convicted, extreme resentment of the legal system is likely to result. To force a lawyer's advice upon a client "can only lead him to believe that the law contrives against him."[124] On the other hand, a "broad policy objective of the constitutional guarantee of an opportunity to testify . . . is to enhance the chance of rehabilitating [prisoners] by treating them with 'basic fairness.' "[125]

B. Practical Considerations

Theoretical concepts have little value if they are not workable in practice. But the soundness of requiring the defendant's personal waiver of his right to testify in his own behalf is evidenced by its acceptance in practice. The general belief of expert criminal attorneys is that the defendant's right to testify should be waived only with the defendant's consent.[126]

There are, of course, tactical reasons why it may be best for the defendant not to testify. This may be true, for instance, if the prosecutor's cross-examination of the defendant could supply missing elements of proof, or reveal prior convictions or the defendant's abrasive personality.[127] Other reasons include the possibility that the prosecutor will present a prior inconsistent statement by the defendant for im-

123. *Cf.* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942): "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. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense. . . . When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards [such as the advice of counsel], and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense . . . unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution."

124. Faretta v. California, 422 U.S. 806, 834 (1975).

125. People v. Coleman, 13 Cal. 3d 867, 874, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975) (discussing parole revocation hearings); *cf.* Morrissey v. Brewer, 408 U.S. 471, 484 (1972).

126. *See* A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 391, 1-389 (2d ed. 1971); Levy, *Some Comments on the Trial of a Criminal Case*, 10 REC. ASS'N B.N.Y. 203, 213 (1955); Robinson, *The Defendant as a Witness*, 29 DICTA 266 (1952); Steinberg, *A Conversation With Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW. 25, 37 (May 1961); *cf.* Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1496 (1966); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477 (1966).

127. Robinson, *The Defendant as a Witness*, 29 DICTA 266 (1952).

peachment purposes or illegally obtained evidence for purposes of rebuttal.[128]

> Counsel should weigh these considerations and decide in the first instance whether or not he thinks the defendant ought to testify. That decision should be told to the defendant, with the reasons for it. Counsel may properly urge the defendant that it is unwise or dangerous for him to take the stand. However, if a defendant wishes to testify despite advice to the contrary, it is necessary to yield to his stubbornness . . . . Counsel should always clearly outline to the defendant the hazards of his testifying (whether or not counsel wants to put him on). But if this fails to daunt the client, and if counsel's advice against testifying fails to persuade him, the client should be allowed to testify.[129]

The fact that the client may not appear to counsel as a person of impressive personality or as a good witness does not alter the fact that it is the defendant's day in court, and it is he who faces the possibility of incarceration or fines. "It seems reasonable to believe that if he is convicted [after being swept off the stand by his own attorney] there will be many nights and days in the penitentiary when he will wonder why he did not testify."[130]

C. Ethical Considerations

Recognition of the defendant's right to testify in his own behalf raises an important ethical question that must be addressed. Should the defendant be permitted to testify over counsel's advice even when counsel knows that the defendant intends to commit perjury?

The existence of this ethical problem should not entitle defense counsel unilaterally to silence the defendant. The traditional approach to this problem is that "[i]f, before trial, the defendant insists that he will take the stand to testify falsely, the lawyer must withdraw from the case . . . ."[131] If the motion for leave to withdraw is denied, counsel must proceed with the case.

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128. A. AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 390, 1-390 (2d ed. 1971).

129. *Id.* at § 391, 1-390; *accord,* ABA PROJ. ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 5.2, 237-38 (1970): "(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel are . . . (iii) whether to testify in his own behalf." The following courts have specifically endorsed this ABA standard: Poteat v. United States, 330 A.2d 229, 231 (D.C. App. 1974); People v. Valentino, 356 N.Y.S.2d 962, 967 (Super. Ct., Nassau County, N.Y. 1974); Taylor v. State, 291 Ala. 756, 763, 287 So. 2d 901, 906 (1973); People v. Brown, 54 Ill. 2d 21, 23-24, 294 N.E.2d 285, 287 (1973); Morse v. People, 180 Col. 49, 55, 501 P.2d 1328, 1331 (1972).

130. Robinson, *The Defendant as a Witness,* 29 DICTA 266, 267 (1952).

131. ABA PROJ. ON STANDARDS FOR CRIMINAL JUSTICE, THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 7.7(b), 167 (1970).

> If the defendant persists in his decision to perjure himself, then the lawyer must, unfortunately, permit him to testify. In this event, however, counsel will have fulfilled his moral obligations to the court and will have maintained his client's . . . respect.[132]

An alternative approach to this problem is proposed by Professor Monroe Freedman. He argues that "the attorney who prevents his client from testifying only because the client has confided his guilt to him is violating that confidence by acting upon the information in a way that will seriously prejudice his client's interest."[133] This is especially true when considered in light of the extreme prejudice that a defendant suffers when he does not take the stand.[134] An attorney's withdrawal from the case will only require the client to obtain another attorney. Because the defendant will realize that the confidential privilege is not inviolate, he will simply withhold incriminating information or the fact of his guilt from his new attorney.[135] Asking for leave to withdraw on ethical grounds, Freedman continues, is likely to indicate to the trial judge, who will also be the sentencing judge, that the defendant is guilty and is going to attempt to perjure himself.[136] Consequently, Freedman concludes:

> [T]he obligation of confidentiality, in the context of our adversary system, apparently allows the attorney no alternative to putting a perjurious witness on the stand without explicit or implicit disclosure of the attorney's knowledge to either the judge or the jury.[137]

Without favoring either of these competing solutions to the ethical problem posed by the defendant who insists upon committing perjury, it should be emphasized that neither solution would permit the attorney simply to keep the defendant off the stand. Implicit in either approach is the realization that the right to testify lies beyond those tactical decisions which can be made by the lawyer alone. Even where the attorney has the most compelling ethical reasons for not putting the defendant on the stand, it is not the lawyer's prerogative to waive the defend-

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132. Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility*, 64 MICH. L. REV. 1493, 1496 (1966).

133. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966).

134. See notes 111-113 and accompanying text *supra*.

135. See note 133, *supra*.

136. *Id.* at 1476.

137. *Id.* at 1477-78. "Of course, before the client testifies perjuriously, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality. In addition, the client should be impressed with the fact that his [untruthfulness] is tactically dangerous. There is always a strong possibility that the prosecutor will expose the perjury on cross-examination. However . . . the final decision must necessarily be the client's. The lawyer's best course thereafter would be to avoid any further professional relationship with a client whom he knew to have perjured himself." *Id.* at 1478.

ant's right to testify unilaterally. Either counsel must withdraw from the case, or the defendant's desire to commit perjury must be heeded.

Counsel should be permitted to withdraw from the case because of a disagreement as to whether the defendant should testify only when the defendant intends to commit perjury, if indeed withdrawal is ever appropriate in such circumstances. If the defendant does not intend to commit perjury, counsel should simply let the defendant take the stand if that is the informed defendant's desire.[138]

> The fact that an indigent defendant and his appointed counsel disagree as to whether the former should testify does not necessarily mean that the attorney should be discharged although it is a factor to be considered in connection with a motion for substitution. Requiring an attorney against his better judgment to examine his client places no unfair burden on the attorney: an attorney is always faced with the burden of developing his trial strategy in the light of what evidence is available and presented in court. Nor is a defendant ordinarily prejudiced when he is represented by an attorney who believes, contrary to the defendant, that the latter should not testify.[139]

Conclusion

For centuries the criminal defendant was prevented from testifying in his own behalf by an inflexible rule of disqualification for interest. In recent times this harsh rule has been abrogated by statute in every state and by the federal government. More importantly, there is a growing consciousness among the courts that the right to testify—the cornerstone in the elementary right to be heard—is a fundamental due process right. As such, the right to testify should be recognized as a personal right of the defendant, and the defendant should be able to exercise that right even against his own counsel's advice. Otherwise, our legal system would countenance the injustice so pervasive during the centuries of the old disqualification for interest rule—that of sending men and women to prison and death without giving them an opportunity to protest their innocence or to present mitigating circumstances. Defendants, like their counsel, may make the wrong choice in deciding whether to exercise the right to testify, but even then it is better that the accused know that it was his word and appearance that was consid-

138. See notes 126-129 and accompanying text *supra*.

139. People v. Robles, 2 Cal. 3d 205, 215, 466 P.2d 710, 716-17, 85 Cal. Rptr. 166, 172-73 (1970). Consequently, there appears to be little foundation for a competing policy argument that defense counsel would be intolerably burdened by being forced to put the defendant on the stand. See notes 126-129 and accompanying text *supra*. Similarly, the argument that only an attorney can make the proper tactical decision as to whether the defendant should testify is outweighed by the fact that the right to testify is a personal, fundamental constitutional right. See notes 85-107 and accompanying text *supra*.

ered and that his conviction was not due to his counsel's refusal to let him speak out on his own behalf.

For this reason alone, issues regarding waiver of the right to testify should not turn upon the question of whether the defendant was prejudiced by not being allowed to take the stand. The law recognizes that many other constitutional rights of the criminal defendant are so basic to our sense of human dignity that their denial cannot be condoned under the stamp of harmless error. Furthermore, on a practical level the defendant who does not testify is prejudiced. The jury naturally expects to hear the defendant's story and is quick to infer guilt when the accused remains silent in the face of the accusations against him. So great is this prejudice that defendants who do not testify effectively lose the presumption of innocence, something that is surely beyond the province of the lawyer to waive unilaterally.

Defense counsel should be compelled to place his client on the stand if, even after having understood the reasons for not testifying, the client insists upon taking the stand. Due process is a hollow protection if it does not mean the right to answer personally the charge brought against one in a court of law. Counsel has no more right to waive unilaterally one's right to due process of law than to argue the guilt of his client.

Appendix

Current State Statutes Making Criminal Defendants Competent Witnesses

ALA. CODE tit. 15, § 305 (1959).

ALASKA RULES OF CT., CIV. R. 43(g); ALASKA CRIM. R. 26(a) (1963).

ARIZ. REV. STAT. ANN. § 13-163 (1956).

ARK. STAT. ANN. § 43-2016 (1964).

CAL. PENAL CODE § 1321 (West 1970); CAL. EVID. CODE § 700 *et seq.* (West 1966). *See also* CAL. CONST. art. I § 13.

COLO. REV. STAT. ANN. § 13-90-101 (1973).

CONN. GEN. STAT. ANN. § 54-84 (Cum. Supp. 1976).

DEL. CODE ANN. tit. 11, § 3501 (1974).

FLA. R. CR. PRO. 3.250 (1973).

GA. CODE ANN. § 38-1603 (1974).

HAWAII REV. STAT. § 621-15 (1968).

IDAHO CODE §§ 9-201, 19-3001 (1948).

ILL. REV. STAT. ch. 38, § 155-1 (1973).

IND. CODE § 35-1-31-3 (1975).

IOWA CODE § 781.12 (1950). *See also* IOWA CODE § 781.13 (1950).

KAN. STAT. ANN. § 22-3415 (1974); KAN. STAT. ANN. § 60-407 (1964); KAN. STAT. ANN. § 60-421 (1964).

KY. REV. STAT. ANN. § 421.225 (Cum. Supp. 1976).

LA. REV. STAT. § 15:461 (1967). *See also* LA. REV. STAT. § 15:462 (1967).

ME. REV. STAT. ANN. tit. 15, § 1315 (Cum. Supp. 1975).

MD. CTS. & JUD. PRO. CODE ANN. § 9-107 (1974).

MASS. GEN. LAWS ch. 233, § 20 (Cum. Supp. 1976).

MICH. COMP. LAWS § 600.2159 (1968).

MINN. STAT. § 611.11 (1964). *See also* MINN. STAT. § 595.02 (Cum. Supp. 1976).

MISS. CODE ANN. § 13-1-9 (1972).

MO. REV. STAT. § 546.260 (1949). *See also* MO. REV. STAT. § 546.270 (1949).

MONT. REV. CODES ANN. § 95-3010 (Cum. Supp. 1975); MONT. REV. CODES ANN. §§ 93-701-1 to -3 (1947).

NEB. REV. STAT. § 29-2011 (1964).

NEV. REV. STAT. § 175.221 (1967). *See also* NEV. REV. STAT. § 50.015 *et seq.* (1971).

N.H. REV. STAT. ANN. § 516:31 (1974). *See also* N.H. REV. STAT. ANN. § 516:32 (1974).

N.J. REV. STAT. § 2A:81-8 (1976).

N.Y. CRIM. PRO. LAW § 60.15 (McKinney 1971).

N.C. GEN. STAT. § 8-54 (1969).

N.D. CENT. CODE § 29-21-11 (1974).

OHIO REV. CODE ANN. § 2945.43 (1975).

OKLA. STAT. tit. 22, § 701 (1969).

ORE. REV. STAT. § 136.643 (1975).

PA. STAT. tit. 19, § 681 (1964). *See also* PA. STAT. tit. 19, § 631 (1964).

R.I. GEN. LAWS ANN. § 12-17-9 (1969).

S.C. CODE ANN. § 26-405 (1962).

S.D. CODE § 19-1-1 (1967).

TENN. CODE ANN. § 40-2403 (1955). *See also* TENN. CODE ANN. § 40-2404 (1955).

TEX. CODE CRIM. PRO. art. 38.08 (1966).

UTAH CODE ANN. §§ 77-44-5, 77-44-1, 78-24-1, *et seq.* (1953).

VT. STAT. ANN. tit. 13, § 6601 (1974).

VA. CODE ANN. § 19.2-268 (1975).

WASH. REV. CODE § 10.52.040 (Cum. Supp. 1975).

W. VA. CODE ANN. § 57-3-6 (1966).

WIS. STAT. § 325.13 (1958).

WYO. STAT. ANN. § 7-244 (Cum. Supp. 1975).