

Providing a Federal Criminal Defendant With a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)

*Adam H. Kurland**

INTRODUCTION

Federal Rule of Criminal Procedure 23(a) provides that a criminal defendant may elect to be tried by the court rather than a jury, but the court must “approve” the request and the Government must also “consent.”¹ The Government has an ethical obligation

* Associate Professor of Law, Howard University School of Law; B.A., J.D., University of California, Los Angeles; Former Assistant United States Attorney, Eastern District of California. The author is a member of the American Bar Association, Criminal Justice, White Collar Crime, Federal Rules Subcommittee, and was a principal contributor to the Committee’s project which proposed amendments to Federal Rule of Criminal Procedure 23(a). The author also served as Of Counsel for defendant (real party in interest) in *People v. District Court*, No. 91-CR-1660 (Colo. 1992), asserting that, under the Colorado Constitution, an accused has a unilateral right to elect a bench trial in a non-capital case. I wish to thank Reid Weingarten, Esq., for his tireless efforts to place Rule 23(a) reform on the ABA agenda and for his helpful comments and criticisms of earlier drafts of this Article. I wish to thank Carla Mathers, Howard University School of Law, J.D. Candidate, 1993, and Lornette Reynolds, Howard University School of Law, J.D. Candidate, 1994, for their research assistance. I would also like to thank Howard University School of Law for providing research funding for this Article. The views expressed herein are solely those of the author.

The U.C. DAVIS LAW REVIEW follows the convention of using female pronouns. This Article follows that convention except when referring to a criminal defendant, where male pronouns are used. Federal criminal defendants are overwhelmingly male. *See, e.g.*, U.S. DEP’T OF JUSTICE, COMPENDIUM OF JUSTICE STATISTICS, 1988, at 33 (stating that males constituted 82.9% of all convicted federal offenders in 1988).

¹ Federal Rule of Criminal Procedure 23(a) provides:

TRIAL BY JURY. Cases required to be tried by jury shall be so

not to withhold its consent for improper reasons.² However, if the Government withholds its consent, Rule 23(a) does not require the Government to state its reasons for doing so.³ Thus, except in the most extreme circumstances where the trial court determines that a constitutionally impartial jury is unlikely to be empaneled (rendering the Government's consent unnecessary anyway), the Government's decision to veto the defendant's request for a bench trial is unchallengeable and unreviewable.

Today, most federal criminal defendants do not wish to waive a jury trial, opting, understandably, to have their fate determined by twelve persons drawn from a fair cross-section of the community.⁴ However, several compelling reasons may influence a fed-

tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

FED. R. CRIM. P. 23(a).

² *Singer v. United States*, 380 U.S. 24, 37 (1965) (citing *Berger v. United States*, 295 U.S. 78 (1935)). In *Berger*, Justice Sutherland made the now famous and often cited statement:

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Berger, 295 U.S. at 88.

³ The *Singer* court stated:

It was in light of this concept of the role of prosecutor [described in *Berger*] that Rule 23(a) was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, Rule 23(a) does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor shall we assume that federal prosecutors would demand a jury trial for an ignoble purpose.

Singer, 380 U.S. at 37.

⁴ There are several basic reasons why a criminal defendant ordinarily would prefer a jury trial. Most important, a jury may take a more flexible approach as to what constitutes "reasonable doubt" than would a judge. See

eral criminal defendant to elect a bench trial in some circumstances. For example, a defendant may have been the sub-

generally HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 58-59, 497-99 (Midway Reprint ed., 1986). Tocqueville observed that "I would rather have a case decided by an ignorant jury guided by a skilled judge than hand it over to judges, most of whom have an incomplete knowledge both of jurisprudence and of the laws." ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 272 n.4 (J.P. Mayer ed., 1969).

In addition, a jury has the power to issue a nullification verdict, that is, a verdict that is contrary to the law and the evidence. Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 *NOTRE DAME L. REV.* 403, 462 (1992) (stating that a "jury . . . may disregard the duty of accurate fact-finding [to] moderate the harshness of the written law"). For a detailed history of the development of the concept of jury nullification, see THOMAS A. GREEN, *VERDICT ACCORDING TO CONSCIENCE: PERSPECTIVES ON THE ENGLISH CRIMINAL TRIAL JURY, 1200-1800* (1985).

Anecdotal evidence suggests that contemporary federal criminal juries are aware of strict mandatory minimum sentences in federal court and may be rendering nullification verdicts in order to avoid having to subject the defendant to harsh mandatory sentences. See *Swamping the Courts*, *WASH. POST*, June 22, 1992, at A16:

Why are acquittals [in the District of Columbia federal court] on the rise? . . . [T]here is also anecdotal evidence that juries are aware of the mandatory minimum sentences — five years, for example, for simple [drug] possession . . . — and are reluctant to convict young defendants in particular when the judge has no room for flexibility.

Id.

If jurors are acting in this manner, it is not in response to some novel quirk in modern federal criminal law. Rather, the jury's actions are consistent with the historical origins of nullification verdicts. At common law, nullification verdicts were rendered as a means of saving defendants from the death penalty, which was punishment for virtually all felonies. See generally 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 18-19 (U. of Chi. Press 1979) (1st ed. 1769) ("It is a melancholy truth, that among the variety of actions which men are daily liable to commit, no less than one hundred and fifty have been declared by act of parliament to be felonies without benefit of clergy; or, in other words, to be worthy of instant death. . . . [To mitigate harshness,] juries, through compassion, will sometimes forget their oaths. . . ."); GREEN, *supra*, at 59-63 ("Acquittals in theft cases [which were capital offenses] typically represented what we may term systemic nullification of the prescribed sanction, the phenomenon of the purely 'merciful acquittal.'"); 1 LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 3-8 (1948) (recounting history of extension of capital punishment).

Finally, a jury trial allows for the possibility, albeit remote, for a hung jury, an option that does not exist with a court trial. See KALVEN & ZEISEL, *supra*, at 453-63.

ject of intense media scrutiny, and the public may perceive him as unpopular or identify him with an unpopular cause. Moreover, a defendant may feel that the case raises factual and legal issues too complex for a jury. Additionally, a defendant who wants to testify at trial may be concerned that a jury would be unable to properly evaluate his prior criminal record. Finally, a defendant may simply want to save the time and expense of a jury trial. These are not uncommon or insubstantial concerns in current federal white collar criminal prosecutions.⁵ Accordingly, in today's federal criminal law climate, defendants appear to be requesting bench trials with greater frequency, and the Government is withholding its consent in some high profile cases.

As noted above, unless the defendant can satisfy the extremely high threshold of establishing that a jury trial would deny him a fair trial (a threshold that is rarely overcome),⁶ if the Government refuses to consent to the bench trial request, the defendant will

⁵ The spate of S & L fraud prosecutions presents a good example. Many financial institutions failed, costing depositors several million dollars. Even where the institution was insured by the Federal Deposit Insurance Corporation (FDIC), the taxpayer has footed the bill to the tune of several billion dollars. *See generally* Mary Fricker & Stephen Pizzo, *Anatomy of an Oregon S & L Prosecution — A Big Success in the Northwest's Largest Bank Fraud Case*, NAT'L L.J., Apr. 9, 1990, at 1. In this climate, the desire to find a scapegoat is understandable, and it is possible that juries may be so outraged with the S & L "mess" that a dispassionate evaluation of the evidence necessary to differentiate between the guilty and the not guilty may be nearly impossible. For a further discussion, see *infra* notes 71-79 and accompanying text (discussing reasons why defendants may request bench trial).

Traditionally, the presence of a prior criminal record may not have been a serious concern in white collar prosecutions. However, with the proliferation of various regulatory offenses concerning false statements, such is not the case today. In 1989, approximately 37% of federal defendants convicted of fraudulent property offenses had a prior criminal record. U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 1989, at 33 [hereafter 1989 FEDERAL JUSTICE STATISTICS]. Moreover, under Federal Rule of Evidence 609(a)(2) "truth crimes", those that involve false statements, even misdemeanors, are mandatorily admissible should the defendant choose to testify. FED. R. EVID. 609(a)(2). These are precisely the types of prior convictions a white collar defendant may have. For a further discussion, see *infra* notes 87-97 and accompanying text.

⁶ One highly respected commentator has noted that "occasionally lower courts . . . have found that the case before them has been the compelling case in which a nonjury trial should be ordered despite the lack of consent by the government, but far more often arguments of this kind have been

be unable to be tried by the court. From a numerical standpoint, this scenario may occur in relatively few cases. However, these cases tend to be high profile, highly publicized, and often raise a plethora of difficult legal and factual issues. These are precisely the types of cases where the defendant's request for a bench trial is the most compelling.⁷

The Supreme Court has unanimously held that current Rule 23(a) is constitutional.⁸ Thus, a federal criminal defendant has no constitutional right to unilaterally elect to waive a jury trial and be tried by the court.⁹ By the same token, however, the Court also has indicated that the Government has no constitutional right to be able to block a defendant's bench trial request.¹⁰ Rule 23(a) simply embodies a statutory standard that is not constitutionally required.¹¹ Accordingly, the Government consent requirement can, and should, be eliminated by legislative action.¹²

Rule 23(a) became effective in 1946, and has remained unchanged in the half century since its enactment. Calls to amend Rule 23(a) have been made regularly since before the rule was even first adopted.¹³ While the impetus for reform has built

rejected." 2 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 2D § 372, at 299 (2d ed. 1982) (footnotes omitted).

⁷ The dissent in *State v. Linder*, 304 N.W.2d 902 (Minn. 1981), noted that "[i]n cases which have received much publicity and have aroused the community, . . . the need for trial before an impartial judge is especially great." *Id.* at 908 (Otis, J., dissenting) (citing ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO TRIAL BY JURY § 1.2(a)(3)(d) (1968)).

⁸ *Singer v. United States*, 380 U.S. 24, 37 (1965).

⁹ *Id.* at 36.

¹⁰ *Id.* at 33-34.

¹¹ *Id.* at 34-35.

¹² The *Singer* court overruled previous dicta in *Patton v. United States*, 281 U.S. 276 (1930), which had suggested that prosecutorial consent was constitutionally required and made favorable reference to the various methods utilized by the states concerning the right to waive a jury trial. *Singer*, 380 U.S. at 37. The *Singer* Court strongly suggested that a federal rule which eliminated prosecutorial consent or provided a defendant with a unilateral right to elect a bench trial would pass constitutional scrutiny. *Id.* Since *Singer*, every respected commentator has agreed that amending Rule 23(a) to provide a defendant with an absolute right to a bench trial would be constitutional. See, e.g., 2 WRIGHT, *supra* note 6, § 372, at 300.

¹³ See Wm. Scott Stewart, *Comments on Federal Rules of Criminal Procedure*, 8 J. MARSHALL L. REV. 296 (1943). The author, reporting the views of the Chicago Bar Association on proposed Rule 21 [now Rule 23(a)] when the Rules were at the tentative draft stage, commented:

steadily since 1946, dramatic changes in federal criminal trial practice, especially in the last few years, require that proposed changes to Rule 23(a) receive serious consideration at this time.

In recent years, federal criminal law and federal criminal trials have become not only quantitatively larger¹⁴ but also procedur-

The preliminary draft provides . . . that a defendant may waive a jury with the approval of the court and the consent of the government. A defendant should be allowed to waive a jury, whether or not the government consents or the court approves. I don't see how this is any concern of the prosecution or the court.

Id. at 301.

In the 1950s concern over anti-communist hysteria and Smith Act prosecutions led to renewed calls to amend the procedures. *See* Richard C. Donnelly, *The Defendant's Right to Waive Jury Trial in Criminal Cases*, 9 U. FLA. L. REV. 247, 254 (1956) (noting effect of widespread community hostility on jury trials of Smith Act defendants); Note, *Government Consent to Waiver of Jury Trial Under Rule 23(a) of the Federal Rules of Criminal Procedure*, 65 YALE L.J. 1032, 1036 (1956) [hereafter Note, *Government Consent to Waiver*] (discussing nationwide hostility that exists against persons indicted under Smith Act). In 1965, in the wake of the *Singer* decision, calls for reform were renewed. *See e.g.*, Robert P. Lightcap, Comment, *The Government's Interest as a Party Litigant in Federal Criminal Proceedings*, 26 U. PITT. L. REV. 767, 771-72 (1965) (explaining how government may misuse Rule 23(a)); Note, *Singer v. United States — Inability to Waive Jury Trial in the Federal Courts*, 60 Nw. U. L. REV. 722, 730 (1965) [hereafter Note, *Inability to Waive Jury Trial*] (arguing for amendment of Rule 23(a)). A decade ago, a student commentator, influenced by an unusual district court decision, advocated a modification of Rule 23(a). *See* Fred A. DeCicco, Comment, *Waiver of Jury Trials in Federal Criminal Cases: A Reassessment of the "Prosecutorial Veto,"* 51 FORDHAM L. REV. 1091, 1101 (1983) (discussing how government consent requirement limits defendant's ability to waive jury trial and advocating reexamination of Rule 23(a)).

¹⁴ The number of criminal filings in district court stayed remarkably constant over the 40 year period from 1943 to 1981 at a level of 38,000 cases per year. WILLIAM P. McLAUCHLAN, FEDERAL COURT CASELOADS 114 (1984). That number has mushroomed in the past decade. In 1989, 58,160 cases were prosecuted in the federal district courts. 1989 FEDERAL JUSTICE STATISTICS, *supra* note 5, at 12.

In addition, the number of counts in an indictment has grown. Prior to the advent of the Racketeer Influenced and Corrupt Organizations Act (RICO) and many other new fraud statutes, indictments in excess of fifteen counts were uncommon. The Justice Department still has an official policy suggesting that "the government bring as few charges as are necessary to ensure that justice is done." U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.320(B) (1988 & Supp. 1992) [hereafter USAM] (principles of federal prosecution). The Justice Department further recommends that, to the extent reasonable, indictments generally should be

ally and substantively much more complex.¹⁵ As a result, the time is ripe for a fundamental reevaluation of several related federal criminal trial procedural issues. In the federal courts, this reevaluation is already afoot with respect to the joinder and severance rules—rules which are similarly operating under archaic standards that bear little relation to modern federal criminal prac-

limited to fifteen counts or less. *Id.* § 9-2.164. Today, however, these limitations seem to be honored more in the breach. For example, a district judge described a recent RICO and CCE indictment as follows:

The labyrinthine 305-page, 175-count indictment in this case, nearly two inches thick and weighing almost four pounds, names thirty-eight defendants . . .

United States v. Andrews, 754 F. Supp. 1161, 1164 (N.D. Ill.), *vacated in part on other grounds*, 754 F. Supp. 1206 (N.D. Ill. 1990). *See also* United States v. Casamento, 887 F.2d 1141, 1151-52 (2d Cir. 1989) (delineating methods of maintaining control over multi-count, multi-defendant trials), *cert. denied*, 493 U.S. 1081 (1990); United States v. Kopituk, 690 F.2d 1289, 1320 (11th Cir. 1982) (discussing federal prosecutors “penchant for drawing together evermore complex and extensive conspiracies into a single indictment”), *cert. denied*, 463 U.S. 1209 (1983); United States v. Vastola, 670 F. Supp. 1244, 1262-63 (D.N.J. 1987) (ordering severance in 21-defendant, 114-count indictment primarily for case management concerns), *rev'd in part on other grounds*, 899 F.2d 211 (3d Cir. 1990); United States v. Gallo, 668 F. Supp. 736 (E.D.N.Y. 1987) (allowing severance in 22-count RICO indictment in view of complexities of case); George J. Cotsirilos & Matthew F. Kennelly, *Judge Aspen and the Case of the Severed Indictments: Splitting Megatrials into Manageable Pieces*, 6 CRIM. JUST., Summer 1991, at 19 (discussing federal court methods of dealing with complex cases). As an end result, fraud trials, with their built-in complexity, take longer to try than average. *See* 1989 FEDERAL JUSTICE STATISTICS, *supra* note 5, at 29, 32.

¹⁵ With the advent of RICO, the Continuing Criminal Enterprise Statute (CCE) and other complex criminal statutes, “mega-trials” have become more and more commonplace in federal court. *See* United States v. Salerno, 937 F.2d 797, 799 (2d Cir. 1991) (stating that circuit is “locus for ‘mega-trials’”), *rev'd on other grounds*, 112 S. Ct. 2503 (1992). This has sorely tested the continuing operation of the joinder and severance rules. *See id.* *See generally* James Farrin, Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 LAW & CONTEMP. PROBS. 325, 330 (1989) (stating that “studies are unanimous in finding that defendants do face a greater likelihood of conviction if offenses are tried jointly rather than separately”). In addition, RICO and like statutes have further given rise to significant, complicated evidentiary issues. *See, e.g.*, USAM, *supra* note 14, § 9-110.311(C) (RICO Guidelines explaining “[w]hen, subject to all of the guidelines, an essential portion of the evidence of the criminal conduct . . . can only be shown to be admissible only under RICO, and not under other evidentiary theories . . . a RICO count may be appropriate”); *see also* cases cited at *supra* note 14.

tice.¹⁶ The right to a bench trial is integrally related to these other federal criminal procedural issues, and similarly must undergo a fundamental reevaluation.¹⁷

This Article contends that the fair and efficient administration of criminal justice requires that Congress amend Federal Rule of Criminal Procedure 23(a) to eliminate both the prosecutorial consent requirement and the court approval requirement. Such an amendment would provide a federal criminal defendant with a unilateral right to elect a bench trial. In support of this position, the Article will briefly review the history and the development of the right to a jury trial and bench trial in the federal system. Historically, the right to a jury trial developed as a means for protecting the accused—neither the Government nor the “public” had an independent right to a criminal jury trial.¹⁸ In addition, this Article will analyze whether such a change would be fair, or whether it would provide a defendant with an “unfair” procedural advantage. Several state court systems currently provide a criminal defendant with a unilateral right to a bench trial, and such a rule has proven to be workable, substantively fair, and administratively efficient. An analogous federal rule should produce similar results in the federal courts. Finally, the Article concludes that such a revision of Rule 23(a) is not only long overdue, but is a vital component of several related procedural reforms that are

¹⁶ See *United States v. Zafiro*, 945 F.2d 881 (7th Cir. 1991) (explaining issues in application of severance rules), *cert. granted*, 112 S. Ct. 1472 (1992); *Vastolo*, 670 F. Supp. at 1262-63 (citing case management concerns in ordering severance in 21-defendant, 114-count indictment). Like Rule 23(a), Federal Rule of Criminal Procedure 8, dealing with joinder, has remained unchanged since its original adoption in 1946. See I WRIGHT, *supra* note 6, § 141; see also FED. R. CRIM. P. 8. Federal Rule of Criminal Procedure 14, setting forth the severance procedures, was amended in some respects in 1966. See FED. R. CRIM. P. 14. However, even some of the modified rules have become unworkable in the 1990s. See FEDERAL COURTS STUDY COMMITTEE, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 106-07 (April 2, 1990) [hereafter FEDERAL COURTS STUDY COMMITTEE REPORT] (recommending that Attorney General convene conference of prosecutors and defense lawyers to consider problems of complex criminal trials and whether changes in Federal Rules of Criminal Procedure or Department of Justice Guidelines could expedite such trials).

¹⁷ For a proposal to substantially modify the American criminal trial process along the lines of the “Continental System,” see Van Kessel, *supra* note 4. See also *supra* note 14 (discussing problems associated with complex trials).

¹⁸ See generally GREEN, *supra* note 4 (discussing development of jury trials).

necessary if the federal criminal justice system is to function effectively in the twenty-first century.

I. BRIEF HISTORICAL AND CONSTITUTIONAL OVERVIEW

The Supreme Court in 1965 in *Singer v. United States*¹⁹ conclusively answered in the negative the question of whether a federal criminal defendant has a *constitutional* right to unilaterally waive a jury trial.²⁰ One should briefly review the historical development of the jury system at common law, and its interrelationship with substantive constitutional protections to understand the merits of any *legislative* proposal to amend Rule 23(a).

The right to a bench trial did not exist at common law.²¹ Many who argue that the Government should have the ability to veto a defendant's request for a bench trial seize on this historical fact to argue that the jury is the "normal and . . . preferable mode of disposing of issues of fact in [serious] criminal cases,"²² and that procedures should not be designed so as to easily skirt the requirement of trial by jury. However, this argument misses the point.

The jury system evolved as a response to the utter inadequacies of the other methods of adjudicating guilt that were in use at the time—trial by ordeal, compurgation, or battle.²³ In the original

¹⁹ 380 U.S. 24 (1965).

²⁰ *Id.* at 37.

²¹ See *Singer*, 380 U.S. at 27-28 (surveying historical development of right to bench trial); 2 WRIGHT, *supra* note 6, § 372, at 297 (noting absence of waivers to jury trials at common law); see also GREEN, *supra* note 4 (discussing relationship between judge and jury at common law).

²² *Patton v. United States*, 281 U.S. 276, 312 (1930).

²³ See DAVID J. BODENHAMER, *FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY* 11 (1992):

The development of English criminal justice already had a long and complex history by the seventeenth century. Its roots extended to the period preceding the Norman Conquest (1066). In Anglo-Saxon England criminal proceedings were oral, personal, accusatory, and local. One person publicly charged another before the community, which in turn decided what form of proof — compurgation, ordeal, or battle — the trial should take. Compurgation, or oath taking, consisted of swearing a sacred pledge to the truthfulness of one's claim or denial, supported by similar oaths from community members. Ordeal, usually reserved for more serious crimes, required a physical trial to test a plea. The accused's arm might be immersed in boiling water or branded with a hot iron, with the manner and

jury system, the jury was “self-informing.” Jurors were members of the community who had some first-hand knowledge of the events in question. In this manner, the original common law juries were much like witnesses, and the jurors were as much fact gatherers as they were fact finders.²⁴

Viewed in this context, the concept of a bench trial becomes an absurdity. Without the jury, the bulk of the evidence would never be brought before the court. Even as criminal procedure evolved over the centuries away from a self-informing jury toward a more modern trial model based mainly on evidence produced by the prosecution,²⁵ trial by jury remained intact. Furthermore, the concept of a right to a jury trial was based on the principle that an accused should be protected from the unfettered power of the crown.²⁶ In an era where the independent judiciary was in its embryonic stage, few defendants would have chosen to have their fate (usually a matter of life and death)²⁷ determined by the court.²⁸

swiftness of healing carefully noted as a divine sign of guilt or innocence. Verdicts for the gravest crimes were secured by battle, a physical contest between accuser and accused whereby God would lend strength to the cause for the truthful party.

Id.

²⁴ GREEN, *supra* note 4, at 16-18, 26-27.

²⁵ *Id.* at 118-19, 364.

²⁶ See John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 269-70 (1979) (noting seventeenth century distrust of English judiciary and discussing Blackstone's eighteenth century concerns that “in misdemeanor cases tried without a jury, the accused [at a bench trial would be] exposed to the arbitrariness of a single crown hireling”).

²⁷ At common law, virtually all felonies were capital offenses. See generally 4 BLACKSTONE, *supra* note 4, at 18-19; GREEN, *supra* note 4, at 59; 1 RADZINOWICZ, *supra* note 4, at 3-8.

²⁸ See Langbein, *supra* note 26, at 269-70 (explaining reasons for defendants' insistence on jury trials); Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123 (1982) (surveying sporadic development of bench trials in United States). See also Singer v. United States, 380 U.S. 24, 29 (1965):

[F]rom 1692 on, in light of increasing hostility to the Crown, the colonists of Massachusetts stressed their right to trial by jury, not their right to choose between alternate methods of trial. . . . 'With [this] state of mind . . . presumably nobody bothered about this question of any one's wanting to waive a jury.'

Id. (citations omitted). Accord Jerome Hall, *Has the State a Right to Trial by Jury in Criminal Cases?*, 18 A.B.A. J. 226, 227 (1932):

In this historical milieu, the United States Constitution was drafted in 1787. Article III, which delineates the judicial power, provides in relevant part that “[t]he trial of all crimes . . . shall be by [j]ury.”²⁹ Importantly, this provision is not part of the Bill of Rights, which sets forth the rights of the individual. Viewed in a vacuum, article III seems to mandate a jury trial as the sole means of adjudicating guilt. However, the Sixth Amendment, which is part of the Bill of Rights, provides that “[i]n all criminal prosecutions, the *accused* shall enjoy the right to a speedy and public trial, by an impartial jury. . . .”³⁰ Viewed together, the relevant language in article III and the Sixth Amendment reflects, consistent with historical development, that the jury trial guarantee “was clearly intended to protect the accused from oppression by the Government.”³¹

For more than a century after the founding of the republic, most courts and lawyers generally assumed that the determination of guilt in a criminal case *must* be by jury.³² However, this assumption was not based on any constitutional interest embody-

[T]rial by the court . . . was the very thing that the accused did not want, [and thus] it is not the least helpful to look for evidence supporting such a right in the history of the jury as a means to limit oppressive government. From the very nature of this struggle, it will be lacking, for opposition to the king included opposition to his judges. . . .

Id.

²⁹ U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

³⁰ U.S. CONST. amend. VI (emphasis added).

³¹ *Singer v. United States*, 380 U.S. 24, 31 (1965) (citing 3 FARRAND, RECORDS OF THE FEDERAL CONVENTION 101 (James Wilson), 221-222 (Luther Martin) (1911)); see also Note, *Government Consent to Waiver*, *supra* note 13, at 1043 n.58 (noting that right to jury trial was hardly discussed at Constitutional Convention and that writings on Bill of Rights reflect that it was solely for the protection of the accused) (citations omitted).

³² See, e.g., THE FEDERALIST NO. 83, at 496-97 (Alexander Hamilton) (Clinton Rossiter ed., 1961):

A power to constitute courts is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the legislature would be at liberty either to adopt that institution or let it alone. This discretion, in regard to criminal causes, is abridged by the express injunction of trial by jury in all such cases. . . .

Id. See also *Singer*, 380 U.S. at 31 (listing other historical sources that indicate framers of Constitution understood juries to be exclusive method of determining guilt); *Callan v. Wilson*, 127 U.S. 540, 550 (1888) (noting that draft of Constitution amended by framers to specify trial by jury).

ing a “public” or Government preference for the jury mode of fact-finding. Rather, the presence of a jury in a criminal case was thought to be a constitutional prerequisite for the jurisdiction of the court.³³ Thus, the concept that anyone could waive a jury trial, whether it was the defendant alone or the defendant with the prosecutor’s consent, was an anathema.

Importantly, neither perspective of the supposed inviolateness of the trial by jury guarantee, either as privilege of the accused, or as a jurisdictional requirement, supports the position that the Government has any independent “public” interest to demand a jury trial. Moreover, it is fundamentally inconsistent to claim on the one hand that the jury trial guarantee is “inviolable,” and claim on the other hand that the Government must have a right to veto a bench trial—but that with Government approval, a defendant can waive a jury trial or plead guilty.³⁴ Either the jury determination of guilt is sacrosanct or it is not. Whether or not the prosecution decides to waive a jury determination to satisfy some perceived “public interest,” this decision does not substitute for the role of the jury, if that role is mandatory. This argument assumes contemporary significance because it exposes the fallacy of the argument that the prosecution has a constitutional right to block a bench trial.³⁵

Not surprisingly, the courts soon discovered flaws in the absolutist view that the adjudication of criminal guilt must be by jury. A strict application led to the conclusion that a defendant could not plead guilty, even with the Government’s consent, because

³³ For a discussion of this issue, see *Patton v. United States*, 281 U.S. 276, 299-300 (1930). See also *DeCicco*, *supra* note 13, at 1100 n.56 (noting that prior to *Patton* decision, jurisdiction of court thought to depend on verdict rendered by jury).

³⁴ In a slightly different context, Justice Douglas contended that a constitutional distinction could be drawn between dispensing of a jury by pleading guilty as opposed to dispensing of a jury in order to be tried to the court. “The fact that a defendant ordinarily may dispense with a trial by admitting his guilt is no reason for accepting this layman’s waiver of a jury trial. What the Constitution requires is that the ‘trial’ of a crime ‘shall be by jury.’” *Adams v. United States ex rel McCann*, 317 U.S. 269, 285 (1942) (Douglas, J., dissenting).

³⁵ Indeed, the public interest theory of requiring a jury trial was rejected in *Patton*. *Patton*, 281 U.S. at 308. More recently, the Supreme Court has noted that if the defendant, prosecution, and court all agree to a bench trial, there is no independent societal interest that favors the jury trial mode of fact-finding. *Gannett Co. v. DePasquale*, 443 U.S. 368, 383-84 (1979). For a further discussion, see *infra* notes 47-52 and accompanying text.

only a jury could adjudicate guilt or innocence.³⁶ In the mid-nineteenth century, some state supreme courts actually ruled that guilty pleas were unconstitutional.³⁷ This view, which would have caused institutional gridlock by preventing plea bargaining, never took firm root on a national scale and survived for only a short time in the few jurisdictions where it had garnered a temporary following.

Nonetheless, the various states, the "laboratories" of our federalist system,³⁸ continued to develop different procedures with respect to the jury trial guarantee. This development occurred through enactment of and judicial interpretation of state constitutional provisions, legislation, promulgation of court rules, or a combination thereof. Consequently, the different procedures throughout the states remain in effect today. At present, some states provide for a defendant's unilateral right to a bench trial.³⁹

³⁶ BODENHAMER, *supra* note 23, at 86:

[In the late 1800's] [s]tate appellate courts were uneasy with these changes, especially plea bargaining, and repeatedly remanded cases reached under such arrangements. The Tennessee Supreme Court reversed a conviction in 1865 in which the defendant pled guilty to two counts of gambling in exchange for dismissal of eight similar charges. A public trial, the justices declared, "cannot be defeated by any deceit or device whatever."

Id.

³⁷ *See id.* (explaining that some state appellate courts often remanded cases concluded by plea bargaining). For a brief review of the history of plea bargaining, see Langbein, *supra* note 26.

³⁸ The reference to the states as "laboratories" dates back to Justice Louis Brandeis stating that "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Justice Oliver Wendell Holmes also noted the important role of states in enacting new legislation:

There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, in the insulated chambers afforded by the several states, even though the experiments may seem futile or even noxious to me and to those whose judgment I most respect.

Truax v. Corrigan, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

³⁹ *See, e.g.*, LA. CONST. art. I, § 17; MONT. CONST. art. II, § 26; CONN. GEN. STAT. § 54-82(a) (1985); CONN. R. SUPER. CT. § 839; ILL. REV. STAT. ch. 38, para. 115-1 (Supp. 1992); IOWA R. CRIM. P. 16(1); LA. CODE CRIM. PROC.

Other states require prosecutorial and court consent.⁴⁰ Still others allow for a defendant to waive a jury trial in all but capital cases or cases where the death penalty is sought.⁴¹ In some jurisdictions, the court must consent to the defendant's waiver.⁴² In

ANN. art. 780 (West 1981); MD. CTS. & JUD. PROC. CODE ANN. § 8-305 (1989); MD. R. CRIM. CAUSES 4-246(a); *Thomas v. State*, 598 A.2d 789, 793 (Md. Ct. Spec. App. 1991) (holding that defendant has unilateral right to bench trial once court determines that defendant has sufficient knowledge to request bench trial); MONT. CODE ANN. § 46-16-110 (1991); N.H. REV. STAT. ANN. § 606:7 (1986); OHIO REV. CODE ANN. § 2945.05 (Anderson 1987); OHIO R. CRIM. P. 23(a).

⁴⁰ See, e.g., ARIZ. CONST. art. VI, § 17; ARK. CONST. art. II, § 7; OKLA. CONST. art. II, § 19; *Valega v. City of Oklahoma City*, 755 P.2d 118, 119 (Okla. Crim. App. 1988) (noting that valid waiver of jury trial requires prosecutorial and court consent); *Crawford v. Brown*, 536 P.2d 988, 990 (Okla. Crim. App. 1975) (deciding that predicated defendant's waiver of jury trial on consent of court and prosecution is constitutional); VT. CONST. ch. I, arts. 10, 12; VA. CONST. art. I, § 8; WIS. CONST. art. I, § 15; ALA. R. CRIM. P. 18.1(b); ALASKA R. CRIM. P. 23(a); ARIZ. R. CRIM. P. 18.1(b); ARK. CODE ANN. § 16-89-108(a) (Michie 1987); ARK. R. CRIM. P. 31.1, 31.4; DEL. SUPER. CT. CRIM. R. 23(a); D.C. CODE ANN. § 16-705(c) (1966); D.C. SUPER. CT. CRIM. R. 23(a); IND. CODE § 35-37-1-2 (1986); KAN. STAT. ANN. § 22-3403 (1988); KY. R. CRIM. P. 9.26(1); MICH. COMP. LAWS § 763.3 (1979); MICH. CT. R. 6.401; *People v. Kirby*, 487 N.W.2d 404 (Mich. 1992) (upholding rules requiring court and prosecutorial consent as not violative of Michigan Constitution); NEV. REV. STAT. § 175.011 (1985); N.M. R. CRIM. P. 5-605A; N.D. R. CRIM. P. 23(a); S.C. R. CRIM. P. 14(b); S.D. CODIFIED LAWS ANN. § 23A-18-1 (1988); TENN. CODE ANN. § 39-13-205(a) (1991); TENN. R. CRIM. P. 23; TEX. CRIM. PROC. CODE ANN. art. 1.13 (West Supp. 1992); UTAH R. CRIM. P. 17(c); VT. R. CRIM. P. 23(a); W. VA. R. CRIM. P. 23(a); WIS. STAT. § 972.02(1) (West Supp. 1991); WYO. R. CRIM. P. 23(a).

⁴¹ See, e.g., LA. CONST. art. I, § 17; N.Y. CONST. art. I, § 2; OR. CONST. art. I, § 11; ARK. CODE ANN. § 16-89-108(a) (Michie 1987); ARK. R. CRIM. P. 31.4; LA. CODE CRIM. PROC. ANN. art. 780A (West 1981); MASS. GEN. L. ch. 263, § 6 (1990); MISS. UNIF. CIR. CT. PRAC. CRIM. R. 5.13(1); *Evans v. State*, 547 So. 2d 38, 40 (Miss. 1989) (stating well-settled rule that defendant may waive jury trial with agreement of prosecution unless death penalty involved); *Robinson v. State*, 345 So. 2d 1044, 1045 (Miss. 1972) (reaffirming requirement of prosecutorial consent as prerequisite to defendant's waiver of jury trials in all but capital cases); N.H. REV. STAT. ANN. § 606:7 (1986); N.J. R. GEN. APPLIC. 1:8-1(a); N.Y. CRIM. PROC. CODE LAW § 320.10 (McKinney 1982); TEX. CRIM. PROC. CODE ANN. art. 1.13(a) (West 1977); VT. R. CRIM. P. 23(a); WASH. REV. CODE § 10.01.060 (1990).

⁴² GA. CONST. art. I, § 1, ¶ XI; *McCorquodale v. State*, 211 S.E.2d 577, 581-82 (Ga. 1974) (deciding that court has discretion to reject defendant's waiver of jury trial), *cert. denied*, 428 U.S. 910 (1976); *Palmer v. State*, 25 S.E.2d 295, 300-01 (Ga. 1943) (finding no error in court's overruling of defendant's demand for trial by court without jury); MO. CONST. art. I,

other states, the court accepts the defendant's waiver only upon consent of the Government.⁴³ In one state, Ohio, if the defendant's jury waiver is proposed either shortly before or during the trial, the trial judge and prosecutor must consent.⁴⁴ One other state, North Carolina, does not appear to permit the accused to waive a jury trial in a felony case under any circumstances.⁴⁵

Meanwhile, until 1930, the federal court system did not permit a criminal defendant to waive a jury trial in any felony case under any circumstances. As noted above, the federal view was primarily supported by the assumption that, under the Federal Constitution, the jurisdiction of the court was thought to depend on a verdict being rendered by a jury.⁴⁶

In 1930, the Supreme Court decided *Patton v. United States*.⁴⁷ In *Patton*, the Court addressed the issue of whether the defendant

§ 22(a); NEB. CONST. art. I, § 6; *State v. Godfrey*, 155 N.W.2d 438, 442-43 (Neb. 1968) (deciding that court may impose reasonable conditions on defendant's right to waive jury trial), *cert. denied*, 392 U.S. 937 (1968); N.Y. CONST. art. I, § 2; OR. CONST. art. I, § 11; HAW. REV. STAT. § 806-61 (1985); HAW. R. PENAL PROC. 23(a); ME. REV. STAT. tit. 15, § 2114 (West Supp. 1991); ME. R. CRIM. P. 23(a); MASS. GEN. L. ch. 263, § 6 (1990); MASS. R. CRIM. P. 19(a); MINN. R. CRIM. P. 26.01(2); N.J. R. GEN. APPLIC. 1:8-1(a); N.Y. CRIM. PROC. LAW § 320.10 (McKinney 1982); OR. REV. STAT. § 136.001(2) (1991); PA. R. CRIM. P. 1101; *Commonwealth v. Sorrell*, 456 A.2d 1326, 1328-29 (Pa. 1982) (finding that statute conflicting with validly enacted rule was unconstitutional and upholding rule requiring court to consider relevant factors in granting defendant's motion to waive jury trial); R.I. R. CRIM. P. 23(a); WASH. REV. CODE § 10.01.060 (1990).

⁴³ CAL. CONST. art. I, § 16; IDAHO CONST. art. I, § 7; FLA. R. CRIM. P. 3.260; IDAHO R. CRIM. P. 23(a); MISS. UNIF. CIR. CT. PRAC. CRIM. R. 5.13(1); *Evans v. State*, 547 So. 2d 38, 40 (Miss. 1989) (stating well-settled rule that defendant may waive jury trial with agreement of prosecution unless death penalty involved); *Robinson v. State*, 345 So. 2d 1044, 1045 (Miss. 1977) (reaffirming requirement of prosecutorial consent as prerequisite to defendant's waiver of jury trial). In Colorado, whether recently enacted C.R.S. 16-10-101, which purports to require prosecutorial consent in non-capital cases, unconstitutionally infringes on the defendant's right to a bench trial, see COLO. CONST. art. II, §§ 16, 23, is currently being litigated before the Colorado Supreme Court. *See note * supra*.

⁴⁴ OHIO R. CRIM. P. 23(A) (requiring court consent and prosecutorial consent when waiver suggested during the trial).

⁴⁵ N.C. CONST. art. I, § 24 (disallowing waiver in felony cases but allowing waiver in misdemeanors); N.C. GEN. STAT. § 15A-1201 (1988) (providing no opportunity for waiver).

⁴⁶ For a list of citations supporting the federal view, see DeCicco, *supra* note 13, at 1100 n.56.

⁴⁷ 281 U.S. 276 (1930).

and the Government could consent to a jury determination of eleven members of the jury, rather than twelve.⁴⁸ In dicta, the Court stated that there was no difference between a “complete waiver of a jury and consent to be tried by a less number than twelve. . . .”⁴⁹ In further dictum, the Court noted that the jury trial guarantee was not jurisdictional but was a *guarantee to the accused*, which could be forgone at his election.⁵⁰ Thus, to a large extent, the Court rejected the so-called “public policy” arguments which contended that the public had a distinct constitutional interest in requiring a jury trial. The Court also added that the Federal Constitution allowed the defendant to waive a jury trial with prosecutorial consent. However, somewhat curiously, the Court seemed to imply that providing prosecutorial consent was constitutionally required.⁵¹

The *Patton* dictum subsequently shaped federal practice by allowing a defendant to waive his right to a jury trial if the prosecution consented to the proffered waiver and the court approved.⁵² When Congress, after several years of development, enacted the Federal Rules of Criminal Procedure in 1946, it

⁴⁸ *Id.* at 287. One juror had become severely ill during the course of the trial and was unable to serve further as a juror. Both parties agreed to the eleven person jury. *Id.* at 286. After conviction, the defendant appealed, claiming that defendants had no power to waive their constitutional right to a jury of twelve persons. *Id.* at 287.

⁴⁹ *Id.* at 290.

⁵⁰ *Id.* at 293.

⁵¹ The Court stated:

Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases. . . . Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.

Id. at 312. The reference to the “intelligent consent of the defendant” is instructive. *Patton* was decided eight years before the Supreme Court held that indigent federal criminal defendants in felony cases were constitutionally entitled to appointed counsel. For a discussion contending that the “prosecutorial consent” language in *Patton* should be read as providing the accused with protection against exercising an uninformed and unintelligent waiver of the right to a jury trial, see discussion *infra* notes 125-33 and accompanying text.

⁵² See, e.g., *Ferracane v. United States*, 47 F.2d 677, 679 (7th Cir. 1931)

essentially codified the *Patton* dictum to create Rule 23(a). In fact, for the most part, the Federal Rules of Criminal Procedure incorporated existing practice, which, understandably, was geared toward the tenor of the times.⁵³

Such was the state of affairs in 1965, when the Supreme Court decided *Singer v. United States*.⁵⁴ In *Singer*, the defendant requested a bench trial because he wanted to "save time."⁵⁵ No other reason was asserted. The Government refused to consent, and the trial court denied the bench trial request. On appeal, the defendant asserted that he had an absolute constitutional right to elect a bench trial, and that the prosecutorial consent requirement was unconstitutional. The Court unanimously held that a rule that conditioned a defendant's bench trial request on

(finding that after *Patton* decision, defendant unquestionably had right to waive jury trial).

⁵³ The joinder and severance rules, circa 1946, made perfect sense for a time when federal mega-trials were largely unheard of (RICO and CCE would not appear in the Federal Criminal Code for another quarter century), many federal prosecutions were based on World War II-related violations of the Selective Service Act and Office of Price Administration regulations, and a paradigm joinder case arose in multi-count forgery indictment or a multi-count bank robbery indictment. See ADMINISTRATIVE OFFICE OF THE U. S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS Table D. 2, at 137-39 (1946) (setting forth statistics of federal offenses). Nevertheless, at the time the Federal Rules were adopted, similar broad joinder provisions specifically designed to prosecute "racketeers" in complex, large-scale cases had already been used successfully at the state level. See Lawrence Fleischer, *Thomas E. Dewey and Earl Warren: The Rise of the Twentieth Century Urban Prosecutor*, 28 CAL. W. L. REV. 1, 16-20 (1991) (discussing N.Y. District Attorney Thomas E. Dewey's pivotal role in promulgation of novel liberal joinder provisions which were used in 1936 to successfully prosecute notorious Lucky Luciano, as well as other members of the New York Mafia, on broad conspiracy charges). In the 1930's and 1940's, owing to then prevailing notions of federalism, "racketeering" cases were much more likely to be tried in state court than in federal court. See generally NORMAN ABRAMS, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 32-41 (1986) ("[I]n the wake of the New Deal, the [Supreme] Court's decisions generally upheld a broad view of [commerce clause] authority" to reach criminal activity traditionally prosecuted by local authorities.). See also *Perez v. United States*, 402 U.S. 146 (1971) (discussing federal-state responsibilities in combatting organized crime and historical developments of commerce clause after New Deal which lead to expansive modern federal criminal jurisdiction).

⁵⁴ 380 U.S. 24 (1965).

⁵⁵ *Id.* at 38.

obtaining prosecutorial consent and court approval was constitutional. However, the Court indicated clearly that if Congress wanted to amend Rule 23(a) to provide the defendant with a unilateral right to a bench trial, such a rule would be constitutional.⁵⁶

The Court also noted that the Government need not give any reasons for its refusal to consent to a bench trial, although the denial could not be asserted for "ignoble purposes" or unconstitutional reasons.⁵⁷ Moreover, the Court recognized that situations may arise where, if the Government objected to a bench trial request, the resulting jury trial would deprive the defendant of his constitutional right to a fair trial. In those circumstances, the Court opined, a court could overrule the Government's objection, and allow the defendant to be tried to the court.⁵⁸

In the aftermath of *Singer*, a handful of federal district courts have granted a defendant's bench trial request over Government objection in order to provide the defendant with a constitutionally required fair trial. For example, in *United States v.*

⁵⁶ First, the Court "conclude[d] that Rule 23(a) sets forth a reasonable procedure governing attempted waivers of jury trials." *Id.* at 26. Importantly, the Court did not state that Rule 23(a) embodied a constitutional requirement. In addition, the Court noted that it was aware that states had adopted a variety of different procedures, including the option that a defendant may unilaterally waive the right to a jury trial. *Id.* at 36-37. The Court strongly implied that such a federal rule would be constitutional by noting that "the framers of the federal rules were aware of possible alternatives when they recommended the present rule to this Court." *Id.* at 37. This language was contrary to the *Patton* dictum, which suggested otherwise. See generally 3 AMERICAN BAR ASSOCIATION STANDARDS FOR CRIMINAL JUSTICE § 15-1.2, commentary at 15.16-17 (2d ed. 1980) [hereafter ABA STANDARDS] (adopting position that prosecutorial consent be required as matter of policy, but recognizing that *Singer* overruled dictum in *Patton* which had suggested that such consent was constitutionally required).

⁵⁷ *Singer*, 380 U.S. at 37-38 (citing *Berger v. United States*, 295 U.S. 78, 88 (1935)).

⁵⁸ *Id.* One student commentator has argued that since a defendant has a constitutional right to a trial by an impartial jury, if an impartial jury cannot be empaneled, the remedy must be dismissal. Jon Fieldman, *Singer v. United States and the Misapprehended Source of the Nonconsensual Bench Trial*, 51 U. CHI. L. REV. 222 (1984). The commentator also opines that constitutional provisions other than the impartial jury guarantee, notably the due process right to a fair trial, require that Rule 23(a) should be amended to permit a defendant to insist upon a bench trial once he has demonstrated jury partiality.

Panteleakis,⁵⁹ two individual defendants and three corporate defendants were indicted on twenty-one counts of medicare fraud. The defendants requested a bench trial, asserting that 1) the case involved complicated issues of law and accounting beyond the comprehension of the average juror; 2) the complexity of the issues rendered the formulation of meaningful instructions for jury guidance unusually difficult; 3) a plethora of evidentiary cross-rulings would confuse the jury; 4) a jury trial would take twice as long as a bench trial; and 5) significant inflammatory pretrial publicity eliminated the possibility of obtaining a fair and impartial jury.⁶⁰

The Government refused to consent to the bench trial. However, the court granted the bench trial, holding that to proceed by jury trial would unconstitutionally deprive the defendants of a fair trial. The court noted:

In evaluating these reasons, which have not been disputed by the government, it can be seen there is something more to be considered than the mere question of whether or not this complicated case should be kept from a jury. Here there are multiple defendants and as the defendants argue, the trial will unquestionably involve intricate rulings on the admissibility or inadmissibility of evidence as it relates to each particular defendant. This is not a conspiracy case and each defendant is entitled to the full benefit of rulings on evidence relating to hearsay, admissions, etc. Many rulings on the evidence presented in the course of a lengthy trial might be the subject matter of appeal in a jury trial which would not be so in a jury-waived trial.

...
The Court feels that this is the kind of case where "the practical and human limitations of [a] jury . . . cannot be ignored," because of the context within which the evidence must be presented. This case indeed presents that "other factor . . . render[ing] unlikely an impartial trial by jury."⁶¹

In *United States v. Braunstein*,⁶² a complex white collar prosecution, the district court granted the defendants' request for a bench trial over the Government's objection.⁶³ The court, however, did not base its decision on constitutional grounds. Rather, it determined that a reading of Rule 23(a), in conjunction with Federal Rule of Criminal Procedure 2, provided grounds for the

⁵⁹ 422 F. Supp. 247 (D.R.I. 1976).

⁶⁰ *Id.* at 249.

⁶¹ *Id.* at 249-50 (citations omitted) (brackets and omissions in original).

⁶² 474 F. Supp. 1 (D.N.J. 1979).

⁶³ *Id.* at 14.

decision.⁶⁴

The defendants in *Panteleakis* and *Braunstein* raised several of the issues commonly relied on by white collar defendants who seek a bench trial over Government objection. However, the decisions were heavily fact specific, and due to their procedural posture as district court rulings, set no real precedent.⁶⁵ Consequently, defendants nationwide dutifully cite these district court cases when seeking a bench trial over Government objection. Nevertheless, such arguments usually fail, as most trial courts determine that empaneling an impartial jury is constitutionally possible. Usually, a defendant cannot obtain interlocutory review of a trial court determination that a fair jury can be empaneled. Furthermore, the post-conviction review of the denial of the bench trial is subject to the "clear abuse of discretion" standard of review.⁶⁶ This standard of review usually poses an insur-

⁶⁴ *Id.* Federal Rule of Criminal Procedure 2 provides:

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

FED. R. CRIM. P. 2.

⁶⁵ The Government chose not to seek an interlocutory review of those decisions, either by appeal or mandamus. *Cf.* *United States v. Igoe*, 331 F.2d 766, 768 (7th Cir. 1964) (finding that mandamus relief was available to review dismissal of indictment where government refused to consent to bench trial and trial court dismissed indictment upon government's refusal to proceed with bench trial), *cert. denied*, 380 U.S. 942 (1965).

A recent case where a defendant received a bench trial over Government objection raised some unusual issues. In *United States v. Lewis*, 638 F. Supp. 573 (W.D. Mich. 1986), the defendants were charged with holding children in involuntary servitude. *Id.* at 575. The defendants sought a bench trial and the Government refused to consent. *Id.* However, the district court held that the defendants' religious beliefs did not allow them to submit to the judgment of a jury, and thus held that Rule 23(a)'s requirement of government consent to a waiver of a jury trial impermissibly burdened defendants' free exercise of religion as guaranteed under the First Amendment. *Id.* at 581.

Other cases which discuss a defendant's right to a bench trial over Government objection include *United States v. Daniels*, 282 F. Supp. 360 (N.D. Ill. 1968); *United States v. Schipani*, 44 F.R.D. 461 (E.D.N.Y. 1968).

⁶⁶ *See, e.g.*, *United States v. Moon*, 718 F.2d 1210, 1218-19 (2d Cir. 1983) (finding no clear abuse of discretion in denying bench trial request), *cert. denied*, 466 U.S. 971 (1984); *United States v. Wright*, 491 F.2d 942, 945 (6th Cir. 1974) (deciding that bench trial not required for fair trial), *cert. denied*, 419 U.S. 862 (1974). For a further discussion, see *infra* notes 71-73 and accompanying text.

mountable obstacle for the defendant.

In the last two decades several important developments in federal criminal law have changed the nature of federal criminal practice. During the same time period, media interest in federal criminal trials has increased significantly. The Government will usually consent to a defendant's bench trial request when the Government perceives it is also in its best interests to do so.⁶⁷ Recent statistics suggest that the Government still usually agrees to most defendants' bench trial requests. In the twelve-month period ending June 30, 1991, approximately eighteen percent of all federal criminal defendants who went to trial were tried to the court.⁶⁸ In 1989, that figure was approximately twenty-three percent.⁶⁹ However, those percentages represent a statistically significant decrease from the percentage of federal criminal defendants who were tried to the court a decade ago.⁷⁰ As one

⁶⁷ The time and expense saved at a bench trial often redounds to the benefit of the Government as well. In addition, a judge generally is more likely to convict than is a jury. *KALVEN & ZEISEL*, *supra* note 4, at 58-59. The authors note that "[t]he jury has long been regarded as a bulwark of protection for the criminal defendant" *Id.* at 58. *See also supra* note 4 (explaining why defendant may prefer jury trials over bench trials). For discussion of related issues, see *infra* note 79.

⁶⁸ ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1991 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, Table D-4, at 254 (1991). 1,302 criminal defendants had bench trials out of a total of 7,162 criminal defendants who went to trial. *Id.* The figures are arrived at by adding together numbers of defendants acquitted and convicted by judge and jury respectively, and then calculating the percentage of defendants who were tried by the court.

⁶⁹ 1989 FEDERAL JUSTICE STATISTICS, *supra* note 5, at 31 (1,819 defendants had bench trials out of 7,960 total defendants who proceeded to trial).

⁷⁰ In 1980, approximately 31% (almost one-third) of federal criminal defendants who went to trial were tried by the court. U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1990 Table 5.24, at 500 (Kathleen Maguire & Timothy J. Flanagan eds., 1991) [hereafter 1990 SOURCEBOOK]. In 1982, Professor Wright remarked in his treatise that the number of federal criminal bench trials had been "remarkably stable" over time at approximately one third of all cases. 2 WRIGHT, *supra* note 6, § 372, at 297 & n.4 (citing sources and statistics from 1982 and 1965). In 1947, the first full year after the Federal Rules of Criminal Procedure became effective, approximately 58% of all criminal defendants who went to trial had bench trials. 1990 SOURCEBOOK, *supra*, Table 5.24, at 500.

The Department of Justice does not keep track of the number of bench trial requests that it denies. Thus, it is impossible to determine definitively whether the decrease in the number of bench trials is due to fewer defense

might expect, the Government is refusing to consent to defense bench trial requests in some high profile fraud cases.

For example, in 1983, the Reverend Sun Myung Moon, head of the controversial Unification Church, was indicted on criminal tax fraud offenses.⁷¹ Moon moved for a bench trial, claiming religious persecution and citing substantial hostile nationwide pre-trial publicity. However, the Government refused to consent to Moon's request for a bench trial. On appeal of his conviction by a jury, the Second Circuit, applying a very deferential "clear abuse of discretion" standard, determined that the denial of the bench trial was not error.⁷² More recent examples involve highly publicized political scandals that have resulted in a myriad of federal prosecutions. Some of these high profile defendants have sought bench trials on complex fraud charges, but the Government has refused to consent in some cases.⁷³ As illustrated by these exam-

requests, more Government vetoes, or both. Some of the recent drop in bench trial requests may be attributable to the Federal Sentencing Guidelines, which arguably remove some of the potential incentive for a defendant to plead guilty or to request a bench trial, actions which, prior to the Guidelines, may have influenced the trial court to impose a more lenient sentence than would have been the case if the defendant opted for a more time consuming jury trial. See generally 1 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMM. REPORTS JULY 1, 1990, *Report of the Subcomm. on Workload, ch. 9, Sentencing Guidelines* 1, 14 (1990) (authored by Associate Reporter Sara Sun Beale) (discussing aspects of Sentencing Guidelines which hamper plea negotiations and which may adversely impact caseload pressures). Nonetheless, whatever may have accounted for the large percentage drop between 1946 and the 1970s, the steady number of reported opinions in the last two decades where defendants have challenged the Government's veto of bench trial requests suggests that the recent drop in the percentage of court trials is due, in large part, to a not inconsiderable exercise of the Government's power to veto those requests pursuant to Rule 23(a).

⁷¹ *United States v. Moon*, 718 F.2d 1210, 1216 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984).

⁷² *Id.* at 1218-19.

⁷³ For example, in a recent federal case in Denver, Colorado, MDC Holdings President David Mandarich was charged with election fraud. Indictment, *United States v. Mandarich*, No. 91-CR-243 (D. Colo. 1991). The case attracted an enormous amount of pre-trial publicity. Defendant Mandarich first moved for a change of venue, which was denied. He then moved for a bench trial, arguing that the case was too complex for a jury and that the extensive pre-trial publicity had made the empaneling of an impartial jury unlikely. Peter G. Chronis, *M.D.C.'s Mandarich Seeks Trial by Judge*, DENVER POST, June 2, 1992, at 1B. The Government denied the request, and the case was tried to the jury. Peter G. Chronis, *Mandarich Bid*

ples, the Government continues in some circumstances to exercise its unreviewable veto over a defendant's bench trial request, thus forcing a jury trial.

Defendants, in these types of cases, often have compelling reasons to seek a bench trial. Regardless of the state of the law concerning what constitutes an impartial jury,⁷⁴ media coverage, both print and television, of high profile criminal trials has exploded since 1946. Consequently, empaneling an impartial jury today that has not been exposed to significant media coverage has become much more difficult and expensive than it was even a decade ago.⁷⁵ Recent Supreme Court decisions have perhaps unin-

for Trial by Judge Denied, DENVER POST, June 3, 1992, at 3B. However, the Government did not get the jury verdict it so badly wanted. At the close of the Government's case, the court granted the defendant's motion for judgment of acquittal. Peter G. Chronis, *Mandarich Acquitted—Judge: U.S. Fails to Prove Its Case*, DENVER POST, June 13, 1992, at 1A.

In addition, former Defense Secretary Caspar Weinberger, facing federal criminal charges arising out of the highly publicized Iran-Contra scandal, sought to waive his right to a jury trial. Walter Pincus, *Weinberger Waives Right to Iran-Contra Jury Trial*, WASH. POST, Oct. 9, 1992, at A23. Weinberger's counsel stated that "[w]e want this trial to take place as quickly as possible." *Id.* Prior to the bench trial request, the trial court had made some key rulings that had worked against the prosecution's case. *Id.* The next day, the prosecution announced it would oppose Weinberger's request for a bench trial. Walter Pincus, *Bush Made Pact on Iran-Contra Inquiries*, WASH. POST, Oct. 10, 1992, at A4.

⁷⁴ As noted above, even in high profile cases, it is exceedingly difficult to establish that a constitutionally impartial jury cannot be empaneled. *See generally* United States v. Dischner, 960 F.2d 870, 891-93 (9th Cir. 1992) (discussing extreme difficulty in establishing that change of venue is warranted based on allegation of jury partiality); United States v. Wright, 491 F.2d 942, 945 (6th Cir. 1974) (noting that courts are reluctant to find that fair trial requires bench trial), *cert. denied*, 419 U.S. 862 (1974); DeCicco, *supra* note 13, at 1097-1100 (suggesting that procedures to ferret out bias are insufficient).

⁷⁵ The modern era of media coverage of trials can be traced back to the early days of radio. In 1925, two commercial stations went on the air and the modern age of mass communications began. MICHAEL KRONENWETTER, *FREE PRESS V. FAIR TRIAL: TELEVISION AND OTHER MEDIA IN THE COURTROOM* 25-27 (1986). Later that summer, radio broadcasted the "Scopes Monkey Trial." The judge who presided over the case is reported to have remarked, "my gavel will be heard around the world." *Id.* at 33.

The enormous impact of television cannot be overstated. Between 1941 and 1949, only 3.6 million televisions were sold in the United States. COBBETT STEINBERG, *TV FACTS* 85 (1985). In 1991, 93 million television sets were in U.S. homes. INTERNATIONAL TELEVISION & VIDEO ALMANAC 19 (Barry Monush ed., 1992). The neo-modern era of televised trials began in

tentionally exacerbated this problem by narrowing the manner in which a criminal defendant may exercise the use of peremptory challenges.⁷⁶ Thus, more and more defendants are likely to seriously consider opting for a bench trial.

In addition, a defendant may prefer the convenience and impartiality of a local bench trial to seeking a change of venue in a distant court that may or may not result in an impartial jury.⁷⁷ Furthermore, a defendant may want the judge to be the trier of fact if the case involves complex issues. Finally, a defendant may prefer a bench trial in a case that has aroused particular public passions. For example, defendants may fear that the public outcry following highly publicized heinous crimes and large scale scandals will be so influential that even a supposedly impartial jury may not find innocence a sufficient defense.⁷⁸ In these circumstances, allowing the Government to veto a defendant's bench trial request, even if the veto is exercised in unquestionable good faith, jeopardizes the relevant interests of the defendant and the criminal justice process.⁷⁹

earnest when CNN provided gavel to gavel coverage of the Claus Von Bulow trial, and continued with coverage of "Big Dan's Rape Trial," the trial which served as the model for the film *The Accused*. *Id.* at 70-82. Now, even though cameras are not allowed in federal criminal trials, legal newspapers and Court TV continue to publicize trials like never before. *See generally* JEFFREY B. ABRAMSON ET AL., *THE ELECTRONIC COMMONWEALTH* (1988); RONALD BERKMAN & LAURA N. KITCH, *POLITICS IN THE MEDIA AGE* (1986); PETER CONRAD, *TELEVISION — THE MEDIUM AND ITS MANNERS* (1982); DONALD M. GILLMOR, *FREE PRESS AND FAIR TRIAL* (1966); WILLIAM H. MARNELL, *THE RIGHT TO KNOW — MEDIA AND THE COMMON GOOD* (1973); PAUL C. REARDON & CLIFTON DANIEL, *FAIR TRIAL AND FREE PRESS* (1968); MARTIN H. SEIDEN, *ACCESS TO THE AMERICAN MIND: THE IMPACT OF NEW MASS MEDIA* (1991).

⁷⁶ *See Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (finding that criminal defendant may not engage in purposeful discrimination of peremptory challenges). Calls to abolish peremptory challenges are increasing. *See, e.g.*, Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 *TEMP. L. REV.* 369 (1992). The author is a Senior United States District Judge.

⁷⁷ *See DeCicco, supra* note 13, 1099 (noting that change of venue may only increase chance of fair trial in some circumstances). *See also Tafero v. Wainwright*, 796 F.2d 1314, 1321 (11th Cir. 1986) (stating that counsel may make strategic decision to waive change of venue due to possible jury prejudice), *cert. denied*, 483 U.S. 1033 (1987).

⁷⁸ *See State v. Linder*, 304 N.W.2d 902, 908 (Minn. 1981) (Otis, J., dissenting).

⁷⁹ Even assuming the Government's objection to the bench trial request

II. CURRENT REALITIES OF FEDERAL CRIMINAL PRACTICE REQUIRE AMENDING RULE 23(a)

As explained in the preceding sections, federal criminal defendants often have compelling reasons for requesting a bench trial. However, they cannot obtain a bench trial without the prosecutor's consent even though the consent requirement has no constitutional or historical justification. This section establishes that the current realities of modern federal criminal practice require a reevaluation of the current Rule 23(a) procedures. That reevaluation reveals that a defendant should have a unilateral right to elect a bench trial.⁸⁰

is made in "good faith," this Article explains that a defendant should still have a unilateral right to a bench trial. Whether the above assumption is accurate in the long run of cases is problematic. One cannot ignore the reality of the American adversary system where the prosecutor has a significant incentive to want to win the case. *See generally* Van Kessel, *supra* note 4, at 435-43 (discussing the considerable pressure American prosecutors face to win cases). Given the option of choosing (or vetoing) a particular fact-finder, a prosecutor exercising that authority in a rational and tactically advantageous manner would obviously be inclined to select a fact-finder that is most likely to return a conviction. However, this may create an insoluble ethical problem for the prosecutor. One commentator has noted:

[The Supreme Court] has noted that the prosecutor is a "servant of the law" with a "two-fold aim . . . that guilt shall not escape or innocence suffer." The accused is presumed innocent until his guilt is proven beyond a reasonable doubt. If the prosecutor believes that he can convince only one of several available finders of fact of the accused's guilt, this may indicate a reasonable doubt still exists in his mind. The effect of waiver [of a jury trial] on the chances for conviction is not a valid consideration for the prosecutor.

Steven H. Hutzelman, Note, *Constitutional Law: Criminal Procedure: Waiver of Jury Trial: Singer v. United States*, 380 U.S. 24 (1964), 51 CORNELL L. Q. 339, 344 (1966) (citations omitted).

In addition, former Assistant Attorney General Edward Dennis commented recently on the strained professional relationship between the Department of Justice and the private defense bar. He characterized the current relationship as having "now reached the point of questioning the ethics of each side and the professionalism of each side." *See* Van Kessel, *supra* note 4, at 436-37 & nn. 135-36 (discussing statement of Former Assistant Attorney General Edward Dennis) (citations omitted). This undoubtedly creates a climate where the Government's motives in refusing to consent to a bench trial are viewed with considerable skepticism to say the least.

⁸⁰ One narrow "exception" concerns the timing of a defendant's request. *See infra* notes 112-15 and accompanying text (proposing that defendant

A. Complexity of Federal Criminal Law

The complexity of current federal criminal law requires a less stringent approach for determining when a defendant may obtain a bench trial. As noted earlier, new federal criminal statutes have created unique problems for jury trials that can largely be avoided in a bench trial. For example, the concept of juror unanimity is wilting. Recent court decisions raise serious questions as to whether a jury is required to unanimously agree on particular elements of some offenses.⁸¹ In a complex criminal case, a defendant should be able to elect to be tried by an impartial judge, where, by definition, the court would be unanimous in its determination.

Next, although the Supreme Court has heretofore not required special verdicts in complex criminal cases, Justice Blackmun has suggested recently that courts should encourage special verdicts in complex federal criminal cases. In cases where unanimity is required, special verdicts would ensure that the jury verdict unambiguously reveals that unanimity.⁸² Again, this potential

must exercise his unilateral right to waive jury trial prior to commencement of jury selection).

⁸¹ See *United States v. Canino*, 949 F.2d 928, 945-48 (7th Cir. 1991) (deciding that jury not required to unanimously agree on whether defendant committed specific predicate act, as long as it unanimously agrees that defendant committed requisite number of predicate acts), *cert. denied*, 112 S. Ct. 1940 (1992). *Contra* *United States v. Echeverri*, 854 F.2d 638, 642-43 (3d Cir. 1988) (finding reversible error for district court to fail to instruct jury that it must unanimously agree on which three acts constitute the continuing series of violations). See also *Schad v. Arizona*, 111 S. Ct. 2491, 2496 (1991) (plurality opinion) (deciding that conviction under jury instructions that did not require jury to agree on one of the alternative theories of premeditated and felony-murder did not deny due process). Three Justices dissented, arguing that the majority's acceptance of the "generic verdict" where the state had proceeded on alternative theories destroys the bedrock constitutional principle that guilt must be established beyond a reasonable doubt. *Id.* at 2507-13 (White, J., dissenting). For a further discussion, see James J. McGuire, *Schad v. Arizona: Diminishing the Need for Verdict Specificity*, 70 N.C. L. REV. 936 (1992).

⁸² *Griffin v. United States*, 112 S. Ct. 466 (1991). Justice Blackmun observed:

The Government either could have charged the two objectives in separate counts, or agreed to petitioner's request for special interrogatories. The Court wisely rejects, albeit silently, the Government's argument that these practices, but not the complex and voluminous proof, would likely have confused the jury. I would go further than the Court and commend these

confusion, which strikes the heart of the integrity of the criminal justice system, can be avoided entirely at a court trial, where the one trier of fact would at least be unanimous in making her determination of a particular issue beyond a reasonable doubt.

Moreover, a bench trial would not require the breaking of new ground governing the use of special verdicts in criminal cases. Special verdicts are generally disfavored in criminal jury trials.⁸³ However, with respect to a bench trial, current Rule 23(c) already requires the court to make special findings, the fundamental equivalent of a special verdict, when requested by one of the parties.⁸⁴ It is well established that Rule 23(c) can be utilized by the court to make findings regarding intent and related credibility issues,⁸⁵ which are often the central issues of dispute in federal

techniques to the Government for use in complex conspiracy prosecutions.

Id. at 475 (Blackmun, J., concurring). For an excellent discussion of the problems concerning the use of special verdicts and special interrogatories in complex criminal jury trials, see Robert M. Grass, Note, *Bifurcated Jury Deliberations in Criminal RICO Trials*, 57 *FORDHAM L. REV.* 745 (1989). See also *United States v. Ogando*, 968 F.2d 146, 149 (2d Cir. 1992) (holding that decision to use special interrogatories in complex criminal jury trials is committed to broad discretion of district court).

⁸³ JAMES C. CISSELL, *FEDERAL CRIMINAL TRIALS* § 1256, at 405 (2d ed. 1987). The rule is of long standing vintage. See generally 4 BLACKSTONE, *supra* note 4, at 354 (stating that "in a criminal case . . . [the jury] ha[s] an unquestionable right of determining upon all the circumstances, and finding a general verdict . . ."). See also 1 THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 679 (8th ed. 1927) ("[The jurors] are not obliged in any case to find a special verdict; they have a right to apply for themselves the law to the facts, and to express their own opinion, upon the whole evidence, of the defendant's guilt.").

⁸⁴ Federal Rule of Criminal Procedure 23(c) provides:

In a case tried without a jury the court shall make a general finding and shall in addition, on request made before the general finding, find the facts specially.

FED. R. CRIM. P. 23(c).

The trial court is under a duty to make special findings upon timely request of the defendant. *Howard v. United States*, 423 F.2d 1102, 1104 (9th Cir. 1970); 3 LESTER B. ORFIELD, *ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 23:49, at 76 (Mark S. Rhodes ed., 2d ed. 1985) [hereafter *ORFIELD'S*].

⁸⁵ *Wilson v. United States*, 250 F.2d 312, 325 (9th Cir. 1957); see also 3 *ORFIELD'S*, *supra* note 84, § 23:49, at 75 (noting that state of mind issues can be clarified by special findings under Rule 23(c)).

white collar prosecutions.⁸⁶ As long as the court is an impartial trier of fact, the Government has no legitimate interest in objecting to this procedure.

B. Vindicating the Defendant's Constitutional Right to Testify

Providing a defendant with a unilateral right to elect a bench trial could encourage more defendants to testify. This development would advance the truth-seeking process and improve the fair and efficient administration of criminal justice.

A defendant has a constitutional right to testify.⁸⁷ Any modification of existing practice that facilitates the exercise of a constitutional right not only benefits the accused, but more importantly, improves the administration of criminal justice. If the defendant testifies, more relevant evidence is available. In addition, the testifying defendant must face "the crucible of cross-examination," which Wigmore described as "beyond any doubt the greatest legal engine ever invented for the discovery of truth."⁸⁸ This undoubtedly advances the truth seeking process.⁸⁹ Thus, applying the guiding principles enunciated in *Berger v. United States*,⁹⁰ the Government is compelled to view this development as a positive step toward seeing that "justice shall be done."⁹¹

⁸⁶ Adam H. Kurland, *Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant*, 51 U. PITT. L. REV. 841, 842 n.5 (1990).

⁸⁷ *Rock v. Arkansas*, 483 U.S. 44, 49-53 (1987).

⁸⁸ 5 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1367, at 32 (James H. Chadbourn ed., 1974). The Advisory Committee to the Federal Rules of Evidence indicates Wigmore may have overstated his case slightly, but still concludes that "all will agree with [Wigmore's] statement that [cross-examination] has become a 'vital feature' of the Anglo-American system." FED. R. EVID., *Advisory Committee Note to Article VIII*, Introductory Note: The Hearsay Problem (citation omitted).

⁸⁹ The Supreme Court has observed that "permitting a defendant to testify advances both the 'detection of guilt' and 'the protection of the innocence.'" *Rock*, 483 U.S. at 50 (citations omitted). See also Van Kessel, *supra* note 4, at 423. Few defendants in American courts testify, in contrast to the Continental System where "[t]he defendant almost always agrees to speak." *Id.* The author advocates changes in the American adversary process that would encourage more defendants to testify and thus enhance the truth seeking process. *Id.* at 481-83.

⁹⁰ 295 U.S. 78 (1935).

⁹¹ *Id.* at 88. Of course, a defendant does not have a constitutional right to commit perjury. *United States v. Mandujano*, 425 U.S. 564, 576 (1976)

It is well established that many criminal defendants do not testify because of a fear that they will be impeached by prior criminal convictions under Federal Rule of Evidence 609.⁹² Prosecutors recognize that if impeachment evidence (the prior criminal record) is presented to the jury, even with a limiting instruction, the jury will likely use the evidence in a manner that the law does not sanction and be swayed by the evidence to a greater degree than would be the case if they only considered the evidence of the actual events in question.⁹³

(finding no constitutional right to commit perjury). However, most white collar cases concern close issues of intent, and the defendants usually do not challenge that they committed the acts charged. *See* United States v. Casperson, 773 F.2d 216, 223 (8th Cir. 1985) (stating that entire defense based on lack of requisite intent); Kurland, *supra* note 86, at 850 (explaining that defendants usually concede that acts were committed but contend that acts were done in good faith). One federal court has noted in a related vein that perjury must be with respect to facts and that truth or falsity must be susceptible to proof so that statements concerning ultimate facts should not be able to form the basis of a perjury charge because the "chance that a defendant will lie about the ultimate fact at issue in his case does not significantly threaten the integrity of the fact-finding process." United States v. Endo, 635 F.2d 321, 323 (4th Cir. 1980).

⁹² Federal Rule of Evidence 609(a)(2) provides that "evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment." FED. R. EVID. 609(a)(2). *See generally* Van Kessel, *supra* note 4, at 482 (noting that most defendants do not testify, in large part, because "[t]he threat of felony conviction impeachment can be a powerful deterrent to taking the witness stand"). For the percentage of fraud defendants who have prior criminal records, see 1989 FEDERAL JUSTICE STATISTICS, *supra* note 5, Table 3.3, at 33. *See also infra* note 93 (noting sources discussing influence of prior convictions on jury).

⁹³ *See generally* Robert Okun, *Character and Credibility: A Proposal to Realign Federal Rules of Evidence 608 and 609*, 37 VILL. L. REV. 529 n.1 (1992) (citing *People v. Allen*, 420 N.W.2d 499, 504 (Mich. 1988) ("[I]n our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not to defendants' prior acts in reaching its verdict.)); H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845 (1982) (arguing that use of character evidence should be limited); Ed Gainor, Note, *Character Evidence by Any Other Name . . . : A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*, 58 GEO. WASH. L. REV. 762 (1990) (proposing reforms to Rule 609 to eliminate unfair prejudice). Social science researchers have begun to compile empirical data demonstrating the difficulty juries have in properly evaluating evidence of prior convictions. *See* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt*, 9

This has a particularly pernicious effect in federal white collar cases. First, white collar defendants usually do not have a history of prior violent crime. However, given the explosion of the criminalization of regulatory offenses in the last decade,⁹⁴ more and more white collar defendants likely will have a prior conviction for fraud or some other similar offense. Pursuant to Federal Rule of Evidence 609(a)(2), these types of "truth crimes," felony or misdemeanor, are *mandatorily* admissible should the defendant testify. Despite the potential for substantial unfair prejudice that lurks in the admission of this type of evidence, the rule contains no probative value/prejudicial effect balancing test.⁹⁵ Conse-

LAW & HUM. BEHAV. 37 (1985) (finding great risk of prejudice towards defendants under existing policy). The authors conclude:

[T]he presentation of the defendant's criminal record [under Rule 609, which is admissible to impeach the credibility of the witness-defendant] does not affect the defendant's credibility, but does increase the likelihood of conviction, and the judge's limiting instructions do not appear to correct that error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it. From a legal policy viewpoint, the risk of prejudice to the defense is greater than the unrealized [legitimate] potential benefit to the prosecution.

Id. at 47. See also *United States v. Beahm*, 664 F.2d 414, 418-19 (4th Cir. 1981) (discussing same general principle in context of Federal Rule of Evidence 609(a)(1)).

⁹⁴ Many of the controversies that are resulting in federal fraud indictments used to be handled civilly or through administrative agencies. See MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* 74-109 (1980) (explaining role of federal government in handling corporate crimes); see generally KATHLEEN F. BRICKEY, *CORPORATE AND WHITE COLLAR CRIME: CASES AND MATERIALS* xxv (1990):

State and federal governments increasingly rely upon the criminal law as a mechanism for controlling business misconduct. White collar crime prosecutions rose from only 8 percent of the total number of federal criminal prosecutions in 1970 to 24 per cent in 1983.

Id. See also Thea Dunmire, *A Misguided Approach to Worker Safety — A Good Example: Prosecuting Corporate Executives. It's Counterproductive*, 3 CRIM. JUST., Summer 1988, at 10 (explaining use of criminal sanctions in corporate area for environmental, safety, health violations); Robert J. Kafin & Gail Port, *Criminal Sanctions Lead to Higher Fines and Jail*, NAT'L L.J., July 23, 1990, at 20 (discussing increased efforts to penalize white collar defendants criminally for offenses previously handled civilly or administratively).

⁹⁵ The relevant portion of Federal Rule of Evidence 609(a)(2) is set forth at *supra* note 92. Rule 609(b) does contain time limits on the age of the

quently, a defendant with a prior conviction involving a false statement may decline to testify in a subsequent felony prosecution in order to prevent the jury from learning of the prior conviction.⁹⁶ A defendant in that situation might be more inclined to testify at a court trial because the court, to a greater degree than a jury, can dispassionately evaluate the effect of the prior conviction, and use it for its proper evidentiary purpose.⁹⁷

Since a defendant should be given a unilateral right to elect a bench trial, he should not be required to articulate his reasons for making the request. As a consequence, even if a defendant elects a bench trial thinking he would testify at a bench trial, the defendant cannot be required to actually testify at the bench trial. In other words, the availability of a bench trial cannot be conditioned on a guarantee that a defendant will testify at the bench trial.

In any event, it would be unworkable, and undoubtedly unconstitutional, to condition a defendant's bench trial request on the representation that he will, in fact, testify at a court trial. For example, suppose a court granted a bench trial based on the defendant's representation that he would testify at a bench trial.

prior conviction that must be complied with. FED. R. EVID. 609(b). Although Rule 609 was amended in several respects in 1990, the mandatory admission of truth crimes for impeachment purposes, even against a criminal defendant, was unchanged. FED. R. EVID. 609, 1990 Advisory Committee's Note. Recent statistics indicate that 37% of defendants convicted of federal fraud offenses have some criminal record. 1989 FEDERAL JUSTICE STATISTICS, *supra* note 5, Table 3.3, at 33.

⁹⁶ Van Kessel, *supra* note 4, at 482; *see also* United States v. Anton, 888 F.2d 53, 56 (7th Cir. 1989) (noting probability of government to introduce evidence of prior convictions if defendant had testified).

⁹⁷ In United States v. Schipani, 44 F.R.D. 461 (E.D.N.Y. 1968), the district court granted a defense request for a bench trial, *inter alia*, because the nature of charges made it impossible for the jury not to be made aware of the defendant's prior criminal record. Based on these compelling circumstances, the court refused to allow the government to withdraw its consent to a bench trial. In most cases, where the Government refuses to consent to a defense request for a bench trial when the defendant claims that the jury would be improperly inflamed by exposure to the defendant's prior criminal record, the court denies the bench trial request. *See, e.g.*, United States v. Kramer, 355 F.2d 891, 899 (7th Cir. 1966) (rejecting claim of hypothetical unfair prejudicial effect that defendant's prior murder conviction would have on jury if defendant elected to testify), *modified on other grounds*, 384 U.S. 100 (1966) (*per curiam*); United States v. Harris, 314 F. Supp. 437 (D. Minn. 1970) (denying defendant's waiver of jury trial because prior conviction did not make fair trial impossible).

If the Government's proof as the trial unfolded turned out to be weaker than originally contemplated, the defense may determine that the defendant's testimony, or the presentation of any defense evidence, is not necessary. The defendant cannot constitutionally be forced to testify under any circumstances.⁹⁸ Since the trial court has no power to direct a verdict against a criminal defendant, the only remedy for the defendant's alleged breach would be to grant a mistrial. Even putting aside the significant constitutional considerations, the absurdity and administrative inefficiency of declaring a mistrial at this late stage of the trial solely because the defense attempted to rest without calling the defendant would prohibit this practice.⁹⁹ Providing the defendant with a *unilateral* right to elect a bench trial, where no reasons for the decision are required, avoids these problems.

C. *Unfair Procedural Advantages?*

Another major concern is whether a defendant may abuse the unilateral right to elect a bench trial in order to obtain an "unfair" procedural advantage. Little consensus exists as to what constitutes the universe of *unfair* procedural advantages.¹⁰⁰ Most

⁹⁸ In *Rock v. Arkansas*, 483 U.S. 44, 53 (1987), the Court reiterated that "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right "to remain silent *unless he chooses to speak in the unfettered exercise of his own will.*"'" (emphasis added) (brackets in original) (citations omitted). In a related context, in *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court held that a state statute which required a "defendant desiring to testify shall do so before any other testimony for the defense is heard by the court trying the case" unconstitutionally infringed on the privilege against self-incrimination. *Id.* at 607-12. The Court specifically noted that unexpected events during the course of the trial may significantly affect the manner in which the proof has actually unfolded at trial. *Id.* at 609-10.

⁹⁹ Since it is unconstitutional to require the defendant to testify first as part of the case-in-defense, the mistrial issue would usually arise after both the Government and the defense have put on their *entire* case, save for the possibility of the defendant's own testimony. In complex white collar cases, the trial to this point could have taken several months.

¹⁰⁰ For example, New York permits a defendant to waive a jury trial anytime before trial. The court must approve the waiver "unless it determines that it is tendered as a stratagem to procure an otherwise impermissible procedural advantage. . . ." N.Y. CRIM. PROC. LAW § 320.10. The statute provides no guidance to determine what types of procedural advantages are proscribed.

As discussed in Section B, *supra*, increasing the likelihood of a defendant testifying does not constitute an "unfair" procedural advantage.

would agree, however, that the most serious of these concerns is that a defendant who elected a bench trial in a multi-defendant case would force a severance in a situation where severance would not otherwise be granted.¹⁰¹ If this were to occur, the number of trials would increase along with the attendant administrative costs. Such a result would undercut any argument that this proposed rule would increase administrative efficiency. However, upon examination, this concern is unfounded.

First, given the dynamics of jury deliberations versus the deliberation of a judge, most defendants still choose to take their chances with a jury rather than a judge.¹⁰² Thus, only the rare defendant would gamble on a bench trial solely to avoid the evidentiary spillover that might accompany a joint trial.¹⁰³ Second, as noted above, the joinder and severance principles are themselves currently undergoing a fundamental reevaluation in light

¹⁰¹ See *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir.) (finding that defendant's request for bench trial grounded solely on desire to obtain severance, was properly denied), *cert. denied*, 409 U.S. 888 (1972).

¹⁰² See *supra* note 4 (explaining why most defendants elect to be tried by jury rather than judge). See also *United States v. Lewis*, 638 F. Supp. 573, 581 (W.D. Mich. 1986) (district judge observing that in tenure as judge, "few defendants have sought to waive a jury trial" and did not expect that limited recognition of a religious belief exception to Rule 23(a) would "encourage many defendants to alter their strategy and seek a bench trial").

¹⁰³ *Lewis*, 638 F. Supp. at 581. The Second Circuit recently has summarized the concerns of evidentiary spillover:

Defendants are often heard to complain that the government benefits from the ambiguity and confusion which accompanies these gargantuan indictments; despite the complaints, we have responded, sometimes grudgingly, by affirming the lion's share of the convictions in spite of our concerns about the unruliness of such cases.

Similarly, defendants often complain that, because of the diversity of proof admissible in such an enormous case, they suffer not only from "prejudicial spillover", such as occurs "where a minor participant in one conspiracy is forced to sit through weeks of damaging evidence relating to another," but also from prejudice transferred across the line separating conspiracies, or defendants, "so great that no one really can say prejudice to substantial right has not taken place."

United States v. Salerno, 937 F.2d 797, 799 (2d Cir. 1991), *rev'd on other grounds*, 112 S. Ct. 2503 (1992) (citations omitted). For an interesting case where a defendant in a single-defendant case requested a bench trial on one count in order to avoid perceived prejudicial spillover, see *United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992). See also *infra* notes 108-12 and accompanying text (discussing *Dockery*).

of the realities of modern federal criminal practice.¹⁰⁴ As a consequence, some of the obsolete legal barriers that currently preclude severance may be eliminated, or at least greatly reduced, independent of whether the bench trial procedures are changed. Thus, the central aspect of this potential “unfair” procedural advantage argument may be eliminated should the joinder and severance rules be modified, as seems likely.

More importantly, even assuming that a defendant is properly joined in a multi-defendant trial, a request by one defendant for a bench trial need not result in severance. A defendant who requests a bench trial can be tried to the court while other co-defendants are simultaneously tried to the jury. This procedure has been used successfully in many state court systems where a defendant has a unilateral right to a bench trial or where court approval is required.¹⁰⁵ Moreover, even under present Rule 23(a), federal trial courts have conducted simultaneous bench and

¹⁰⁴ See FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 16, at 106-07 (recommending reevaluation of joinder and severance rules). See also *supra* notes 14-16 and accompanying text (discussing relationship between bench trials and increasingly complex modern federal criminal trial practice).

¹⁰⁵ See *People v. Willis*, 577 N.E.2d 1215 (Ill. App. Ct. 1991) (“severing” trials of co-defendants, but holding both bench trial and jury trial simultaneously); *Ogonowski v. State*, 589 A.2d 513 (Md. 1991) (upholding simultaneous bench and jury trial procedure and rejecting defendant’s repeated severance motions); *People v. Wallace*, 549 N.Y.S.2d 515 (App. Div. 1989) (deciding that trial court exercised proper discretion in ordering simultaneous bench and jury trial for defendants); *People v. Imburgia*, 514 N.Y.S.2d 320 (App. Div. 1987) (allowing joint jury and bench trial to proceed). See also *Young v. Miller*, 883 F.2d 1276 (6th Cir. 1989) (challenging Michigan state court conviction on federal habeas corpus because of, *inter alia*, failure to sever trial, court holding that simultaneous bench and jury trial procedure did not violate due process), *cert. denied*, 111 S. Ct. 2886 (1991).

In New Jersey, a defendant may waive a jury trial with court approval. A popular New Jersey practice treatise addresses this issue as follows:

R 1:8-1 provides no guidance as to the procedure to be followed if there is more than one defendant and one, or some but not all of the defendants wish to waive a jury trial. Presumably in such a situation the Court might order a severance and try the defendant or defendants who have waived a jury trial without a jury. The other defendants would then be tried by a jury. However, it would appear to be more reasonable for the Court to refuse to approve a waiver as to fewer than all defendants. The efficient use of court time would seem to require a single trial of all defendants whenever possible. Therefore, if all

jury trials in appropriate circumstances.¹⁰⁶ By eliminating the Government's power to veto a defendant's bench trial request, use of the simultaneous bench trial and jury trial procedure would undoubtedly increase. Thus, providing a defendant with a unilateral right to elect a bench trial is not tantamount to advocating that a defendant should be able to obtain severance merely by requesting a bench trial.¹⁰⁷

Ironically, a less publicized, but perhaps more compelling concern is the *Government's* abuse of the interplay between Rule 23(a) and the joinder and severance rules. *United States v. Dockery*¹⁰⁸ is illustrative. There, the defendant was indicted for drug offenses and for being a felon in possession of a firearm. The defendant sought severance on the ex-felon in possession of a firearm count because the jury necessarily would have been made aware of his prior conviction even if he chose not to testify.¹⁰⁹ Severance was denied. Thereafter the defense sought to stipulate to the presence of the firearm outside the presence of the jury. The Government refused to join in this stipulation. The court of appeals correctly characterized this as essentially a mid-trial defense effort

defendants do not waive a jury trial, there should be a jury trial as to all defendants.

32 LEONARD N. ARNOLD, *NEW JERSEY PRACTICE: CRIMINAL PRACTICE AND PROCEDURE 2D* § 932, at 183-84 (2d ed., Supp. 1992). Curiously, the New Jersey commentary does not consider the possibility, found workable in many other states, of simultaneous bench trial and jury trial.

¹⁰⁶ In *United States v. Andreen*, 628 F.2d 1236 (9th Cir. 1980), a prosecution for embezzlement of union trust funds, one defendant elected a bench trial and was tried simultaneously with eight co-defendants who elected to be tried by jury. *Id.* at 1239. The Ninth Circuit found no error with this procedure. *Id.* at 1249. In *United States v. Zuideveld*, 316 F.2d 873 (7th Cir. 1963), *cert. denied*, 376 U.S. 916 (1964), ten defendants proceeded to trial on various obscenity violations. *Id.* at 874-75. Eight defendants waived a jury trial and were tried by the court in a bench trial simultaneously with the jury trial of the other two defendants. *Id.* at 875. The Seventh Circuit affirmed the convictions and praised the district judge for the "care used in his conduct of the simultaneous jury trial for two other defendants." *Id.* at 881. *See also* *United States v. Farries*, 459 F.2d 1057, 1061 (3d Cir. 1972) (recognizing possibility of such procedure, but not utilizing it because defendant objected to being tried simultaneously with other defendants under any circumstances), *cert. denied*, 409 U.S. 888 (1972).

¹⁰⁷ *See Farries*, 459 F.2d at 1061 (rejecting defendant's request for bench trial where it was grounded solely as device to obtain severance not otherwise allowable under the Federal Rules).

¹⁰⁸ 955 F.2d 50 (D.C. Cir. 1992).

¹⁰⁹ *Id.* at 53.

to seek a bench trial on that count.¹¹⁰ The court of appeals found that the defendant had been unfairly prejudiced, and reversed the conviction.¹¹¹ Had the defendant possessed a unilateral right to elect a bench trial, these problems would have been eliminated.

The only significant “unfair” procedural advantage problem concerns the possibility of a defendant’s outright manipulation of the timing of the request for a bench trial. For example, a defendant, unhappy with how jury selection is proceeding, could attempt to secure a bench trial some time after jury selection has commenced. Although it would not be cataclysmic to allow a defendant to exercise the jury waiver at any time, the lack of a timing requirement could cause significant disruption of court schedules resulting in a waste of time, money, and other court resources.

However, there may be legitimate reasons for a late waiver request. Thus, an absolute prohibition on jury waivers after jury selection has commenced is unnecessary. A sensible rule would require a defendant to exercise his unilateral right to a bench trial prior to the commencement of jury selection. Otherwise, the waiver request will be denied unless the court, *for cause*, allows for a later waiver.¹¹²

This limitation does not significantly impair a defendant’s uni-

¹¹⁰ *Id.* at 55.

¹¹¹ *Id.* at 57.

¹¹² The American Law Institute’s Uniform Rules of Criminal Procedure contains a similar provision. Rule 511 provides:

If the defendant has a right to trial by jury, the trial must be by jury [unless the defendant [with the prosecuting attorney’s consent] understandingly and voluntarily waives the right in open court, in which case the trial must be by the court. The waiver must occur before selection of the jury begins unless the court for cause allows a later waiver].

UNIF. R. CRIM. P. Rule 511(a), 10 U.L.A. 123 (Supp. 1992) (brackets and double brackets in original).

The double brackets are instructive. As far back as 1931, the drafters of the Uniform Rules endorsed providing a defendant with a unilateral right to waive a jury trial. *Id.* at 256 (1974). However, between 1983 and 1987, the Rules were reexamined, with the primary focus of conforming to the revised ABA Standards, which had added a prosecutorial consent requirement in the 1978 revision of the Trial by Jury Standards. *See id.* at 1-2 (1987). However, revised Rule 511 seems to depart from the revised ABA Standard on this issue. The comment to revised Rule 511 provides in its entirety:

The first two sentences are based on [ABA] Standard 15-1.2(a) and (b). The last sentence establishes a time requirement for

lateral right to a bench trial. The defendant has a unilateral right—but he must exercise it in a timely manner. Many rights of an accused, including constitutional rights, are dependent on the timely exercise of those rights.¹¹³ Such a requirement is sensible and in the best interests of justice.

Dockery illustrates the wisdom of such a rule. Given the factual posture of the case, the defendant based his mid-trial request for a bench trial on legitimate concerns, but the Government refused to consent. A court, but not the Government, should have authority to grant the late waiver for sufficient cause.¹¹⁴ In making its determination, the court is in a position to weigh the defendant's concerns with concerns of fairness and administrative efficiency, as well as any concerns that the Government might urge the court to consider. Had that option been available in *Dockery*, the court would have probably granted the defendant's bench trial request on that count. And if the defendant had been convicted, appellate reversal of the conviction would probably not have been required.

Occasionally, all parties, including the Government, will agree to a waiver of a jury trial well after the trial has begun. For example, under the proposed rule, when several co-defendants plead guilty mid-trial, the remaining defendants may elect a bench trial. Even under current Rule 23(a), late waivers have been approved by all parties in these circumstances.¹¹⁵ Under the proposed rule,

waiver. *A state whose procedure did not permit waiver of jury would omit the bracketed language.*

Id. at 123 (Supp. 1992) (emphasis added).

The manner in which the prosecutorial consent requirement is found in a separate bracket *within the bracket* setting forth a defendant's waiver rights indicates that, as a general rule, the Uniform Rules support a defendant's unilateral right for waiver. Rule 511 envisions that the prosecutorial consent requirement be included only in states where procedures *require* prosecutorial consent in order to comply with state constitutional requirements. *See also supra* note 44 (listing state that has timeliness requirement for waiver).

¹¹³ *See, e.g.*, FED. R. CRIM. P. 12(f) ("Failure . . . to raise defenses or objections . . . which must be made prior to trial . . . shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.").

¹¹⁴ Indeed, the Government's objection to the bench trial request in *Dockery*, and the resulting consequences, demonstrates why Government consent should not be required for jury trial waivers even after jury selection has commenced.

¹¹⁵ *See, e.g.*, *Merrell v. United States*, 463 U.S. 1230, 1231 (1983) (noting that in multi-defendant trial, several defendants pled guilty mid-trial, and

a prosecutorial consent requirement for late waivers is also unnecessary. Its elimination would work no harm because it would not affect the availability of a bench trial in appropriate cases.

D. Refuting Other "Policy" Arguments Supporting the Government's Right to Veto the Bench Trial

Several other "public policy" positions are commonly articulated in support of the Government's retention of the right to veto a bench trial request. Over ninety percent of all criminal prosecutions are state prosecutions.¹¹⁶ Not surprisingly, the more familiar state model, where the overwhelming majority of state prosecutors and state trial judges are elected, heavily influences these "public policy" arguments.¹¹⁷ In addition, the Amer-

remaining co-defendants "waived a jury for the rest of the trial") (White, J., dissenting from denial of certiorari).

¹¹⁶ In 1988, over 667,000 persons were convicted of felony offenses in state courts. See 1990 SOURCEBOOK, *supra* note 70, Table 5.32, at 516. In contrast, in 1989, 54,643 defendants were disposed of, either by conviction or acquittal in federal district court. *Id.* Table 5.24, at 502.

¹¹⁷ For a compilation of how state trial judges are selected and retained, see *id.* Table 1.60, at 69-70 (overwhelming majority of state trial judges are elected). In addition, virtually all state prosecutors are elected: *Elected State Prosecutors*: COLO. CONST. art. VI, § 13; FLA. CONST. art. V, § 8; IDAHO CONST. art. V, § 18; ILL. CONST. art. VI, § 19; KY. CONST. § 97; MD. CONST. art. V, § 7; MASS. CONST. amend. art. 19; MONT. CONST. art. XI, § 3(2); N.M. CONST. art. VI, § 24; N.Y. CONST. art. XIII, § 13; N.D. CONST. art. VII, § 8; OR. CONST. art. 7, § 17; R.I. CONST. art. IV, § 1; TEX. CONST. art. XVI, § 65; UTAH CONST. art. VIII, § 16; VT. CONST. ch. II, § 43; WASH. CONST. art. XI, § 5; ALA. CODE § 12-17-180 (1975); ARK. CODE ANN. § 7-5-102 (Michie 1991); CAL. GOV'T CODE § 24009 (West 1988); COLO. REV. STAT. § 1-4-204 (1989); GA. CODE ANN. § 21-2-9 (Michie 1990); IND. CODE § 3-10-2-11 (1988); IOWA CODE ANN. §§ 39.17 (1991) & 331.751 (1983); KAN. STAT. ANN. § 22a-108 (1988); LA. REV. STAT. ANN. § 16:1 (West 1982); ME. REV. STAT. ANN. tit. 30-A § 251 (West Supp. 1991); MASS. GEN. L. ch. 54, § 154 (1991); MICH. COMP. LAWS § 168.203 (1981); MINN. STAT. § 388.01 (Supp. 1992); MISS. CODE ANN. § 19-23-1 (1972); MO. REV. STAT. § 56.010 (1989); MONT. CODE ANN. § 7-4-2203 (1991); NEB. REV. STAT. § 32-308 (1988); NEV. REV. STAT. § 252-020 (1985); N.Y. COUNTY LAW § 400 (McKinney 1991); N.C. GEN. STAT. § 7A-60 (1989); OHIO REV. CODE ANN. § 309.01 (1987); OKLA. STAT. tit. 19, § 215.1 (1988); OR. REV. STAT. § 8.610 (1991); 16 PA. CONS. STAT. § 7701 (1956); S.C. CODE ANN. § 1-7-310 (Law Co-op. 1986); S.D. CODIFIED LAWS ANN. § 7-16-1 (1981); TENN. CODE ANN. § 8-14-202 (Supp. 1991); W. VA. CODE § 3-5-13a (Supp. 1992); WIS. STAT. § 978.01 (Supp. 1991); WYO. STAT. § 9-1-802 (1991); Hays v. Hays, 47 P. 732 (Idaho 1897). *Appointed State Prosecutors*: N.J. CONST. art. 7, § 2, ¶ 1;

ican Bar Association's official position of lukewarm support for maintaining a prosecutorial consent requirement is similarly influenced by the state model of prosecution.¹¹⁸ However, these arguments for requiring prosecutorial consent have little, if any relevance as to whether such a rule should apply in federal criminal prosecutions, where neither the judge nor the prosecutor is elected.¹¹⁹

CONN. GEN. STAT. § 51-278 (Supp. 1992); DEL. CODE ANN. tit. 29, § 2505 (1991).

¹¹⁸ 3 ABA STANDARDS, *supra* note 56, § 15-1.2. However, recognizing the substantial merit in allowing a defendant a unilateral right to elect a bench trial, a position endorsed by the Uniform Rules of Criminal Procedure for several years, the ABA STANDARDS commentary also sets forth the arguments supporting unilateral waiver as an almost equally compelling alternative. *Id.* commentary at 15.21-23.

The fact that state criminal trials reflect the overwhelming focus of the criminal justice system was evident when the ABA Trial by Jury Task Force, influenced heavily by state prosecutorial interests, recently rejected any proposed change to Standard 15-1.2:

Both the task force and the Standards Committee considered the issue of the prosecutor's consent being required in order to have a non-jury trial. The position of the [ABA Federal] White Collar Crime Committee, that the defendant's waiver should result in a trial to the court regardless of the acquiescence by the prosecution, was presented to both and was rejected. The task force was overwhelmingly opposed to the position, and the Standards Committee opposed the position by a narrow margin.

ABA STANDARDS FOR CRIMINAL JUSTICE § 15-1.2, at 1 n.2 (Working Draft May, 1992).

¹¹⁹ During the recent debate over revision of the ABA Criminal Justice Standards, state prosecutorial interests emphatically argued for retention of the prosecutorial consent requirement based on the fear that, in some jurisdictions, some judges are "too much defense oriented." STANDARDS COMM. WITH RESPECT TO STANDARDS ON TRIAL BY JURY AND DISCOVERY, STANDARD COMM. MINUTES, *Discussion of Trial by Jury and Discovery Standards 1* (May 2, 1992); TASK FORCE ON DISCOVERY AND JURY TRIAL, *Minutes of Meeting 14* (March 21-22, 1992) [hereafter March 21-22, 1992 Minutes]. Whether such a perception is accurate is problematic. Whatever the precise dimensions of the problem at the state level, it is a far less important concern at the federal level. Since the vast majority of state judges are elected, state executives exercise far less control over the selection of state judges than is the case in the federal system. The federal judicial selection procedures, which require nomination by the President and confirmation by the Senate, tend to ferret out candidates who may be seen as harboring inappropriate pro-defendant or anti-government biases. The federal selection procedures and lifetime tenure provisions also make for a more independent federal judiciary. Justice Brennan has commented that,

First, one position asserts that “in as much as both the state and the defendant are parties to the trial, both should be given an equal voice as to the method of the trial.”¹²⁰ However, the practical operation of current Rule 23(a) does not result in an equal voice. Rather, the Government retains an absolute veto of the defendant’s option to elect a bench trial. This is an especially misbalanced state of affairs, since the right to a jury trial has always supposedly protected the defendant’s interests.¹²¹ Moreover, although some aspects of a criminal trial are balanced equally between the parties,¹²² many are not.¹²³ Most important, however, the fundamental concept of a criminal trial is not equal. As Historian David Bodenhamer has eloquently noted:

Government holds enormous power. Not only does it possess the resources to monitor personal actions but it alone has the legitimate authority to accuse, prosecute, and punish individuals. Thus, any criminal trial between the government and a citizen is inherently unequal. Our conception of justice demands that this inequality be redressed.¹²⁴

One small way to redress this inequality is to provide a defendant with a unilateral right to elect a bench trial. Fairness demands no less.

because of these differences between the federal and state judiciary, state judges “are often more immediately ‘subject to majoritarian pressures than federal courts, and are correspondingly less independent than their federal counterparts.’” William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 551 (1986) (citation omitted).

¹²⁰ 3 ABA STANDARDS, *supra* note 56, at § 15-1.2, commentary at 15.18.

¹²¹ *Patton v. United States*, 281 U.S. 276, 312-13 (1930).

¹²² For example, if a jury is utilized, the methods whereby peremptory challenges are used to effect composition of the jury are equal. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the Court held that the prosecution could not use peremptory challenges in a discriminatory manner. Recently, the Court held that similar rules apply to a criminal defendant’s use of peremptory challenges. *Georgia v. McCollum*, 112 S. Ct. 2348 (1992).

¹²³ Most fundamentally, the government must establish guilt beyond a reasonable doubt. In addition, in federal felony prosecutions subject to imprisonment for over a year, the defense is entitled to ten peremptory challenges, and the government is entitled to six. FED. R. CRIM. P. 24(b). However, during the 102d Congress, both houses of Congress considered legislation that would amend Rule 24(b) to provide both the prosecution and the defendant with six peremptory challenges in a non-capital case. See S. 2305, 102d Cong., 2d Sess. § 713 (1992); H.R. 3371, 102d Cong., 1st Sess. § 1959 (1991).

¹²⁴ BODENHAMER, *supra* note 23, at 4-5.

Next, "public policy" arguments often state that the prosecution represents the public, and the public should have a say as to whether the right to a jury trial should be waived. The public, and the Government, have a right to a fair trial—absent any proof that a bench trial would not be fair, the public has no interest in choosing a particular mode of fact-finding.¹²⁵ Thus, as long as the Government is able to obtain a fair trial, it has no overriding interest in whether the trial is before a judge or jury.¹²⁶

A commonly articulated variant of this theme asserts that the prosecutor represents all the public, even the accused, and that the prosecutor should be able to object to the bench trial request for the defendant's own good. This position, which finds some opaque support in *Patton v. United States*,¹²⁷ has recently been asserted by the American Bar Association.¹²⁸

Viewed in historical context, this argument may once have had some merit, at least in theory. At common law, and continuing for more than one and one-half centuries after the founding of the republic, many criminal defendants were unlikely to have counsel.¹²⁹ Thus, at the time *Patton* was decided in 1930, this

¹²⁵ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 383-84 (1979) (stating that public has no right to demand jury trial because of purported societal interest in that mode of fact-finding). Compare with *Hutzleman*, *supra* note 79, at 344 (discussing dilemma where prosecutor believes she can convince only one of several available fact-finders of the accused's guilt).

¹²⁶ See *supra* notes 26-31 and accompanying text (discussing historical development of right to jury trial as guarantee that protects individual from "government oppression"). For a discussion of the available procedures to insure that the judge is impartial see *infra* notes 156-58 and accompanying text.

¹²⁷ 281 U.S. 276, 312 (1930).

¹²⁸ 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.18-19.

¹²⁹ See WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 27-44 (2d ed. 1972) (noting that in 1938, federal criminal defendants who requested counsel were supplied counsel in most districts, depending upon court custom, but defendants who desired to plead guilty or who failed to request counsel generally were not advised or offered counsel); GREEN, *supra* note 4, at 135, 270 (explaining that at common law accused rarely had advantage of counsel). See also Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 7-8 (1944). Prior to 1938, the right to counsel guarantee was generally understood to mean that the defendant was entitled to counsel retained by him; not that counsel be made available to indigent defendants. *Id.* Federal practice varied widely as to whether appointed counsel was made available. *Id.* By the early nineteenth century, an inexorable trend had already begun to develop where most criminal defendants were from the lower socio-economic class. See generally William

government "representation" of the interests of the accused may have been the only legal representation available to the accused. Accordingly, requiring the government to consent to a defendant's bench trial request was deemed necessary to protect an *uninformed* defendant from waiving his precious right to trial by jury.¹³⁰

However, whatever merit the policy of requiring prosecutorial consent had, it was obliterated with respect to federal criminal trials in 1938 when, eight years after *Patton*, the Supreme Court decided *Johnson v. Zerbst*.¹³¹ In *Zerbst*, the Court held that the Sixth Amendment requires that an indigent defendant in federal court facing felony charges be provided with counsel.¹³² After *Zerbst*, an accused in federal court would no longer have to rely on the good offices of the prosecutor to insure that he was making fully informed decisions. Thus, with respect to federal criminal trials, this argument has been devoid of merit for decades.¹³³

The current ABA Jury Trial Waiver Standard fails to fully incorporate the substantive and temporal correlation between the prosecutorial consent requirement in *Patton* and the principles of *Zerbst*. However, other parts of the ABA Standards for Criminal

E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era: An Historical Perspective* (1967), reprinted in *AMERICAN LAW AND THE CONSTITUTIONAL ORDER: HISTORICAL PERSPECTIVES* 165, 171-72 (Lawrence M. Friedman & Harry N. Scheiber eds., 1988). Accordingly, a large percentage of criminal defendants were indigent.

¹³⁰ Several commentators have found substantial historical support for this assertion. See Hall, *supra* note 28, at 227; DeCicco, *supra* note 13, at 1101; Lightcap, *supra* note 13, at 771; Note, *Inability to Waive Jury Trial*, *supra* note 13, at 724. In *Patton*, the Supreme Court emphasized the importance of the defendant's ability to make an "intelligent waiver" of the right to a jury. *Patton*, 281 U.S. at 277-78. By definition, such an intelligent waiver could not be made by an "uninformed" defendant.

¹³¹ 304 U.S. 458 (1938).

¹³² Criminal counsel was required to be provided unless the right to counsel was completely and intelligently waived. *Id.* at 468-69.

¹³³ The argument retained vitality with respect to the states for another quarter century. However, it was finally obliterated when the Court decided *Gideon v. Wainwright*, 372 U.S. 335 (1963), holding that the Fourteenth Amendment requires all indigent defendants to be represented by counsel in state prosecutions for serious offenses. Of course, in states which had a strong right to counsel guarantee as part of their state constitution, the issue had been resolved well before *Gideon* was decided. For a historical perspective of the development of the right to counsel in criminal cases see DANIEL J. MEADOR, *PRELUDES TO GIDEON* (1967).

Justice make the connection. For example, ABA Defense Function Standard 4-5.2(a)(2) provides:

The decisions which are to be made by the accused after full consultation with counsel are (i) what pleas to enter; (ii) *whether to waive a jury trial*; and (iii) whether to testify on his or her own behalf.¹³⁴

Here, the right to waive a jury trial is properly included among various important trial rights *of the defendant*. The defendant can decide whether to exercise these rights after full consultation with defense counsel. These decisions are of no concern to the adversary.

Another position asserts that in particularly impassioned high profile cases, the public demands that a jury resolve issues, and that jury resolution of particular issues is more likely to be accepted by the community.¹³⁵ This assertion is baseless. One justice of the New Jersey Supreme Court has discredited this position by observing that the argument that “‘community expectations’” for a jury trial can be weighed by the court to deny a bench trial is “‘imprecise, insubstantial . . . [and] ‘of vague and variable quality.’”¹³⁶ The recent unfortunate riotous events in Los Angeles in the wake of the jury verdicts in the Rodney King case vividly demonstrate that the community no more accepts a controversial jury verdict than it would a verdict rendered by the court.¹³⁷

¹³⁴ 1 ABA STANDARDS, *supra* note 56, § 4-5.2(a) (emphasis added).

¹³⁵ See 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.22 (discussing possibility that government “‘might insist on a jury trial because of public opinion against the defendant . . . [Since the prosecutor need not give any reasons for its decision] abuse of discretion may occur’”). See also *id.* commentary at 15.20:

As a matter of self-protection, a court should be able to require a jury in some cases. If the decision in a case will likely result in criticism, a court should be able to require the assistance of a jury. A good example is the acquittal of an unpopular defendant in a case that has received much publicity. *If a jury is used, the community will be more likely to accept the result and much less likely to criticize the court.* This is especially important if the judge is elected to office.

Id. (emphasis added).

¹³⁶ State v. Dunne, 590 A.2d 1144, 1157 (N.J. 1991) (Handler, J., dissenting) (citation omitted).

¹³⁷ See, e.g., Lou Cannon, *National Guard Called to Stem L.A. Violence After Officers' Acquittal on All But One Count: Justice Department to Review King Beating Case*, WASH. POST, Apr. 30, 1992, at A1 (reporting that Los Angeles was

Moreover, the concept that certain types of issues are the unique province of the jury is simply unwarranted. A federal judge is capable of resolving any issue in a criminal case.¹³⁸ In white collar criminal cases, intent often is the only issue in dispute.¹³⁹ As noted earlier, Federal Rule of Criminal Procedure 23(c) has long been recognized as particularly helpful in facilitating court resolution of intent, state of mind, and credibility issues.¹⁴⁰ Thus, the Federal Rules themselves reject the argument that these types of issues are somehow uniquely suited for resolution by a jury. As the dissent in *Dunne* succinctly stated:

[The majority assumes that certain types of cases are] somehow intrinsically a preferred case for a jury. That view . . . is based on the untested assumption that certain kinds of cases are best left to a jury [for example, where demeanor and veracity of witnesses are involved, those cases are better decided by twelve average persons representing a cross-section of society, than by a judge alone]. The clear implication is that in this kind of case a criminal verdict by a trial judge would not be trustworthy, that a judge's adjudication of crime would lack the integrity or cogency

placed on riot alert to curb spreading violence after jury returned verdict acquitting three white police officers in beating of black motorist Rodney King). See also Don J. DeBenedictis, *Cop's Second Trial in L.A.*, 78 A.B.A. J., July 1992, at 16 (stating that jury acquittals in first case "shocked the public and touched off seven days of fiery riots").

¹³⁸ See *Craig v. Harney*, 331 U.S. 367, 376 (1947) (stating that judges must be "able to thrive in a hardy climate"); *Adams v. United States*, 317 U.S. 269, 279-80 (1942) (recognizing that bench trials provide fair and impartial mechanism for adjudication of criminal prosecutions); BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-77 (1921) (discussing how judge inevitably brings dimension of community input into decisions).

¹³⁹ Kurland, *supra* note 86, at 842 n.5. The ABA commentary states that "a jury determination may be preferred by the judge in cases where the demeanor and veracity of witnesses are involved." 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.20.

In white collar cases, where intent usually is the only contested issue, veracity often is a critical determination. Cf. 3 ORFIELD'S, *supra* note 84, § 23:49, at 75 ("Ordinarily, the remedy to rectify a misconception regarding the significance of a particular fact, such as a particular state of mind, is to request special findings of fact under Rule 23(c).") (citation omitted).

¹⁴⁰ 3 ORFIELD'S, *supra* note 84, § 23:48, at 75. See also *Wilson v. United States*, 250 F.2d 312 (9th Cir. 1957) (deciding that district court acted appropriately in entering special findings on issue of "wilfulness" in tax prosecution).

of a verdict rendered by a jury. I strongly disagree.¹⁴¹

One argument, sometimes clothed in concerns for accountability to the public, asserts that jury trials are "safer" than bench trials for certain types of issues. The American Bar Association currently espouses this position.¹⁴²

As noted above, the argument, essentially one of protection from electoral accountability, is simply inapposite in the federal system. One of the distinguishing features of the federal system is the presidential appointment of judges for life.¹⁴³ Furthermore, the President also appoints the United States attorney.¹⁴⁴ As such, in the federal system, neither the judge nor the prosecutor faces electoral accountability. The clear strength of this system is that it allows these public servants to discharge their responsibilities to the criminal justice system without worrying about electoral or other public relations consequences.¹⁴⁵

The framers recognized that this protection was necessary to lift federal judges from the concerns of the political consequences of their actions. In *The Federalist No. 78*, Alexander Hamilton noted that "[a life tenured federal judiciary holding office during good behavior] is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws."¹⁴⁶ Although United States attorneys do not

¹⁴¹ State v. Dunne, 590 A.2d 1144, 1159 (N.J. 1991) (Handler, J., dissenting opinion).

¹⁴² 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.20:

As a matter of self-protection, a court should be able to require a jury trial in some cases. If the decision in a case will likely result in criticism, a court should be able to require the assistance of a jury. A good example is the acquittal of an unpopular defendant in a case that has received much publicity. If a jury is used, the community will be more likely to accept the result and much less likely to criticize the court. *This is especially important if the judge is elected to office.*

Id. (emphasis added).

¹⁴³ U.S. CONST. art. III, § 1.

¹⁴⁴ 28 U.S.C. § 541(a) provides that "[t]he President shall appoint, by and with the advice and consent of the Senate, a United States attorney for each judicial district." 28 U.S.C. § 541(a) (1988).

¹⁴⁵ See generally Brennan, *supra* note 119, at 551; Van Kessel, *supra* note 4, at 428 (discussing how state judicial selection procedures diminish judicial independence and autonomy, whereas federal selection procedures increase judicial independence and autonomy).

¹⁴⁶ THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

serve for life, similar principles of independence underlie the inherent strength of their appointment procedures.

Finally, a key reason why federal prosecutors are reluctant to give up their veto power is that they have a nagging suspicion that some federal judges are anti-government and would acquit in the face of the evidence. This view is espoused, almost always "off the record," by many federal prosecutors. This concern appears to be most prevalent in white collar cases, where, at least in theory, prosecutors believe that some judges might somehow identify with a white collar defendant.¹⁴⁷

Defense-oriented federal judges, though probably few in number, can still be found among the members of the federal judiciary. However, the fear of the existence of a small cadre of federal judges biased against the Government is an insufficient reason to oppose amending Rule 23(a) along these lines.

First, many former Department of Justice attorneys have acknowledged that the Department of Justice has long operated under an unofficial, unwritten "policy" that Department of Justice attorneys should consent to all bench trial requests. This informal "policy," however, does not affect local U.S. attorney's offices that bear direct responsibility for the lion's share of federal prosecutions.¹⁴⁸ Consequently, as a practical matter, in most cases the Government essentially has free reign to deny bench trial requests.

However, if the Department of Justice, with its nationwide perspective, is comfortable with its informal "policy" for cases prosecuted under the direction of Criminal Division trial attorneys, one should give little weight to the perceived fears of local U.S. attorneys that even a few judges would systematically violate their

¹⁴⁷ See generally 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.18 (suggesting that some judges may be biased in favor of accused). This is a key concern of state prosecutors as well. See *supra* note 119 (explaining concerns of state prosecutors).

¹⁴⁸ The Justice Department recognizes that absolute uniformity in federal prosecutions is not desirable. See generally USAM, *supra* note 14, at § 9-27.140(B) ("[Principles of federal prosecution] not intended to produce rigid uniformity . . . at the expense of the fair administration of justice."). However, if the judge is not being challenged as biased, the policy of rational and objective decision making should militate in favor of a standard concerning bench trials that has consistent nationwide applicability. See generally *id.* § 9-27.001 (discussing goal of "promoting greater consistency among the prosecutorial activities of the 95 United States Attorney's offices").

oaths of office and acquit in the face of the evidence. After all, cases prosecuted by Criminal Division attorneys are tried in the same courts, before the same judges, as are the cases prosecuted by the local U.S. attorneys.¹⁴⁹

Second, and far more important, if the Government is concerned that a judge would not be an impartial trier of fact, it is difficult to conclude that the judge could still satisfactorily preside over the trial in the role of judge. For example, a judge bent on torpedoing the Government's case could virtually assure the same result at a jury trial as at a bench trial by rendering all sorts of anti-government evidentiary rulings. Even if the Government could successfully obtain interlocutory review of an adverse government ruling, these rulings are practically insulated from reversal because of the application of an extremely deferential abuse of discretion standard of review.¹⁵⁰ Moreover, a judge could grant a judgment of acquittal at the close of the government's case,

¹⁴⁹ See *id.* § 9-27.001. Moreover, given the current manner in which the "roving" Department of Justice Bank Fraud Task Forces are implemented, it becomes a fortuity whether a particular case will be tried by a prosecution team staffed and directed by Department of Justice lawyers out of Washington or by the local U.S. Attorneys office. See, e.g., *Justice Department Update* 1 BANK FRAUD 3 (Summer 1992) (describing San Diego Bank Fraud Task Force as consisting of "[f]our AUSAs, five Fraud Section attorneys and four Tax Division attorneys"); Fricker & Pizzo, *supra* note 5, at 1 (discussing nationwide success of Task Force); *New England Bank Pleas*, NAT'L L. J., Mar. 30, 1992, at 15 (discussing success of investigation into false bank loan applications).

¹⁵⁰ See, e.g., Eleanor Swift, *The Hearsay Rule at Work: Has It Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473 (1992):

[A]ppellate courts usually uphold the district courts' [evidentiary] decision on appeal. . . . [T]he impression is unmistakable that many federal appellate courts do not think it is their role to review district court admission and exclusion decisions carefully. The deferential "abuse of discretion" standard of review produces a low rate of trial court error. Sometimes, appellate courts decline to decide the question of error at all. And, when error is found, the harmless error doctrine reduces even further the rate of actual reversal

Id. at 478-79 (citations omitted).

Review of evidentiary exclusions under the probative value/ unfair prejudice balancing test of Federal Rule of Evidence 403 are similarly constrained. See, e.g., *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992) (stating that district court's evidentiary rulings will not be overturned unless appellate court concludes that trial court acted arbitrarily and irrationally); *United States v. Ewings*, 936 F.2d 903, 907 (7th Cir. 1991) (concluding that even if error is found, harmless error standard applies); *United States v.*

which, because of double jeopardy principles, would be insulated from all review.¹⁵¹ Finally, a determined district judge could engineer a jury acquittal by exercising the court's right to comment on the weight of the evidence¹⁵² and by giving energetically phrased jury instructions, such as a particularly amplified instruction on the definition of reasonable doubt.¹⁵³

All of these devices can be utilized legitimately by a district judge who is scrupulously fair to all parties and who wants to guide the jury to make an appropriate decision.¹⁵⁴ However, if a

Beltran, 761 F.2d 1, 11 (1st Cir. 1985) (applying abuse of discretion standard).

¹⁵¹ Government appeals in criminal cases are governed by 18 U.S.C. § 3731 (1988), which provides in relevant part:

In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court . . . except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Id. However, the government cannot take an appeal even from an erroneous grant of a judgment of acquittal at the close of the government's evidence. *Sanabria v. United States*, 437 U.S. 54, 75-78 (1978). *See also* 2 WRIGHT, *supra* note 6, § 469, at 670. This principle was tested, but ultimately upheld in *United States v. Ellison*, 722 F.2d 595, 595-96 (10th Cir. 1982) (en banc). There, the Tenth Circuit, sitting en banc, determined that, due to double jeopardy principles, mandamus was an inappropriate remedy to review a trial court's grant of a pre-verdict Rule 29 motion for judgment of acquittal. *Id.*

¹⁵² Federal courts possess the common law power to comment on the evidence where it would be helpful to the jury. 2 WRIGHT, *supra* note 6, § 488, at 730-31.

¹⁵³ *See, e.g.*, *Quercia v. United States*, 289 U.S. 466, 469 (1933) (stating that judge has discretion to comment on evidence to assist jury in reaching reasonable conclusion); *United States v. Beard*, 960 F.2d 965, 970 (11th Cir. 1992) ("[T]rial judge is not limited in giving abstract instructions, and may 'assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence'" (citation omitted)). In practice, the much more common concern is that the court's amplified instructions will improperly favor the prosecution. *See, e.g.*, *United States v. Rubio-Villareal*, 967 F.2d 294, 299 (9th Cir. 1992) (en banc) (reversing conviction where amplified permissive instruction essentially told "the jury . . . that the judge thought there was sufficient evidence to convict" and therefore "created the risk that the jury would abdicate its responsibility to evaluate the evidence in deference to the judge"). Unlike the Government, who has no appellate remedy from a resulting acquittal, a defendant can appeal on this ground after conviction.

¹⁵⁴ *See supra* note 73 (describing recent high profile case where Government had objected to defendant's bench trial request and case

judge were so partial that she could not sit as a fair trier of fact, one could easily envision how that judge could, under a veneer of impartiality, improperly manipulate these same devices to grant a judgment of acquittal or to coax the jury into returning a not guilty verdict. In light of this reality, one justice of the Minnesota Supreme Court has insightfully recognized that “[w]hatever considerations would make it improper for a judge to try the case without a jury would also make it improper for [the judge] to try the case with a jury.”¹⁵⁵

Thus, the answer to this problem lies not in allowing the prosecution to block bench trials, but rather in strengthening the often ineffective federal recusal procedures.¹⁵⁶ This solution has been proposed often over the years¹⁵⁷ and rings true with at least equal force today. Moreover, recent legislation that establishes federal judicial disciplinary and internal operating procedures provides even more options to help insure that *dishonest or unlawfully* pro-defendant judges are kept from presiding over federal criminal trials.¹⁵⁸

E. Eliminating Court Approval

The above analysis demonstrates that elimination of the prosecutorial consent requirement is in the best interests of justice and would not create any unworkable or unfair procedural

proceeded to jury trial but district court granted judgment of acquittal at close of the Government's case).

¹⁵⁵ *State v. Linder*, 304 N.W.2d 902, 908 (Minn. 1981) (Otis, J., dissenting) (citation omitted).

¹⁵⁶ Current federal recusal procedures are set forth at 28 USC §§ 144, 455 (1988). These procedures are difficult to implement, in part because appellate review is usually subject to a deferential abuse of discretion standard. Mandamus relief, although theoretically available, is also very difficult to obtain. See *In re Barry*, 946 F.2d 913 (D.C. Cir. 1991) (allowing mandamus only when right to relief is clear and indisputable).

¹⁵⁷ See Note, *Government Consent to Waiver*, *supra* note 13, at 1044 (noting that only legitimate government objection to bench trial is possible bias of judge against prosecution, and that “[p]rotection is afforded against this possibility by the procedures for disqualifying federal judges”). See also 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.22-23 (arguments in support of defendant's unilateral right to bench trial also endorse more effective use of judicial recusal procedures).

¹⁵⁸ See 28 U.S.C. § 372(c)(6)(B)(iv), (vii) (1988) (disciplinary provisions authorizing judicial council to order temporary ban on assigning cases to particular judge for cause shown and further authorizing any “such other action as it deems appropriate under the circumstances”).

nightmares. But what of the court approval requirement? Except for the narrow situation where a defendant seeks to waive a jury trial after jury selection has commenced,¹⁵⁹ the court approval requirement should be similarly eliminated.

First, one should consider the procedural ramifications of eliminating the prosecutorial consent requirement but maintaining the court approval requirement. This would improve the present Rule 23(a) procedures by removing the possibility of an unexplained and potentially improper prosecutorial veto, and would allow a bench trial in cases where the court has no objection. At first blush, that seems like a solid improvement that is more politically appealing than also eliminating the court approval requirement.¹⁶⁰

However, even without an explicit court approval requirement, the trial court is constitutionally required to make a determination that the defendant's waiver of the jury trial is knowing and intelligent.¹⁶¹ The real issue is whether the Rule should provide for a more involved role of the court. Retention of the court approval requirement necessarily means that the court will have the authority to require the defendant to explain his reasons for requesting a bench trial. Consequently, maintaining this requirement only provides a potential for confusion and for undermining the general purpose for amending Rule 23(a) in the first place.

For the reasons discussed above, court approval is not necessary to guard against a defendant's attempt to obtain an "unfair"

¹⁵⁹ See *supra* notes 112-15 and accompanying text (discussing waiver of jury trial after commencement of jury selection).

¹⁶⁰ Retaining the court approval requirement prevents the proposal from being simplistically characterized as "pro-defendant." Similar realpolitik strategy concerns underlie the ABA White Collar Committee's decision to recommend eliminating the prosecutorial consent requirement but maintaining the court approval requirement. See Laurie Robinson, Section Director, *Summary of April 25 Committee Meeting* 5-6 (April 29, 1992) (summarizing discussions of Federal Rules Subcommittee). The author participated in these discussions.

¹⁶¹ Otherwise, a conviction obtained without an on the record waiver by the defendant must be reversed. See *United States v. Garrett*, 727 F.2d 1003, 1012 (11th Cir. 1984) (requiring waiver on record), *aff'd on other grounds*, 471 U.S. 773 (1985); see also *Adams v. United States ex rel McCann*, 317 U.S. 269, 277-79 (1942) (requiring defendant to make intelligent waiver but not requiring assistance of legal counsel to make waiver); *United States v. Martin*, 704 F.2d 267, 271 (6th Cir. 1983) (setting out conditions for effective waiver, including that waiver be "voluntary, knowing, and intelligent").

procedural advantage because the court can fashion trial procedures to accommodate the defendant's request for a bench trial without creating any unfair procedural advantage.¹⁶² Similarly, for the reasons noted above, there is no legitimate basis for concluding that certain types of issues are inappropriate for court resolution.

Next, a federal court need not be concerned with rendering an unpopular decision. As discussed above, the framers wisely provided the federal judiciary with lifetime tenure to insulate the judiciary from such momentary popular passions.¹⁶³ Moreover, even if federal judges were elected, this would not be a legitimate concern. The American Bar Association Judicial Canons of Ethics, which presumably apply to all judges (regardless of their method of selection and retention), provide that "[a] judge shall not be swayed by partisan interests, public clamor or fear of criticism."¹⁶⁴ The suggestion that the career aspirations of the judge might take precedence over the protections of the accused seems absurd.

Elimination of the court approval requirement also serves to protect the integrity of Federal Rule of Criminal Procedure 23(c). For example, in a recent ABA Trial by Jury Task Force meeting, one federal judge, commenting on existing practice, observed that some federal judge's condition their consent to a bench trial on the parties *not* requesting special findings which are authorized under Rule 23(c).¹⁶⁵ As noted above, given today's federal criminal law climate, the ability to receive special findings is crucial to insure the resolution of certain complex issues beyond a reasonable doubt. Even under present Rule 23(c), a federal judge cannot properly condition court consent on such a bargain.¹⁶⁶

¹⁶² See *supra* notes 100-15 and accompanying text.

¹⁶³ U.S. CONST. art. III, § 1. See also *supra* notes 142-46 and accompanying text (discussing lifetime appointment of federal judges).

¹⁶⁴ ABA CODE OF JUDICIAL CONDUCT Canon 3B(2) (1990).

¹⁶⁵ Comments of Hon. Norma Shapiro, Unofficial Notes by Adam H. Kurland on ABA Trial by Jury Task Force Meeting in Wash. D.C. (March 22, 1992) (document on file at offices of U.C Davis Law Review). See also March 21-22, 1992 Minutes, *supra* note 119 (discussing, among other things, what role judge should play in determining method of trial).

¹⁶⁶ This procedure has been specifically condemned in at least two circuits. See *United States v. Livingston*, 459 F.2d 797, 798 (3d Cir. 1972) (finding error in court's conditioning defendant's request for a jury trial waiver on a waiver by him of his right to request special findings); *Howard v. United States*, 423 F.2d 1102 (9th Cir. 1970) (refusing to condone court's

Imposition of this type of condition can constitute reversible error.¹⁶⁷ Although disturbing, this practice apparently still occurs in an overt manner. Elimination of the court approval requirement would end that practice. It would also eliminate the possibility that a court would deny a bench trial request ostensibly "in the interests of justice," but really as a pretext to avoid having to render special findings.¹⁶⁸

Additionally, the elimination of court approval would also eliminate several difficult issues concerning appealability and the applicable standard of review. If the court approval requirement is maintained, the issue arises as to how, and under what standard, a court's denial of a bench trial would be reviewed.

For example, a judge could abuse a court approval requirement by simply being a conduit for prosecutorial wishes. If the prosecutor voiced objections to the bench trial, some courts might, as a matter of course, deny the bench trial request, although they probably would be able to construct a more palatable reason for their denial.¹⁶⁹ Such occurrences would defeat the purpose behind the proposed amendment to Rule 23(a), which is to make bench trials available even in circumstances where the Government objects.

In addition, in states that have a court approval requirement, but no prosecutorial consent requirement, the court must necessarily delve into the defendant's reasons for making the request. Problems arise when the court declines the bench trial request for largely subjective, and arguably incorrect, although not necessarily unconstitutional, reasons. The predictable end result is that the court's decision is reviewable post-conviction under the very deferential abuse of discretion standard. This invariably results in affirmance of the conviction rendered by the jury, and the subversion of the defendant's right to a bench trial.¹⁷⁰

avoidance of Rule 23(c) requirements by conditioning grant of bench trial on waiver of special findings).

¹⁶⁷ *Howard*, 423 F.2d at 1104.

¹⁶⁸ See 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.22 (discussing possibility of court's unjustified refusal to consent).

¹⁶⁹ In New Jersey, the consent of the state is not required, but the prosecutor must be given notice that the defendant seeks the approval of the court to waive a jury trial and the prosecutor must be given an opportunity to be heard. N.J. R. GEN. APPLIC. 1:8-1(a).

¹⁷⁰ See *State v. Linder*, 304 N.W.2d 902, 907-08 (Minn. 1981) (Otis, J., dissenting); *State v. Dunne*, 590 A.2d 1144, 1152-61 (N.J. 1991) (Handler,

In the federal system, the results of maintaining the court approval requirement would likely be the same.¹⁷¹ A court determination to deny a bench trial is not immediately appealable as a final order,¹⁷² and is unlikely to be immediately reviewable via a writ of mandamus.¹⁷³ Thus, a court denial of a defendant's bench trial request would require the defendant to be tried by a jury over his objection.

Using analogous state practice as a guide, on appeal after conviction, such review would probably prove illusory. As noted above, if reviewed, as would be likely, under an abuse of discretion standard, the practical effect of such deferential review will be to find no abuse of discretion, and hence no reversal, in virtually every case. Thus, elimination of the prosecutorial consent requirement, but retention of the court approval requirement, would likely produce wholly illusory results in many cases.

Lastly, in light of the recent significant caseload increases in the federal courts, any proposed modification that would save time should be welcome. In a complex case, a trial to the court can be tried much more quickly.¹⁷⁴ This was true in the 1940s. As federal criminal cases have become much more complex, both in

J., dissenting). In both cases, dissenting opinions strongly denounced this state of affairs.

¹⁷¹ Under current Rule 23(a), a determination to deny a bench trial request on the ground that a jury trial does not deprive defendant of fair trial is reviewed post-conviction under the clear abuse of discretion standard. *See United States v. Moon*, 718 F.2d 1210, 1234 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984).

¹⁷² Appeals by criminal defendants are governed for the most part by the final decision appeal provisions of 28 U.S.C. § 1291 (1988). 15B CHARLES A. WRIGHT, ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* 2D § 3918, at 414 (1992).

¹⁷³ In any event, any right that can only be vindicated by mandamus is not really worth much. The petitioner must establish that the right to relief is "clear and indisputable." *See* 1 WRIGHT, *supra* note 6, § 145, at 529 (mandamus improper to challenge improper joinder). *See also supra* notes 151, 156 (discussing mandamus relief).

¹⁷⁴ Professor Hans Zeisel has estimated that "the bench trial would take 40 percent less time than the jury trial." HOWARD JAMES, *CRISIS IN THE COURTS* 193 (rev. ed. 1971). Recent federal court statistics demonstrate that the median amount of time from filing of a criminal charge to disposition is significantly less for a bench trial than for a jury trial. *See* 1990 SOURCEBOOK, *supra* note 70, Table 6.20, at 490. *See also* 3 ABA STANDARDS, *supra* note 56, § 15-1.2, commentary at 15.23 (stating that requirements of prosecutorial and court consent are "unnecessary obstacles to the faster and more efficient trial without a jury").

legal theory and evidentiary substance, it is even more true today. No time must be spent on selecting a jury. Time consuming sidebar conferences, in limine motions, and evidentiary hearings can be greatly truncated, at great savings in time and expense. Perhaps only relatively few cases would be affected by such a change. However, given the current state of the federal courts, any time saving device with little or no downside, should be welcome.

Thus, after careful analysis of all the relevant factors, a federal criminal defendant should be able to unilaterally elect to be tried by the court without having to state or otherwise explain his reasons. The only "exceptions" should be 1) that the court must determine that the waiver is knowing and intelligent (which is a constitutional requirement); and 2) that court approval for cause be required when the defendant seeks to waive a jury trial after jury selection has commenced. If the defendant makes a timely request for a jury waiver, the waiver must be granted without requiring the defendant to state his reasons for the request. Of course, if the defendant feels that it is in his best interests to inform the court of the general reasons behind this decision, he remains free to do so.

F. Jury Waiver and the Federal Death Penalty

With the revival of the federal death penalty, the existing procedures for bench trials in death penalty cases should be reviewed as well. This is a virtually non-existent issue in white collar prosecutions. Nonetheless, since Congress often considers legislation that would drastically expand application of the federal death penalty, the issue deserves brief mention here.

In some states, capital cases must be tried to a jury. That is not the federal rule. Federal law currently provides that a capital defendant can, subject to Rule 23(a), choose to be tried by the court at the guilt phase.¹⁷⁵ The statute also provides that a capital defendant convicted either by a jury or the court can have a penalty phase jury empaneled¹⁷⁶ or can have the court alone determine the punishment "upon motion of the defendant and with the approval of the Government."¹⁷⁷

¹⁷⁵ 21 U.S.C. § 848(i)(1)(B)(ii) (1988) (Continuing Criminal Enterprise Statute).

¹⁷⁶ *Id.* § 848 (i)(1)(B).

¹⁷⁷ *Id.* § 848(i)(1)(C). For an excellent review of the federal death

A special federal rule for jury waiver in capital cases (particularly with respect to the penalty phase) is not illogical. The determination of death as the ultimate sanction is unique, and has long been subject to special rules and procedures.¹⁷⁸ In 1984, three Supreme Court Justices suggested that, in their view, a jury may be constitutionally *required* to make a capital sentencing determination.¹⁷⁹ Nonetheless, if Rule 23(a) is amended along the lines suggested herein, a defendant would have a unilateral right to elect a bench trial at the guilt phase of a capital case. No special rule for jury trial waivers in capital cases is contemplated at this time.

A conforming amendment to the relevant penalty phase provisions of section 848 might also be considered.¹⁸⁰ One could argue that a defendant should have the same "unqualified" right, free from possible Government veto, for court determination of sentencing at the guilt phase of a capital case.¹⁸¹ However, as noted above, strong constitutional and policy arguments suggest that another rule in this limited context may be appropriate.¹⁸²

penalty, see Sandra D. Jordan, *Death for Drug Related Killings: Revival of the Federal Death Penalty*, 67 CHI.-KENT L. REV. 79 (1991). For a discussion of the government's perspective on the federal death penalty, see Charles J. Williams, *The Federal Death Penalty for Drug-Related Killings*, 27 CRIM. L. BULL. 387 (1991). One district court has rejected the argument that a capital defendant has a constitutional right to be sentenced by a judge. *United States v. Cooper*, 754 F.Supp. 617, 624-25 (N.D. Ill. 1990). The decision is undoubtedly correct.

¹⁷⁸ *Gregg v. Georgia*, 428 U.S. 153, 176-78 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); *Furman v. Georgia*, 408 U.S. 238, 290 (1972) (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring).

¹⁷⁹ *Spaziano v. Florida*, 468 U.S. 447, 476 (1984) (Stevens, J., joined by Justices Brennan and Marshall, dissenting). The *Spaziano* majority held that the Sixth Amendment does not require that a jury make the ultimate sentencing determination in a capital case. *Id.* at 464-65. The majority position was reaffirmed in *Hildwin v. Florida*, 490 U.S. 638, 639-40 (1989). The *Hildwin* court further held that the Sixth Amendment does not require a jury to make specific findings to sentence a defendant in a capital case. *Id.*

¹⁸⁰ The Government "approval" provisions in section 848 need to be revisited anyway. Is there a substantive difference in the requirement of "consent of the Government" in current Rule 23(a) and the "approval of the Government" in the operative language of section 848? The amendment of Rule 23(a) could at least focus attention on this drafting problem.

¹⁸¹ See *supra* notes 178-79 and accompanying text.

¹⁸² See *supra* notes 178-79 and accompanying text.

Since this is an issue far afield from the concerns of white collar prosecutions, detailed analysis is best left for another day.

CONCLUSION

Every decade or so, the federal criminal law climate changes. This results in, among other things, renewed calls to amend Federal Rule of Criminal Procedure 23(a). The current climate requires the amendment of Rule 23(a) to provide a criminal defendant with a unilateral right to elect a bench trial. From a numerical standpoint, this proposed change would likely affect relatively few cases and thus would work no drastic shift in federal criminal law. Criminal jury trials would still be the norm. The number of federal criminal defendants who obtain bench trials would likely increase to no more than one third of all defendants who actually proceed to trial, which was the approximate percentage of federal criminal defendants who obtained bench trials a decade ago.¹⁸³ However, the change would effect mostly complex and high profile cases, where the defendant's decision to elect a bench trial is the most compelling.

In its present form, Federal Rule of Criminal Procedure 23(a) is an obsolete relic of a long gone era. The jury trial guarantee is for the protection of the accused, not the Government. Any historical "preference" for jury trials was based on the concept that the jury was a jurisdictional requirement and that prosecutorial consent (and court approval) provided protection against an uninformed waiver by the defendant. Neither concern has any contemporary relevance. Thus, there are no good reasons for objecting to this proposed modification of Rule 23(a).

This should not be viewed myopically as simply a "pro-defendant" proposal. Rather, this proposal is a constructive response to the concerns of the Federal Courts Study Committee,¹⁸⁴ and is offered to facilitate the fair and efficient administration of criminal justice. This proposed reform of Rule 23(a) is part of a much larger picture. It should be evaluated in conjunction with the evaluation of other long overdue proposed procedural reforms that impact on the litigation of modern federal criminal cases.

¹⁸³ Interestingly, that percentage would still be substantially less than the somewhat remarkable 58% bench trial rate that prevailed in 1947, the first full year after the Federal Rules of Criminal Procedure became effective. 1990 SOURCEBOOK, *supra* note 70, Table 5.24, at 500.

¹⁸⁴ FEDERAL COURTS STUDY COMMITTEE REPORT, *supra* note 16, at 106-07.

Modifications of these several integrally related aspects of federal criminal trial procedure are essential if the federal criminal justice system is to function fairly and effectively in the twenty-first century.

PROPOSED AMENDED RULE 23(a)

RULE 23 TRIAL BY JURY OR BY THE COURT

(a) **TRIAL BY JURY.** Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in open court. The court shall determine whether the defendant's waiver is knowing and intelligent. The waiver must occur before selection of the jury begins unless the court for cause allows a later waiver.

