The Incoherence of Defendant Autonomy

Robert E. Toone

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ROBERT E. TOONE*

The idea of individual autonomy has become central to the Supreme Court's constitutional jurisprudence. Yet in the context of a criminal trial, this Article argues, the idea makes no sense. The choices that criminal defendants face at trial—such as whether to relinquish their right to counsel, present mental health defenses, or offer mitigating evidence at a capital sentencing hearing—are constructed and circumscribed by the state and do not involve a range of options that ordinary people would consider essential to defining their own concept of existence. It was therefore a mistake for the Supreme Court to base its decision in Faretta v. California *on the premise that defendant autonomy is a constitutional value that trumps, or at least counterbalances, interests such as accuracy, fairness, and efficiency. This reasoning has empowered defendants' self-destructive impulses and changed how courts resolve important issues of substantive law. It has also undermined, not advanced, the accusatorial and adversarial traditions that define our system of criminal justice. The Article concludes that while the current Court's skepticism about* Faretta *is justified, it should not overturn that ruling without also addressing the structural problems that its rhetoric of "free choice" has masked.*

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INTRODUCTION

Of all the constitutional rights recognized in American criminal procedure, the right to self-representation is surely the most likely to be eliminated by the Supreme Court in the foreseeable future—and deservedly so. The right, established by the Court in its 1975 decision *Faretta v. California*,[1] has been assailed by liberals such as Judge Stephen Reinhardt,[2] conservatives such as Kenneth Starr,[3] and countless other judges, practitioners, journalists, and law professors. The Supreme Court itself undermined *Faretta*'s doctrinal foundation in 2000 when it rejected the claim that defendants have a right to represent themselves on appeal,[4] and a majority of the current justices appear skeptical about the validity of the Court's earlier reasoning.[5]

Yet surprisingly, none of *Faretta*'s critics has challenged the radical premise that underlies the decision: that defendant autonomy is a constitutional value which trumps, or at least counterbalances, society's interests in fairness, order, efficiency, and accurate outcomes. Acknowledging that the right to self-representation has no textual basis in the Constitution and, when exercised, usually increases the likelihood that the defendant will be convicted regardless of actual culpability, the Court in *Faretta* justified its ruling on the ground that the Constitution broadly protects the autonomy of criminal defendants—that the "free choice" of defendants must be respected notwithstanding concern for the objective fairness of the proceeding.[6] This reasoning has had a substantial impact on the

1. 422 U.S. 806 (1975).
2. *See* United States v. Farhad, 190 F.3d 1097, 1101–02, 1106–07 (9th Cir. 1999). (Reinhardt, J., concurring).
3. *See* Adina Matusow, *Supremes Consider Risks of Self-Representation*, LEGAL TIMES, Mar. 17, 2004, at 8.
4. Martinez v. Court of Appeal of Cal., 528 U.S. 152, 162 (2000). *See infra* Part I.A.
5. *See infra* text accompanying notes 15–26.
6. *Faretta*, 422 U.S. at 833–34.

criminal justice system, and not just with pro se defendants. In death penalty cases, courts have interpreted *Faretta* to mean that defendants have a right to refuse to present mitigating evidence at sentencing, thus frustrating the individualized consideration requirement of the Eighth Amendment. *Faretta* has also transformed the case law on mental health defenses to the point that it is now widely accepted that such defenses may not be imposed over defendants' objections.

This Article argues that the very idea of defendant autonomy is philosophically incoherent and inconsistent with other fundamental traditions of American criminal justice. Part I examines the autonomy rationale in *Faretta* and its impact on the areas of the death penalty, mental health defenses, and criminal law scholarship generally. It shows that even the most vigorous critics of *Faretta* have implicitly endorsed defendant autonomy by weighing that interest against society's interests in efficiency and fairness. Part II explains that even though the freedom of criminal defendants is central to the two major traditions that distinguish American criminal justice—the accusatorial tradition and the adversarial process—*Faretta* broke sharply from these traditions by limiting the ability of courts to protect defendants from their self-destructive conduct. Part III distinguishes *Faretta*-style autonomy from the Supreme Court's application of the concept in its substantive due process rulings to protect certain intimate decisions and activities by people in the outside world, and then draws upon the writings of Joseph Raz and other modern philosophers to explain why the concept of defendant autonomy is incoherent and empty. Finally, this Article concludes that in the context of criminal procedure, the idea of autonomy is less an affirmation of defendants' dignity and "free choice" than a rhetorical flourish that sidesteps more difficult questions about inequality and injustice in the criminal justice system, the proper allocation of authority between attorneys and clients, and other structural problems. Certainly, the Supreme Court should reconsider its ruling in *Faretta*, but it should not take that step without also reexamining the structural problems that led it to establish the *Faretta* right in the first place.

I. *FARETTA* AND ITS FALLOUT

A. A Right and Rationale in Doubt

Charged with grand theft, Anthony Faretta was concerned about the quality of his appointed counsel. The public defender's office, he

told the judge, was "very loaded down with . . . a heavy case load," and having previously represented himself in a criminal case, Faretta believed he could do the job better.[7] After conducting an inquiry into Faretta's knowledge of evidence and procedure, the judge rejected his request, concluding that self-representation would not serve "the ends of justice and requirements of due process."[8] Faretta was found guilty and sentenced to prison, and the California appellate courts affirmed.

On review of Faretta's conviction, the six-justice majority for the United States Supreme Court acknowledged that it was "not an easy question" whether to recognize a constitutional *right* of criminal defendants to proceed without the assistance of counsel.[9] Justice Stewart observed:

> There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court's decisions holding that the Constitution requires that no accused can be convicted and imprisoned unless he has been accorded the right to the assistance of counsel. For it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.[10]

Nevertheless, the Court concluded that the trial judge had violated the Sixth Amendment by rejecting Faretta's request to proceed without counsel.

The Court based its holding in part on the history of the Anglo-American criminal justice system and broad notions of liberty underlying the Sixth Amendment and the rest of the Constitution. Justice Stewart set forth a detailed historical account arguing that the right to self-representation is grounded in the English and American legal traditions.[11] He invoked "the virtues of self-reliance and a traditional distrust of lawyers" characteristic of the American colonists,[12] and contrasted this tradition with that of the Star Chamber, a seventeenth-century British tribunal whose mandatory-counsel provision exemplified its "disregard of basic individual rights."[13]

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7. *Id.* at 807.
8. *Id.* at 810 & n.4.
9. *Id.* at 807.
10. *Id.* at 832–33 (citations omitted).
11. *Id.* at 821–32.
12. *Id.* at 826.
13. *Id.* at 821.

Commentators were quick to challenge this historical account at the time,[14] and, extraordinarily, the Court has since repudiated it. Twenty-five years after *Faretta*, the Court ruled in *Martinez v. Court of Appeal of California*[15] that defendants do not have the right to represent themselves on direct appeal. In *Martinez*, Justice Stevens demonstrated the uselessness of the historical evidence that the Court had previously relied on, observing that it "pertained to times when lawyers were scarce, often mistrusted, and not readily available to the average person accused of crime."[16] Many of the precedents cited in *Faretta* posited a right of self-representation as a "sword" for the prosecution for the purpose of concluding that an unrepresented defendant had waived an important right.[17] Precedents from a time in which poor defendants had no choice but to represent themselves are of limited value in a post-*Gideon* era.[18]

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14. *See, e.g.*, Howard J. Schwab, *How Far* Faretta*: Creating Implied Constitutional Rights*, 6 SAN FERN. V. L. REV. 1, 8–11 (1977) (accusing the Court of taking "bits and pieces out of the past" to support its argument); Marlee S. Myers, Note, *A Fool for a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403, 407–09 (1975) (arguing that the majority's historical analysis was both irrelevant and incorrect); Kenneth J. Weinberger, Note, *A Constitutional Right to Self-Representation*, 25 DEPAUL L. REV. 774, 779–80 (1976) (suggesting that the Court incorrectly assumed the Framers regarded self-representation as fundamental).

15. 528 U.S. 152 (2000).

16. *Id.* at 156.

17. *Id.* at 157 & n.4. Because the Court found that the Sixth Amendment is concerned solely with trials, not appeals, it quickly dismissed as irrelevant the *Faretta* Court's discussion of the "language and spirit" of the Amendment. *Id.* at 159–60. It did, however, implicitly undermine this argument by referring to *Faretta*'s constitutional interpretation as "nontextual," *id.* at 160, which it of course is, and the discussion of British Star Chamber practices in this context, *see Faretta*, 422 U.S. at 821–23, as vulnerable to the same criticism leveled in *Martinez* against the other historical evidence in *Faretta*.

18. *See* Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (holding that indigent criminal defendants have a fundamental right to the assistance of counsel at trial). Drafted in response to a common law rule prohibiting defense counsel in felony cases, the Assistance of Counsel Clause of the Sixth Amendment originally preserved only a defendant's right to be represented by retained counsel. It did not provide any right to defendants who could not afford a lawyer's services. Bruce A. Green, *Lethal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 439 (1993); Alexander Holtzoff, *The Right of Counsel Under the Sixth Amendment*, 20 N.Y.U. L. REV. 1, 7–9 (1944). In a series of rulings beginning in the 1930s, the Court departed from that original understanding. *See* Powell v. Alabama, 287 U.S. 45, 68–71 (1932) (applying the Due Process Clause of the Fourteenth Amendment in reversing convictions and death sentences of indigent black defendants who had been tried without assistance of counsel). In *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938), the Court ruled that the Sixth Amendment guaranteed appointed counsel to federal criminal defendants who could not afford to retain counsel on their own. *Id.* at 468. In *Gideon*, the Court extended this right to felony defendants in state court, and the right now attaches to all defendants who might be imprisoned if convicted. Alabama v. Shelton, 535 U.S. 654, 674 (2002); Argersinger v.

The other major rationale in *Faretta* was the autonomy of criminal defendants. The Court used eloquent but depthless rhetoric to champion the value of unrestrained individual freedom. The right to self-representation, it wrote, is compelled by not only the logic of the Sixth Amendment, but more generally by "that respect for the individual which is the lifeblood of the law."[19] The right had been implicitly sanctioned by the Framers, since "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."[20] The autonomy of a criminal defendant must be protected, even if doing so enables him to conduct his own defense ultimately to his own detriment.[21] As the Court later summarized, its ruling in *Faretta* provided "constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding."[22]

This rationale, too, was cast into doubt by the Court's more recent ruling in *Martinez*. Gone was the soaring individualist rhetoric. Indeed, although the *Martinez* Court acknowledged that "a respect for individual autonomy" was a basis for its earlier ruling, it spent almost no time discussing what autonomy means or how it relates to criminal defendants. Instead, through the use of a selective quote from *Faretta*, the *Martinez* Court recapitulated the autonomy rationale as a question of an attorney's undivided loyalty to her client,[23] and then quickly minimized its importance in the context of

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Hamlin, 407 U.S. 25, 37 (1972).

19. *Faretta*, 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

20. *Id.* at 833–34.

21. *Id.* at 834.

22. Flanagan v. United States, 465 U.S. 259, 268 (1984); *see also* McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) (stating that the right to self-representation "exists to affirm the dignity and autonomy of the accused"); Jones v. Barnes, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting) ("*Faretta* establishes that the right to counsel is more than a right to have one's case presented competently and effectively."); Chapman v. United States, 553 F.2d 886, 891 (5th Cir. 1977) (noting that "the right to represent oneself is not 'result-oriented' "). *See generally* George E. Dix, *Waiver in Criminal Procedure: A Brief for More Careful Analysis*, 55 TEX. L. REV. 193, 219 (1977) (citing *Faretta* for the proposition that "respect for human dignity" may entail "permitting a defendant to make decisions concerning his future that most would regard as unwise and that may even have an adverse effect on some of the other interests involved"); Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 93 (1991) (describing *Faretta* as "the zenith of the Court's efforts in safeguarding the individual's dignity").

23. The Court reasoned:

> As we explained in *Faretta*, at the trial level "[t]o force a lawyer on a defendant

criminal appeals. It wrote:

> In light of our conclusion that the Sixth Amendment does not apply to appellate proceedings, any individual right to self-representation on appeal based on autonomy principles must be grounded in the Due Process Clause. Under the practices that prevail in the Nation today, however, we are entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding. We have no doubt that instances of disloyal representation are rare. In both trials and appeals there are, without question, cases in which counsel's performance is ineffective. Even in those cases, however, it is reasonable to assume that counsel's performance is more effective than what the unskilled appellant could have provided for himself.[24]

Pointing to the various restrictions that have developed with respect to the *Faretta* right, the *Martinez* Court wrote that the interest of defendant autonomy was "at times" outweighed by "the government's interest in ensuring the integrity and efficiency of the trial."[25] In the appellate context, where the autonomy interest of the defendant, being no longer presumed innocent, is less compelling, "the balance between the two competing interests surely tips in favor of the State."[26]

Martinez revealed a Court that is ill at ease with its prior ruling and reasoning, but unsure whether to repudiate them altogether. Instead of confronting the autonomy rationale head on, the Court essentially avoided the issue. It transformed a sweeping assertion of individual free choice into a narrow, pragmatic concern about the loyalty of one's attorney—and even that concern sidestepped the broader concerns raised by Anthony Faretta about the adequacy of his indigent defense counsel. As the next Section will explain, the

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can only lead him to believe that the law contrives against him." On appellate review, there is surely a similar risk that the appellant will be skeptical of whether a lawyer, who is employed by the same government that is prosecuting him, will serve his cause with undivided loyalty.

Martinez v. Court of Appeal of Cal., 528 U.S. 152, 160 (2000) (alteration in original) (citations omitted).

24. *Id.* at 161.

25. *Id.* at 162.

26. *Id.* at 162–63.

Martinez Court's reductionist approach to the autonomy rationale belied the sweeping impact it has had on the criminal justice system.

B. The Rise of Defendant Autonomy

Although Chief Justice Burger warned in dissent that the criminal justice system should not be used "as an instrument of self-destruction,"[27] none of the justices foresaw the extent to which *Faretta* would empower the self-destructive impulses of criminal defendants. The most conspicuous fallout of *Faretta* has been in high-profile criminal cases where volatile, mentally unstable defendants—Colin Ferguson, Theodore Kaczynski, Jack Kevorkian, and Zaracarias Moussaoui being just a few examples—have represented themselves to disastrous ends.[28] In these cases and many others, defendants have turned trials into circuses through the device of self-representation. As Professor John Decker observed on the occasion of *Faretta*'s 20th anniversary, "Little did the Court realize the extent of the chaos it created. As a consequence of *Faretta* there are 'trials' in courts throughout the country that make a mockery of justice and disrupt courtroom procedure."[29]

This problem is serious enough, and judges continue to struggle to maintain order when defendants invoke their *Faretta* right. But the impact of the *Faretta* ruling far exceeds the procedural and logistical problems raised by self-representation. By establishing defendant autonomy as an independent constitutional value, *Faretta* has radically changed the way courts resolve important issues of substantive law. The two most significant issues that *Faretta* has affected involve the death penalty and mental health defenses.

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27. Faretta v. California, 422 U.S. 806, 840 (1975) (Burger, C.J., dissenting).

28. *See* Marie Higgins Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 789–92 (2000) (summarizing the trials of Long Island road shooter Colin Ferguson, "Unabomber" Theodore Kaczynski, and "Suicide Doctor" Jack Kevorkian); Seymour M. Hersh, *The Twentieth Man*, THE NEW YORKER, Sept. 23, 2002, at 56, 74–76 (describing dozens of handwritten motions filed by Zacarias Moussaoui containing curses aimed at the trial judge and wild theories about government's complicity in the September 11th attacks); Tom Jackman, *Moussaoui May Have Doomed His Defense*, WASH. POST., July 15, 2002, at A3 (same); Trisha Renaud, *Tangled Mind, Tangled Case Suit Says Doctors, Others Share Blame for Mentally Ill Killer's Crime*, FULTON COUNTY DAILY REP., Mar. 24, 2000, at 1 (describing pro se murder defendant's trial testimony "in which he claimed to be God's personal psychiatrist, vowed to slit God's throat in a sneak attack, demanded death and then threatened jurors should they not grant his wish").

29. John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 485 (1996).

1. The Death Penalty

The death penalty is our most severe criminal sanction, reserved for the most heinous offenses and the most incorrigible criminals. The Supreme Court has consistently treated death as a qualitatively different kind of punishment than imprisonment,[30] and since 1972 it has developed a separate and complex body of Eighth Amendment law to ensure that the death penalty is imposed fairly and objectively.

From this jurisprudence two fundamental principles have emerged. First, the discretion of capital sentencers in considering aggravating circumstances must be channeled by clear and objective standards.[31] Second, defendants must be allowed to present as mitigating any evidence relating to their character or record, or the specific circumstances of the offense.[32] Capital defendants represented by competent counsel typically take advantage of this "individualized consideration" principle by presenting a wealth of mitigating evidence at the penalty phase. Such evidence can help a sentencer to distinguish qualities that make the defendant less deserving of execution than other similarly situated offenders, and can lead the sentencer to understand the defendant as a human being, something more difficult to sentence to death than the " 'sack of cement' " that might otherwise be perceived.[33]

A properly litigated capital sentencing hearing is adversarial: the state presents its strongest evidence and arguments why the defendant deserves to be executed, and the defense counters with its "case for life." If no mitigating evidence is presented, the hearing becomes a one-sided affair, and the likelihood that death will be imposed is high.

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30. *See* Ring v. Arizona, 536 U.S. 584, 605–06 (2002); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

31. In *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam), the Supreme Court struck down Georgia's death penalty law. In *Gregg v. Georgia*, 428 U.S. 153, 206–07 (1976), the Court concluded that Georgia's revised capital statutory scheme, which carefully circumscribed the class of people eligible for the death penalty, had eliminated the previous statute's constitutional deficiencies. Subsequent cases have refined the requirements of this anti-arbitrariness principle. *See* Richmond v. Lewis, 506 U.S. 40, 46–52 (1992); Maynard v. Cartwright, 486 U.S. 356, 362–63 (1988); Zant v. Stephens, 462 U.S. 862, 876–87 (1983); Godfrey v. Georgia, 446 U.S. 420, 427–33 (1980).

32. Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982); *Lockett*, 438 U.S. at 604.

33. Ivan K. Fong, Note, *Ineffective Assistance of Counsel at Capital Sentencing*, 39 STAN. L. REV. 461, 484 (1987) (quoting SOUTHERN POVERTY LAW CENTER, TRIAL OF THE PENALTY PHASE 3 (1981)); *see also* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 845 (1992) (stating that the "individualized consideration" principle "is premised on the recognition that not all first-degree murderers are similarly situated").

What should be done with a defendant who, seeking death, attempts to waive the presentation of mitigating evidence? This predicament, which occurs with surprising frequency,[34] has not been directly addressed by the Supreme Court.[35] Lower state and federal courts have reached conflicting conclusions as to whether defendants should be allowed to waive this safeguard. A few courts have ruled in the negative, emphasizing the state's overriding interest in ensuring that the death penalty is not erroneously imposed.[36] The majority of courts, however, have concluded that the Constitution permits defendants to waive individualized consideration. In many of these cases, the defendants elected to represent themselves pursuant to *Faretta*. The Illinois Supreme Court held that the right to self-representation cannot be denied simply because it "frustrate[s] the [state's] statutory intention to provide the sentencing body with all

34. *See, e.g.*, Gary Caldwell, *Florida Capital Cases: July 1, 1994–June 30, 1995*, 20 NOVA L. REV. 1255, 1284 (1996) (describing a "growing number of cases" in which defendants seek to prevent presentation of mitigating evidence); Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55, 55–56 & n.5 (2001) (documenting recent cases in Virginia where capital defendants pleaded guilty and asked to be sentenced to death).

35. The various formulations of the Court's Eighth Amendment "individualization consideration" requirement do not provide a clear answer. In some cases, individualized consideration is expressed as a waivable entitlement of the defendant, who "must be allowed to introduce any relevant mitigating evidence." California v. Brown, 479 U.S. 538, 541 (1987). Other cases conceptualize it as a duty of the sentencer, who may not refuse to consider or be prevented from considering mitigating evidence. Hitchcock v. Dugger, 481 U.S. 393, 394 (1987); *Eddings*, 455 U.S. at 113–14. In still other cases, the Court has described the requirement as "essential" and "mandate[d]" by the Eighth Amendment, language from which it can be inferred that mitigating evidence must be presented regardless of a defendant's intentions. Penry v. Lynaugh, 492 U.S. 302, 317 (1989), *abrogated on other grounds by* Atkins v. Virginia, 536 U.S. 304 (2002); *Lockett*, 438 U.S. at 605; *see also Woodson*, 428 U.S. at 304 (describing the requirement as "a constitutionally indispensable part of the process of inflicting the penalty of death").

36. In *State v. Koedatich*, 548 A.2d 939 (N.J. 1989), the court found "persuasive policy reasons ... based substantially on the State's 'interest in a reliable penalty determination' " for not allowing a defendant to waive his right to present mitigating evidence. *Id.* at 993 (citations omitted). It is self-evident, in the court's opinion, "that the state and its citizens have an overwhelming interest in insuring that there is no mistake in the imposition of the death penalty." *Id.* at 995. More recently, the Florida Supreme Court reversed a trial court that, having failed to provide for an alternative means for the jury to be advised of available mitigating evidence, nevertheless gave great weight to the jury's recommendation of death. Muhammad v. State, 782 So. 2d 343, 361–62 (Fla. 2001) ("The failure of Muhammad to present any evidence in mitigation hindered the jury's ability to fulfill its statutory role in sentencing in any meaningful way."); *see also* Morrison v. State, 373 S.E.2d 506, 509 (Ga. 1988) (stating that "in view of the concern for reliability inherent in our death-penalty procedures," trial courts "may have an obligation to conduct an independent investigation into the possible existence of evidence in mitigation"). For a general discussion of the individual and societal interests implicated by the Eighth Amendment, see *Ake v. Oklahoma*, 470 U.S. 68, 83–84 (1985).

relevant mitigating evidence."[37] In its review of the same case, the Seventh Circuit agreed:

> The Court in *Faretta* did not impose any restrictions upon a defendant's right to refuse the assistance of counsel except to state that the right must be "knowingly and intelligently" waived .... If an individual in a capital sentencing hearing wishes to proceed pro se, *Faretta* grants him the right to do so.[38]

Whether the defendant intends to pursue a case in mitigation is irrelevant to the *Faretta* inquiry.[39] The Utah, Illinois, and California Supreme Courts have also approved death sentences reached after pro se defendants presented limited or no mitigating evidence at sentencing.[40] And in a recent case, the Fifth Circuit issued a writ of mandamus to prevent the trial court from appointing independent counsel to present mitigating evidence against the pro se defendant's wishes.[41]

Even in cases where the defendants do not represent themselves, courts have applied the reasoning of *Faretta* to uphold their waiver of individualized consideration. Some have rejected ineffective assistance of counsel claims on the ground that defendants retain "a measure of personal control" over their defense, which encompasses, at a minimum, "the right to decide whether to present a mitigation defense."[42] Other courts have expressly ruled that defense attorneys

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37. People v. Silagy, 461 N.E.2d 415, 431 (Ill. 1984).

38. Silagy v. Peters, 905 F.2d 986, 1007 (7th Cir. 1990) (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).

39. *Id.* at 1007–08.

40. People v. Clark, 789 P.2d 127, 150 (Cal. 1990); People v. Coleman, 660 N.E.2d 919, 933 (Ill. 1995); State v. Arguelles, 63 P.3d 731, 752–54 (Utah 2003); *see also* Nelson v. State, 681 So. 2d 252, 255–56 & n.6 (Ala. Crim. App. 1995) (holding that the defendant was competent to represent himself and to waive the presentation of mitigating evidence); State v. Harding, 670 P.2d 383, 400 (Ariz. 1983) (affirming death sentence of self-represented defendant who had declined to present mitigating evidence); People v. Stansbury, 846 P.2d 756, 784 (Cal. 1993), *rev'd on other grounds*, 511 U.S. 318 (1994) ("The Sixth Amendment teaches that we should accord the competent defendant, even in a capital case, this much control over his destiny."); Bishop v. State, 597 P.2d 273, 276 (Nev. 1979) (holding that defendant's refusal to present mitigating at the penalty phase did not negate his *Faretta* right).

41. United States v. Davis, 285 F.3d 378, 381–85 (5th Cir. 2002).

42. Jeffries v. Blodgett, 771 F. Supp. 1520, 1552–53 (W.D. Wash. 1991), *vacated on other grounds*, 988 F.2d 923 (9th Cir. 1993); *see also* Trimble v. State, 693 S.W.2d 267, 278–80 (Mo. Ct. App. 1985) (holding that counsel was not ineffective for following defendant's instructions not to present certain mitigating evidence). Both of these cases relied on prior rulings that allowed represented defendants not to present viable insanity defenses—and those rulings in turn relied on *Faretta*. *See* State v. Thomas, 625 S.W.2d 115, 123–24 (Mo. 1981); State v. Jones, 664 P.2d 1216, 1219–24 (Wash. 1983); *see also* Snell v. Lockhart,

have an affirmative duty to carry out the wishes of their death-seeking clients. In 1982, the Louisiana Supreme Court held that *Faretta* guarantees a competent defendant "a constitutional right to impose a condition of employment on his counsel," including the condition that no mitigating evidence be presented.[43] The Ohio Supreme Court has reasoned:

> The same value that guarantees a defendant a right to present mitigating evidence—"the right of the defendant to be treated with dignity as a human being"—also gives him the right to decide what is in his own best interest. In our view, appellant's suggestion that the court call its own witnesses in mitigation or appoint an independent attorney to do so gives insufficient deference to that value.[44]

Similarly, the California Supreme Court has repeatedly applied the rationale of *Faretta* to uphold the self-destructive preferences of represented defendants.[45] In one case, the court rejected the claim that an attorney should present mitigating evidence over her client's objections since, the court reasoned, the imposition of such a duty might lead some defendants "to exercise their Sixth Amendment right of self-representation before commencement of the guilt phase in order to retain control over the presentation of evidence at the penalty phase, resulting in a significant loss of legal protection for these defendants during the guilt phase."[46] In other words, a defendant should be allowed to seek the death penalty because otherwise he might be tempted to waive counsel at the start of trial. Allowing the defendant to secure his own execution is a price worth paying to keep him from actually invoking the *Faretta* right.

2. Mental Health Defenses

Mental health defenses are, at least ostensibly,[47] designed to

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791 F. Supp. 1367, 1385 (E.D. Ark. 1992), *rev'd on other grounds*, 14 F.3d 1289 (8th Cir. 1994) ("If the petitioner has [the right to self-representation], he certainly has the right to make such a fundamental and personal decision as whether to present mitigating evidence following a capital murder conviction.").

43. State v. Felde, 422 So. 2d 370, 395 (La. 1982).

44. State v. Tyler, 553 N.E.2d 576, 585 (Ohio 1990) (per curiam) (citation omitted). The court concluded that defense counsel was "obliged to honor appellant's choice 'out of that respect for the individual which is the lifeblood of the law.' " *Id.* (quoting Faretta v. California, 422 U.S. 806, 834 (1975)).

45. *See* People v. Howard, 824 P.2d 1315, 1345–46 (Cal. 1992); People v. Deere, 808 P.2d 1181, 1186–89 (Cal. 1991); People v. Lang, 782 P.2d 627, 652–54 (Cal. 1989).

46. *Lang*, 782 P.2d at 653 (citations omitted).

47. *See generally* Joseph Goldstein & Jay Katz, *Abolish the "Insanity Defense"—Why*

protect those lacking sufficient mental responsibility from being undeservedly convicted and punished. Yet the defenses carry consequences distinct from those accompanying other affirmative defenses. Defendants acquitted on the basis of the "insanity defense" are typically committed for an indefinite period of time to a mental hospital, and may in fact spend more time institutionalized that they would if convicted of the offenses charged.[48] Furthermore, society attaches a stigma to mental health defenses that does not exist with other affirmative defenses; even after release, an acquitted defendant is subject to the social and economic opprobrium commonly associated with mental illness.[49]

It is therefore common for criminal defendants to refuse to present a mental health defenses at trial, even when such a defense might reasonably lead to acquittal. The question has arisen whether, and under what conditions, defense attorneys, prosecutors, or trial judges should impose a defense over a defendant's objection.[50] Again, the principle of defendant autonomy established in *Faretta* has been critical to the debate.

In a line of cases beginning in the 1960s, the D.C. Circuit Court of Appeals held that, once sufficient questions are raised regarding a defendant's mental illness, a trial court must make an insanity determination and, if warranted, impose the insanity defense, even if over the defendant's objections. In *Whalem v. United States*,[51] the court explained the "structural foundation" of the criminal law that

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Not?, 72 YALE L.J. 853 (1963) (arguing that the true purpose of the insanity defense is to authorize the restraint of those who lack the capacity to satisfy the mental element of a crime).

48. *See id.* at 868; *see also* Frendak v. United States, 408 A.2d 364, 377 (D.C. 1979) (observing that "a defendant may fear that an insanity acquittal will result in the institution of commitment proceedings which lead to confinement in a mental institution for a period longer than the potential jail sentence").

49. *Frendak*, 408 A.2d at 377 ("Although an insanity acquittal officially absolves the defendant of all moral blame, in the eyes of many some element of responsibility may remain. Thus, the insanity acquittee found to have committed criminal acts and labeled insane may well see oneself 'twice cursed.' " (citing Matthews v. Hardy, 420 F.2d 607, 610–11 (D.C. Cir. 1969))).

50. *See* David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295, 295 (1988); Anne C. Singer, *The Imposition of the Insanity Defense on an Unwilling Defendant*, 41 OHIO ST. L.J. 637, 639–40 (1980); Note, *The Right and Responsibility of a Court to Impose the Insanity Defense over the Defendant's Objection*, 65 MINN. L. REV. 927, 927–29 (1981). This question has long been resolved with respect to defendants' mental competence, which is a separate issue. The Supreme Court has ruled that even if a defendant fails to raise the issue, a court must do so itself if "the evidence raises a 'bona fide doubt' as to a defendant's competence to stand trial." Pate v. Robinson, 383 U.S. 375, 385 (1966).

51. 346 F.2d 812 (D.C. Cir. 1965).

compelled its decision:

> [T]he legal definition of insanity in a criminal case is a codification of the moral judgment of society as respects a man's criminal responsibility; and if a man is insane in the eyes of the law, he is blameless in the eyes of society and is not subject to punishment in the criminal courts.[52]

A trial judge's failure to raise the insanity defense *sua sponte* after questions had been raised could be reversible error.[53]

A different approach to this problem, recognizing a right of competent defendants to prohibit the interposition of mental health defenses, emerged in the mid-1970s.[54] It was set forth most prominently by the D.C. Court of Appeals in *Frendak v. United States*.[55] In that case, the trial court imposed the insanity defense against the defendant's wishes, and the jury found him not guilty by reason of insanity. The appeals court reversed, holding that the defendant's waiver decision had to be respected if it was made voluntarily and intelligently. The validity of *Whalem* had been undermined by the "underlying philosophy" of two recent Supreme Court decisions—*North Carolina v. Alford*[56] and *Faretta*—both of which emphasized the importance of allowing a defendant to make fundamental decisions about his defense, no matter what the

52. *Id.* at 818. In an earlier case, the D.C. Circuit explained why punishment must be withheld from those adjudged to be morally irresponsible: "To punish a man who lacks the power to reason is as undignified and unworthy as punishing an inanimate object or animal. A man who cannot reason cannot be subject to blame. Our collective conscience does not allow punishment where it cannot impose blame." Holloway v. United States, 148 F.2d 665, 666–67 (D.C. Cir. 1945).

53. United States v. Wright, 511 F.2d 1311, 1314 (D.C. Cir. 1975); *see* Les v. Meredeth, 561 P.2d 1256, 1259 (Colo. 1977); People v. Anderson, 641 N.E.2d 591 (Ill. App. Ct. 1994); State v. Fernald, 248 A.2d 754, 760–61 (Me. 1968); Walker v. State, 321 A.2d 170, 174 (Md. Ct. Spec. App. 1974); State v. Pautz, 217 N.W.2d 190, 192 (Minn. 1974); State v. Kahn, 417 A.2d 585, 592 (N.J. 1980).

54. *See* United States v. Edwards, 488 F.2d 1154, 1164 (5th Cir. 1974); State v. Johnson, 570 P.2d 503, 505 (Ariz. 1977); People v. Guaze, 542 P.2d 1365, 1370 (Cal. 1975); People v. Geddes, 1 Cal. Rptr. 2d 886, 888 (1991); Hooks v. State, 366 N.E.2d 645, 646–47 (Ind. 1977); Jacobs v. Commonwealth, 870 S.W.2d 412, 418 (Ky. 1994); State v. Lowenfield, 495 So. 2d 1245, 1252 (La. 1985); Treece v. State, 547 A.2d 1054, 1055 (Md. 1988); Commonwealth v. Federici, 696 N.E.2d 111, 114–15 (Mass. 1998); Anderson v. State, 493 S.W.2d 681, 683–84 (Mo. Ct. App. 1973); Johnson v. State, 17 P.3d 1008, 1015 (Nev. 2001) (per curiam); State v. Jones, 664 P.2d 1216, 1219–23 (Wash. 1983).

55. 408 A.2d 364 (D.C. 1979).

56. 400 U.S. 25 (1970). In *Alford*, the Court concluded that the Constitution does not prohibit the acceptance of a guilty plea from a defendant asserting his innocence, so long as the trial judge is satisfied that there is a "strong factual basis" for the charge. *Id.* at 38.

consequences.[57] The structural interests cited in *Whalem*—the satisfaction of "some abstract concept of justice," according to the court in *Frendak*—were clearly outweighed by the need to protect defendants' autonomy.[58]

Frendak proved influential. In adopting the *Frendak* rule in 1983, the Washington Supreme Court relied heavily on the "right to personally control one's own defense" which, it wrote, was implied by the holding in *Faretta*.[59] Ultimately, in the 1991 case *United States v. Marble*,[60] the D.C. Circuit abrogated its *Whalem* precedent.[61] While much of *Marble* focused on a perceived shift in society's views on mentally ill criminals, the court also found that *Whalem* was "in substantial tension" with the principle of defendant autonomy recognized by the Supreme Court.[62] *Whalem* rested on an outdated view of public policy—not the "constitutional ground" established by *Faretta*.[63]

3. The Persistence of Interest Balancing

It is not surprising, given its transformative effect on American criminal justice, that *Faretta* has generated much criticism by courts, commentators, and practitioners. Many have concluded that *Faretta* was wrongly decided.[64] Their criticism, however, has generally involved the same interest-balancing dynamic, weighing the "autonomy" interests of criminal defendants against society's interests in fairness, order, efficiency, and accurate outcomes. While arguing that societal interests should win out in the end, they concede the premise that defendant autonomy is a constitutional value deserving protection. Perhaps the most compelling critic of *Faretta* has been Ninth Circuit Judge Stephen Reinhardt, who explained in a 1999 opinion how the right to self-representation "frequently, though not always," undermines the defendant's right to a fair trial.[65] Even

57. *Frendak*, 408 A.2d at 375–76.
58. *Id.* at 376–78.
59. State v. Jones, 664 P.2d 1216, 1219 (Wash. 1983).
60. 940 F.2d 1543 (D.C. Cir. 1991).
61. *Id.* at 1547.
62. *Id.* at 1546–47.
63. *Id.* at 1547. *But see* Hendricks v. People, 10 P.3d 1231, 1236–38 (Colo. 2000) (holding that Colorado's unique statutory provisions, which allow mental status defenses to be raised over defendants' objections, were not trumped by the non-constitutional grounds of *Frendak*).
64. *See, e.g.*, Decker, *supra* note 29, at 596–98 (describing *Faretta* as "foolish Sixth Amendment doctrine" and calling on the Supreme Court to "reconsider its jurisprudential integrity").
65. United States v. Farhad, 190 F.3d 1097, 1107 (9th Cir. 1999) (Reinhardt, J.,

Judge Reinhardt, however, conceded that defendants' "dignitary interests are important and are entitled to protection," arguing only that those interests must be balanced "against the Due Process Clause's fundamental guarantee that trials will be reliable, just, and fair."[66] And as we have seen, in its reexamination of the right to self-representation in *Martinez* (which took note of Reinhardt's criticism issued four months earlier),[67] the Supreme Court also engaged in interest-balancing. It described defendant autonomy as an interest that, at the trial level, is sometimes outweighed by society's interest in ensuring integrity and efficiency; at the appellate level, "the balance between the two competing interests surely tips in favor of the State."[68]

The same dynamic has dominated the academic debate over the ability of capital defendants to waive the presentation of mitigating evidence at sentencing. Professors Richard Bonnie and Welsh White have argued that the capital defendant's "interest in controlling his own fate" should not be subordinated to the "societal interest in the integrity of the capital sentencing process," even when the defendant seeks to waive the presentation of mitigating evidence.[69] Commentators have reached the opposite result after balancing the same interests, concluding that society's interest in "the integrity of the process" or "preventing capricious sentencing" is sufficiently compelling to outweigh the defendant's interests in "dignity" and "free choice" in conducting his own defense.[70] Similarly, with mental

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concurring).

66. *Id.* at 1108 (Reinhardt, J., concurring); *see also* Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 227–29 (2000) (arguing that *Faretta* has "overstayed its ambiguous welcome" and that the need to assure a fair trial should override the defendant's autonomy under the Sixth Amendment).

67. Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161 n.9 (2000) (noting that "[s]ome critics argue that the right to proceed pro se at trial in certain cases is akin to allowing the defendant to waive his right to a fair trial").

68. *Id.* at 162–63.

69. Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1387 (1988); *see also* Shawn A. Carter, *The Pro Se Dilemma: Can Too Many Rights Make a Wrong?*, 62 LA. L. REV. 1299, 1319 (2002) ("[D]ue to the great importance of respecting a defendant's free will to choose how to present his case, the pro se right should allow defendants to withhold mitigating evidence and it should encompass a defendant's right to choose whether or not to present a defense."); Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 863–69 (1987) (arguing that "capital defendant's autonomy should be respected" even at the expense of conflicting societal interests).

70. *See* Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence when the Defendant Advocates Death*, 55 TENN. L. REV. 95, 96 (1987); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at*

health defenses, commentators have sparred over the correct balance between the defendant's right to control his fate and society's interest in refusing to punish those whom it considers morally blameless by virtue of their mental illness.[71]

The perfect storm for these issues was the federal capital murder trial of alleged "Unabomber" Theodore Kaczynski. The defense attorneys appointed to represent Kaczynski decided to present a defense based on mental illness, but Kaczynski objected to the presentation of any mental health evidence.[72] The trial judge ruled that the attorneys could proceed with their presentation, and Kaczynski requested the opportunity to represent himself.[73] After the court denied his request, Kaczynski pled guilty.[74] On appeal, a divided panel of the Ninth Circuit affirmed the denial of Kaczynski's motion to vacate his guilty plea. The majority ruled that Kaczynski's request to represent himself was untimely and dilatory and did not render his subsequent plea involuntary.[75] In dissent, Judge Reinhardt (again) wrote that although the defense attorneys and trial judge acted with noble intentions—and although *Faretta* is fundamentally unsound—the judge violated Kaczynski's rights under that ruling.[76]

The Unabomber case led to a reinvigorated debate in the law reviews: some making the case why "fairness must trump autonomy" in cases involving mental health defenses,[77] others criticizing the trial

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Certain Stages in Capital Proceedings, 30 AM. J. CRIM. L. 75, 105 (2002) ("The state's interest is strong enough to outweigh the interests of the defendant. Therefore, the states must require the presentation of mitigating evidence during capital sentencing even over the objections of the defendant . . . ."); Christopher M. Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Injury*, 93 KY. L.J. (concluding that "the community's collective interest in a just outcome must, in my view, outweigh the defendant's separate interest in autonomy—in the power to influence that outcome") (forthcoming Jan. 2005); Eric Rieder, Note, *The Right of Self-Representation in the Capital Case*, 85 COLUM. L. REV. 130, 152 (1985).

71. *Compare* Note, *supra* note 50, at 957–60 (arguing for an approach that guides courts in detecting voluntary rejections of the insanity defense), *with* Cohn, *supra* note 50, at 314 (concluding that "the larger interest in an individual's autonomy and freedom of choice must take precedence over the purported interest in refusing to punish the mentally ill").

72. United States v. Kaczynski, 239 F.3d 1108, 1111–12 (9th Cir. 2001).

73. *Id.* at 1112.

74. *Id.* at 1112–13.

75. *Id.* at 1117–19.

76. *Id.* at 1119–20 (Reinhardt, J., dissenting).

77. Sabelli & Leyton, *supra* note 66, at 216; *see also* Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma when Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1385–86 (1998) (defending right of defense lawyer to use "surrogate decisionmaking" in such cases and "regard autonomy as one of the client's interests but not necessarily the overarching one").

judge and defense attorneys for denying Kaczynski control over his defense.[78] A Note in the *Harvard Law Review* took the occasion to reprimand both the Ninth Circuit majority and Judge Reinhardt for showing insufficient regard for "the critical autonomy interests that the right to self-representation is designed to protect."[79] But what if, far from being critical, the autonomy interests of Kaczynski—in his role as a criminal defendant at trial—were not worth protecting at all? What if fairness was being restricted for the sake of an idea that is, in this context, meaningless?

II. "FREE CHOICE" IN THE ACCUSATORIAL AND ADVERSARIAL TRADITIONS

"And whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."[80] That the Supreme Court in *Faretta* had to resort to such flimsy reasoning to justify the right to self-representation[81] does not detract from the fact that the freedom of criminal defendants *is* an essential part of our modern criminal justice system. Indeed, it is at the heart of the two major traditions that distinguish American criminal justice and which have been incorporated into our constitutional system: the accusatorial tradition and the adversarial process. Far from lending support to these traditions, or logically following from them, however, the *Faretta* Court's establishment of defendant autonomy as an independent value radically undermines them.

A. *The Accusatorial Tradition*

As Professor Abraham Goldstein observed thirty years ago, while "accusatorial" and "adversarial" are frequently treated as virtual synonyms, they refer to distinct concepts.[82] The accusatorial

78. Michael Mello, *The Non-Trial of the Century: Representations of the Unabomber*, 24 VT. L. REV. 417, 511 (2000) ("There are choices and decisions that the person whose life is on the line ought to be allowed to make, as a basic part of human dignity and autonomy. Whether to stake your life on a mental defect defense is one of those choices.").

79. *Recent Cases: Ninth Circuit Affirms Denial of Unabomber Theodore Kaczynski's Request to Represent Himself at Trial*, 115 HARV. L. REV. 1253, 1256 (2002).

80. Faretta v. California, 422 U.S. 806, 833–34 (1975).

81. *Cf.* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 751 (1989) (describing as "astonishing" the Supreme Court's use of the phrase, "If the right to privacy means anything, it is . . ." in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

82. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009, 1016 (1974).

tradition protects individual liberty by making it difficult for the government to subject individuals to criminal sanctions. It assigns "great social value to keeping the state out of disputes" and erects high barriers to criminal charging, conviction, and punishment.[83] It is distinguished from the inquisitorial tradition in continental Europe, which places an affirmative duty on judicial and prosecutorial officials to see that the law is carried out and regards the accused as a primary source of information and evidence.[84]

With the highest per capita incarceration rate in the world,[85] and more than two million people in United States jails and prisons,[86] how fully our accusatorial tradition is observed in practice is a reasonable question.[87] Nevertheless, at least in theory, our criminal justice system places a premium on protecting the liberty of those who might be subjected to criminal charging and prosecution. The accusatorial tradition provides the normative basis for a range of due process safeguards in our constitutional system,[88] including the "probable cause" requirement for arrest,[89] the presumption of pretrial release,[90] the privilege against compulsory self-incrimination,[91] the presumption of innocence and the placement of the burden of proof on the prosecution,[92] and the high "beyond a reasonable doubt" standard for

83. *Id.* at 1017. In his essay, Professor Goldstein presented idealized descriptions of the accusatorial and inquisitorial traditions and was careful to point out that the American system of criminal justice incorporates many inquisitorial elements, just as European inquisitorial systems have accusatorial elements. *Id.* at 1019.

84. *Id.* at 1018–19.

85. THE SENTENCING PROJECT, *New Incarceration Figures: Rising Population Despite Falling Crime Rates*, *at* http://www.sentencingproject.org/pdfs/1044.pdf (last visited Feb. 15, 2005) (on file with the North Carolina Law Review).

86. According to the Federal Bureau of Justice Statistics, 2,085,620 prisoners were held in federal or state prisons or in local jails on December 31, 2003. BUREAU OF JUSTICE STATISTICS, *Prison Statistics*, *at* http://www.ojp.usdoj.gov/bjs/prisons.htm (last visited Feb. 15, 2005) (on file with the North Carolina Law Review).

87. *See generally* David Cole, *As Freedom Advances: The Paradox of Severity in America Criminal Justice*, 3 U. PA. J. CONST. L. 455, 455 (2001) (exploring how the United States can simultaneously be "a leader of the 'free world' and of the incarcerated world").

88. *See generally* Rogers v. Richmond, 365 U.S. 534, 541 (1961) (discussing how coerced confessions "offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system"); Chambers v. Florida, 309 U.S. 227, 236 (1940) (explaining that the Due Process Clause was intended to guarantee procedural safeguards "to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority").

89. Brinegar v. United States, 338 U.S. 160, 175–76 (1949); Johnson v. United States, 333 U.S. 10, 13–14 (1948).

90. Stack v. Boyle, 342 U.S. 1, 7–8 (1951) (Jackson, J., concurring).

91. Miller v. Fenton, 474 U.S. 104, 109–10 (1985); Watts v. Indiana, 338 U.S. 49, 54–55 (1949).

92. Taylor v. Kentucky, 436 U.S. 478, 483–86 (1978).

that burden.[93] Thus, the mere possession of a ne'er-do-well reputation is inadequate to land a person in court, and the existence of a reasonable doubt as to any element of a charged offense requires an acquittal at trial.

Faretta does not comport with this tradition. Self-representation makes it substantially more, not less, likely that a defendant will be found guilty and punished, regardless of her actual culpability. In addition to the obvious loss of legal expertise, pro se defendants face unique problems handling evidence, addressing the jury, and examining witnesses, and may have limited access to legal materials if detained prior to trial.[94] The Court itself acknowledged in *Faretta* that it was "cutting against the grain" of its Sixth Amendment jurisprudence, the basic thesis of which being "that the help of a lawyer is essential to assure the defendant a fair trial."[95] It is "undeniable" that in most cases "defendants could better defend with counsel's guidance than by their own unskilled efforts."[96] Self-representation, the Court later observed, is "a right that when exercised usually increases the likelihood of a trial outcome unfavorable to the defendant."[97]

B. The Adversarial Process

1. The Fundamental Norm of Challenge

Even if *Faretta*'s recognition of defendant autonomy as an independent value cuts against the accusatorial tradition, it might still advance the goals of a separate tradition in our criminal justice system, the adversarial process. This tradition involves the method of resolving disputes at trial. The parties—the prosecutor and the

93. *In re* Winship, 397 U.S. 358, 362–64 (1970).

94. *See generally* Decker, *supra* note 29, at 560–69, 598 (considering the pro se defendant's procedural concerns and concluding that self-representation is inadvisable).

95. Faretta v. California, 422 U.S. 806, 832–33 (1975). *See also id.* at 851 (Blackmun, J., dissenting) ("[F]rom start to finish the development of the right to counsel has been based on the premise that representation by counsel is essential to ensure a fair trial.").

96. *Id.* at 834. This point was made even more bluntly by the dissenting justices. There are "obvious dangers of unjust convictions in allowing all defendants to represent themselves at trial." *Id.* at 851 (Blackmun, J., dissenting). "The fact of the matter is that in all but an extraordinarily small number of cases an accused will lose whatever defense he may have if he undertakes to conduct the trial himself." *Id.* at 838 (Burger, C.J., dissenting).

97. McKaskle v. Wiggins, 465 U.S. 168, 177 n.8 (1984); *see also* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161 (2000) ("No one, including Martinez and the *Faretta* majority, attempts to argue that as a rule pro se representation is wise, desirable, or efficient.").

defendant—play an aggressive role in presenting the evidence, challenging their opponents, and shaping the legal issues. They do so before a neutral and relatively passive judge and jury.[98] The freedom of the parties is not absolute: they are constrained by substantive law, rules of procedure, ethical rules, and standards of decorum. The prosecutor is further constrained by a general duty to see justice done.[99] Nevertheless, the American system depends far more on the parties' aggressive pursuit of their own interests than do most European systems, which depend instead on judicial supervision and control to move the process along.[100]

Elements of the adversarial process are also incorporated in our constitutional system.[101] Among other rights, defendants are entitled to compel the appearance of witnesses in their favor,[102] to confront and cross-examine witnesses,[103] to testify on their own behalf,[104] to be present at all stages of the trial,[105] and to have access to certain expert services to assist in the evaluation, preparation, and presentation of their defense.[106] Perhaps the most important constitutional right in this regard is the right to counsel.[107] The Supreme Court has premised its Sixth Amendment jurisprudence on the idea that by promoting "partisan advocacy on both sides of a case," the provision of counsel to defendants advances the ultimate goal of the adversarial system—"that the guilty be convicted and the innocent go free."[108] Defense lawyers, the Court wrote in *Gideon v. Wainwright*,[109] are "necessities, not luxuries" in the adversarial system.[110]

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98. Goldstein, *supra* note 82, at 1016.

99. Berger v. United States, 295 U.S. 78, 88 (1935) (describing the prosecutor as "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").

100. Goldstein, *supra* note 82, at 1018–19.

101. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 123 (1978) ("[T]he adversary system stands with freedom of speech and the right of assembly as a pillar of our constitutional system.").

102. U.S. CONST. amend. VI; Washington v. Texas, 388 U.S. 14, 19 (1967).

103. U.S. CONST. amend. VI; California v. Green, 399 U.S. 149, 157–64 (1970); Douglas v. Alabama, 380 U.S. 415, 418 (1965).

104. Rock v. Arkansas, 483 U.S. 44, 51 (1987).

105. Illinois v. Allen, 397 U.S. 337, 338 (1970).

106. Ake v. Oklahoma, 470 U.S. 68, 77 (1985).

107. *See* United States v. Cronic, 466 U.S. 648, 656–57 (1984).

108. Herring v. New York, 422 U.S. 853, 862 (1975).

109. 372 U.S. 335 (1963).

110. *Id.* at 344 (stating that it is an "obvious truth" that "in our adversary system of justice any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him").

The adversarial and accusatorial traditions overlap in significant respects, and not all procedures and rights can be cleanly divided into "adversarial" or "accusatorial" baskets.[111] One important difference is the way each tradition values defendant's liberty. While accusatorial safeguards protect liberty as an inherent value, a good in and of itself, the adversarial system protects the liberty of the prosecutor and defendant (subject to the rules of substantive law, procedure, ethics, etc.) as an instrumental value: because doing so normally facilitates our adversarial justice system and, thus, advances the cause of justice.

The qualifier "normally" is important. Underlying the adversarial system is an expectation about how the parties should behave—"a fundamental norm of challenge."[112] Prosecutors will seek to convict and impose the punishment they believe appropriate, under the applicable law and facts, to the offense. Defendants will put up resistance, to the extent they can: filing motions, challenging the government's evidence, cross-examining witnesses, arguing the law, marshaling and presenting available exculpatory evidence, and casting the facts in the best light during closing argument.[113] They will seek the dismissal of the charges, seek an acquittal if the case goes to trial, and try to minimize the impact of any conviction.[114] They will take all steps allowed by law to secure either their release or the least severe punishment possible.

This is not to say that every defendant must stage a Stalingrad defense. A range of defense strategies may be appropriate based on the facts of each case. A defendant may reasonably decide not to pursue a particular strategy or invoke a particular right in order to increase the likelihood of success on another strategy or to limit her overall risk of conviction. Furthermore, even in our adversarial system, limiting criminal liability is not the only appropriate goal for a defendant. Acceptance of responsibility and expression of remorse are desirable, even (or especially) when a more contentious approach might produce a lesser sentence.[115] The same is true for the goals of

111. For example, the neutral and relatively passive role of trial judges serves both traditions by allowing the parties to develop the evidence and legal issues adversarially and by protecting the accused's status as an innocent until a final verdict is reached.

112. Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOL. 52, 52 (1967).

113. *See id.* (explaining that the adversary system "depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process").

114. *See* Dix, *supra* note 22, at 240.

115. *See* Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology*

sparing victims, family members, and witnesses the burden of attending and participating in a long, contentious trial.

The problem arises when a defendant's conduct or objectives are so completely contrary to our expectations that the adversarial process fails to be "meaningful." This can occur in several ways. Defense attorneys may fail to take basic steps in defense of their clients because of incompetence, laziness, overwork, or institutional pressures that lead them to take into consideration interests other than those of their clients.[116] And as we have seen, defendants themselves may refuse to present exculpatory or mitigating evidence, argue viable defenses, or otherwise act in an irrational or self-destructive manner.

Such deviant conduct undermines the "fundamental norm of challenge"[117] underlying the adversarial system and its ultimate objectives. With respect to the performance of defense lawyers, the Supreme Court has cautioned that the Constitution is not satisfied by the mere presence of counsel at trial. Instead, to ensure that the adversarial testing is "meaningful," defense counsel must perform with a certain degree of competence.[118] As the Court wrote in 1984, "if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated .... 'While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.' "[119] To be sure, at the same time it wrote these words, the Court set forth a low standard for effective assistance of counsel under the Sixth Amendment. Applying this standard, courts have sometimes upheld performances by defense counsel ranging from the uninspired to the abysmal, even in capital cases.[120] Nevertheless, the Court has not retreated from its teleological (as opposed to formalistic) conception of the adversary system, requiring judicial intervention when defense lawyers perform

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into Criminal Procedure, 114 YALE L.J. 85, 109–18 (2004) (discussing the social and psychological benefits of remorse and apology).

116. *See* Meredith A. Nelson, *Quality Control for Indigent Defense Contracts*, 76 CAL. L. REV. 1147, 1149–68 (1988).

117. *See* Skolnick, *supra* note 112, at 52–53.

118. United States v. Cronic, 466 U.S. 648, 656–57 (1984).

119. *Id.* (quoting United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

120. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1835–44 (1994); Jeffrey Levinson, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147–48 (2001).

in a manner not likely to "advance the public interest in truth and fairness."[121]

As for self-destructive conduct by defendants themselves, the next Section will show that until the Supreme Court recognized defendant autonomy as an independent constitutional value in *Faretta*, judges never doubted their authority to intervene, either to take steps to restore meaningful adversarial testing or assume more control over the trial itself.

2. Waiver and the "Protecting Duty" of Courts

Prior to the due process revolution of the twentieth century, criminal defendants in America had few guaranteed rights. Of those, courts seldom allowed them to be waived.

This hostility to waiver was exemplified in the "eleven juror" cases of the nineteenth century, which rejected the validity of convictions reached after defendants had consented to the removal or disqualification of a juror during a trial. The common law view was set forth by the New York Court of Appeals in its 1858 decision *Cancemi v. People*:[122]

> Criminal prosecutions involve public wrongs, "a breach and violation of public rights and duties," which affect "the whole community, considered as a community, in its social and aggregate capacity .... The penalties or punishments, for the enforcement of which they are a means to the end, are not within the discretion or control of the parties accused; for no one has a right, by his own voluntary act, to surrender his liberty or part with his life. The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away "without due process of law," when forfeited, as they may be, as a punishment for crimes.[123]

This view reflected what might be described today as a "concern for public-regarding justice."[124] The criminal law existed to redress violations that "affect the whole community."[125] At the same time, the public maintained an interest in the liberty of all its subjects—and

121. Polk County v. Dodson, 454 U.S. 312, 318 (1981).
122. 18 N.Y. 128 (1858).
123. *Id.* at 136–37 (citations omitted).
124. *See* Tracey L. Meares, *What's Wrong with* Gideon, 70 U. CHI. L. REV. 215, 219 (2003).
125. *Cancemi*, 18 N.Y. at 136–37.

that liberty could not be forfeited by consent, but only through due process of law.

The idea of forfeiture can be traced to the influential writings of John Locke, who believed that, while the rights to life and liberty cannot be waived or transferred by its possessor, they can be forfeited as punishment for an act of wrongdoing.[126] Quoting Blackstone, the *Cancemi* court put it this way: "[T]he 'natural life, being the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority.' "[127] The state can deprive a person of his life or liberty only after he has forfeited his rights through the commission of a crime.

Early American courts applied the concept of inalienability broadly in criminal cases. Defendants had very limited ability to affect the system through the waiver of rights. While they could dispense with such procedural "particulars" as objecting to jurors and contesting certain facts, they could not consent to such "radical changes in great and leading provisions" of trial procedure as the "highly dangerous innovation" of eleven-person juries.[128] The trial court's consent to a defendant's waiver was sufficient ground for an appellate court to vacate the conviction.[129] As late as 1898, the U.S.

126. *See* Hugo Bedau, *The Right to Life*, 52 THE MONIST 550, 567–68 (1968); Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 111–12 (1978); Terrance McConnell, *The Nature and Basis of Inalienable Rights*, 3 J.L. & PHIL. 25, 28–29 (1984); A. John Simmons, *Inalienable Rights and Locke's Treatises*, 12 PHIL. & PUB. AFF. 175, 178–79 (1983). The idea of inalienable rights is also reflected in the Thirteenth Amendment, which prohibits slavery and involuntary servitude even if entered into voluntarily. *See* Bailey v. Alabama, 219 U.S. 219, 242–45 (1911). The only exception to the Amendment's command involves "punishment for crime whereof the party shall have been duly convicted." U.S. CONST. amend. XIII, § 1. Thus, the right not to be enslaved can be forfeited, but not alienated.

127. *Cancemi*, 18 N.Y. at 137 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES 129); *see also* Hopt v. Utah, 110 U.S. 574, 579 (1884) (holding that a defendant cannot waive his right to be present at trial because "[t]he public has an interest in his life and liberty"), *quoted in* Schick v. United States, 195 U.S. 65, 84 (1904) (Harlan, J., dissenting), Lewis v. United States, 146 U.S. 370, 374 (1892).

128. *Cancemi*, 18 N.Y. at 137–38. The critical importance of trial by jury as a means of protecting liberty was unquestioned in early American history. *See* DAVID J. BODENHAMER, FAIR TRIAL: RIGHTS OF THE ACCUSED IN AMERICAN HISTORY 32–34 (1991); John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC'Y REV. 261, 269–70 (1979).

129. For another example, see *State v. Carman*, 18 N.W. 691 (Iowa 1884), *overruling State v. Kaufman*, 2 N.W. 227 (Iowa 1879). *See generally* Susan C. Towne, *The Historical Origins of Bench Trial for Serious Crime*, 26 AM. J. LEGAL HIST. 123, 154–55 (1982) (criticizing *Cancemi* and *Carman*).

Supreme Court, following the logic of *Cancemi*, prohibited a federal defendant from consenting to trial by an eight-person jury.[130]

The late nineteenth and early twentieth centuries saw significant changes in the American system of criminal justice. As bureaucratization and professionalism developed among judges and prosecutors, an increased emphasis on efficiency began to affect notions of due process in criminal trials.[131] The development of various due process protections—and, in particular, the increased availability of defense counsel—alleviated courts' concern that defendants might waive or bargain away rights without understanding the inherent risk.[132]

At the same time, plea bargaining, once actively discouraged by judges,[133] came to dominate the criminal system. A defendant who pleads guilty effectively waives at once the privilege against self-incrimination, the right to confrontation, and the right to a jury trial.[134] It is, as one writer put it, "the entire ball game."[135] As plea bargaining emerged as the primary means of resolving criminal charges, courts began to regard concerns about inalienable rights and self-destructive waiver as anachronistic, and asked why they should prevent a defendant from waiving a jury trial if he could relinquish the right to trial altogether. As the Supreme Court eventually asked, "If he be free to decide the question for himself in the latter case, notwithstanding the interest of society in the preservation of his life and liberty, why should he be denied the power to do so in the former?"[136]

In 1904, the Supreme Court permitted defendants to waive jury

130. Thompson v. Utah, 170 U.S. 343, 353–55 (1898). At the time of the offense, Utah was a territory under the jurisdiction of the federal government. The Court held that the jury provisions in Article III and the Sixth Amendment carried the implied condition that defendants be tried before a jury composed of "not less than twelve persons." *Id.* at 350. The very jurisdiction of a federal court to issue a criminal conviction, when the defendant had pleaded not guilty, rested on the foundation of a jury verdict. Patton v. United States, 281 U.S. 276, 294 (1930) (citing Low v. United States, 169 F. 86, 92 (6th Cir. 1909)).

131. BODENHAMER, *supra* note 128, at 83–87.

132. *See* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 121 (1999).

133. *See* Albert W. Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC'Y REV. 211, 214–17 (1979); Langbein, *supra* note 128 at 264–65.

134. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

135. Ralph S. Spritzer, *Criminal Waiver, Procedural Default and the Burger Court*, 126 U. PA. L. REV. 473, 476 (1978).

136. Patton v. United States, 281 U.S. 276, 305, 309–10 (1930); *see also* Schick v. United States, 195 U.S. 65, 71–72 (1904) (reasoning that the ability of a defendant to plead guilty or admit incriminating facts supports the conclusion that he may waive his right to a jury trial).

trials in cases involving petty criminal offenses.[137] It expanded this ruling to all cases in its 1930 decision *Patton v. United States*.[138] There the Court reasoned that the framers had intended to preserve the right to trial by jury "primarily for the protection of the accused."[139] The ancient doctrine that the accused could waive nothing was no longer necessary in light of the changed conditions of the criminal law.[140] At common law, Justice Sutherland explained, punishments were much more severe,[141] and defendants were afforded few of the procedural protections available today. In an effort to alleviate the harshness of these conditions, and out of a then-well-founded "anxiety of the courts to see that no innocent man should be convicted," common law judges demanded that all parties strictly adhere to "every technical requirement" of criminal procedure.[142] Yet ever since the "humane policy" of modern criminal law had established rights by which a defendant could effectively make a defense, courts no longer had any reason to abide by the ancient doctrine.[143] Defendants could be trusted to act in their own self-interest, and in some circumstances (such as the existence of overwhelmingly negative pretrial publicity) waiver of jury trial might be in the defendant's best interests.[144]

Patton was the culmination of a substantial shift in American criminal justice: from the public-regarding, paternalistic, trial-based system exemplified by *Cancemi* to a system emphasizing bureaucratic efficiency, plea bargaining, and a general reliance on the ability of

137. *Schick*, 195 U.S. at 71–72. The Court stated, "When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy." *Id.*

138. 281 U.S. 276 (1930).

139. *Id.* at 296–98. Although the specific issue in *Patton* involved the constitutionality of a verdict reached by eleven jurors—one had withdrawn, as in *Cancemi*—the Court shifted its focus to the validity of bench trials generally, which, it wrote, "in substance amount[ed] to the same thing." *Id.* at 290.

140. *Id.* at 307–08 (quoting Hack v. State, 124 N.W. 492, 494–95 (Wis. 1910)).

141. At English common law, criminal conviction was often accompanied by such significant third-party effects as corruption of blood and forfeiture of estate. *Id.* at 296 (citing Dickinson v. United States, 159 F. 801, 820 (1st Cir. 1908) (Aldrich, J., dissenting)); *see also* Dix, *supra* note 22, at 217–18 (explaining that interests of persons other than the defendant were often at stake at common law); Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 8 n.28 (1970) (noting that at common law, because the consequences of a felony conviction affected the relatives of the defendant, waiver of trial was not permitted).

142. *Patton*, 281 U.S. at 307 (quoting Hack v. State, 124 N.W. 492, 494–95 (Wis. 1910)).

143. *Id.* at 308. This historical account was cited with approval by Justice Black in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

144. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 278 (1942); Edward L. Rubin, *Toward a General Theory of Waiver*, 28 UCLA. L. REV. 478, 488–89 (1981).

defendants to act in their own interest. Indeed, the *Patton* Court went so far as to describe the fear that a defendant might use waiver for self-destructive purposes as "based more upon useless fiction than upon reason."[145]

Still, the anti-paternalism of the Court did not reach so far as to give defendants a *right* to waive jury trials. Rather, it held, waiver could be conditioned on the consent of the judge and prosecutor.[146] Such a policy, the Court explained in *Singer v. United States*,[147] recognizes that the state maintains an interest "in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result."[148] Indeed, it wrote, "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[149]

With the conspicuous exception of the right to counsel, the rule established in *Patton* and *Singer* remains the law today. Courts may allow a defendant to waive the benefits afforded him by the Sixth Amendment's Public Trial, State and District, and Confrontation Clauses, but he does not have a right to compel a private trial, transfer his case to another district, or "try the case by stipulation."[150] In each situation, the defendant's waiver can take effect only if the trial judge, and in some cases the prosecutor, consents. Even with the meteoric rise of plea bargaining in the twentieth century, the Court has steadfastly refused to recognize a right of defendants to plead guilty; entry of pleas remains conditional on the court's approval.[151]

In recognizing a right to insist on the *opposite* of the right to counsel, *Faretta* was and remains an exceptional ruling. There is a significant difference between permitting a benefit to be waived upon the consent of the court and establishing waiver as a right.

The sole condition that courts impose on the ability of defendants to exercise the *Faretta* right is a minimum level of mental competence. In *Johnson v. Zerbst*,[152] the decision that recognized a right to appointed counsel for indigent defendants in federal court, the Court also established the "voluntary, knowing, and intelligent"

145. *Patton*, 281 U.S. at 296 (quoting Dickinson v. United States, 159 F. 810, 820 (1st Cir. 1908) (Aldrich, J., dissenting)).
146. *Id.* at 312.
147. 380 U.S. 24 (1965).
148. *Id.* at 36.
149. *Id.* at 34–35.
150. *Id.*
151. North Carolina v. Alford, 400 U.S. 25, 38 n.11 (1970).
152. 304 U.S. 458 (1938).

standard used today for most attempted waivers of important trial rights.[153] While the standard has been described as carrying no "normative preference for or against waiver,"[154] its actual effect depends greatly on the context in which it is applied. Prior to *Faretta*, the discretion of trial judges in deciding whether to permit waiver of the right to counsel was practically unbounded.[155] In *Johnson*, Justice Black emphasized that a trial judge had a "serious and weighty responsibility"—a "protecting duty"—to see that counsel was not waived improperly.[156] After investigating the facts of the case "including the background, experience, and conduct of the accused," trial judges had to "indulge every reasonable presumption" against waiver when making their final decisions.[157] The practical effect of this cautionary language was to incline judges to resolve doubts against the waiver of counsel, and to protect defendants whenever the evidence suggested that their choices might be self-destructive. Significantly, before *Faretta*, no conviction had ever been reversed because the trial court refused to allow the defendant to proceed pro se.[158]

As this discussion has shown, the right and duty of courts to

153. The Supreme Court has explained that because the *Johnson* standard applies to the waiver of rights directly related to "the fair ascertainment of truth at a criminal trial," it involves a more demanding judicial determination than standards governing other rights. Schneckloth v. Bustamonte, 412 U.S. 218, 241–42 (1973).

154. William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 777 n.48 (1989); *see also* Tigar, *supra* note 141, at 8 (stating that the *Johnson* standard "stresses the consensual, 'free choice' character of waiver and its ultimate reliance upon the individual's freedom to forego benefits or safeguards through the uncoerced exercise of his rational faculties"). The *Johnson* standard is an example of what some writers call "soft paternalism" in that it seeks only to protect individuals from the consequences of possibly involuntary conduct. *See* 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF 12 (1986). Whether such a requirement is paternalistic at all is debatable. *Id.* at 12–16.

155. One court observed:

> Prior to *Faretta*, this Court held that an accused *may* waive the right to counsel and defend himself, but this was a discretionary matter for the trial court to decide. The defendant had no *right* to represent himself, but merely the *opportunity* if the trial court found it feasible and the defendant made a knowing, voluntary and intelligent waiver of his right to counsel.

Parker v. State, 556 P.2d 1298, 1300 (Okla. Crim. App. 1976) (citations omitted).

156. 304 U.S. at 465.

157. *Id.* at 464; *see also* Moore v. Michigan, 355 U.S. 155, 161 (1957) (stating that a "finding of waiver is not lightly to be made"); Von Moltke v. Gillies, 332 U.S. 708, 723–24 (1948) (plurality opinion) (holding that a "penetrating and comprehensive examination" must be made).

158. Michael P. Erhand, Note, *The Pro Se Defendant's Right to Counsel*, 41 U. CIN. L. REV. 927, 928 (1972).

protect defendants from self-destructive decisionmaking has been an integral component of American criminal justice. Even as defendants gained due process protections and greater control over the conduct of their defenses, including the ability to waive certain rights and benefits, courts maintained the ultimate authority to prevent defendants from acting in a manner that was manifestly contrary to their own interests and society's interests in a fair proceeding. They maintained their authority to intervene as necessary to preserve the "fundamental norm of challenge" underlying the adversarial system.

By recognizing a constitutional right to waive an obvious benefit, and by limiting the authority of courts to prevent its self-destructive exercise, *Faretta* was a radical break from prior tradition and jurisprudence. It was not the next logical step in the due process revolution or the development of America's adversarial process. Quite the contrary. In enabling defendants to dispense with the right to counsel, which by 1975 had come to be understood as critical to the effective functioning of the adversarial system, *Faretta* all but ratified the "sacrifice of unarmed prisoners to gladiators" and undermined a primary reason for allowing waiver of rights in the first place. It is thus no exaggeration to say that *Faretta* not only "cut against the grain" of the Court's previous Sixth Amendment jurisprudence, but also undermined foundational principles of modern American criminal procedure.

III. AUTONOMY IN THE CRIMINAL TRIAL

Even though *Faretta* broke from prior law and tradition, it might be argued, its recognition of a new constitutional value—protecting the right of a defendant to make certain decisions independent of concern for the objective fairness of the proceeding—was an overdue breakthrough for individual autonomy, one that has only begun to be realized in the criminal justice system. A closer examination, however, exposes the incoherence of this claim. Put simply, defendants lack the necessary conditions for the exercise of autonomy, in any meaningful sense of the term. It is helpful to begin by contrasting defendant autonomy with the more vibrant conception of autonomy that the Supreme Court has applied to allow Americans outside the criminal justice system to determine their own lives.

A. Autonomy as a General Constitutional Value

The idea of autonomy has acquired considerable popularity in

the United States and other western societies.[159] It has been embraced by philosophers whose views intersect in few other ways.[160] Kant, for example, considered autonomy an inherent value of all persons and a necessary precondition for morality,[161] whereas Nietzsche championed autonomy because it allows a person to escape the shackles of morality and establish his own values.[162]

As autonomy has played an increasingly important role in modern moral and political philosophy, so has it become central to the Supreme Court's constitutional jurisprudence.[163] It first emerged as a constitutional value in the 1920s when the Supreme Court applied the principle of substantive due process to shield from state interference the ability of parents to direct the upbringing and education of their children.[164] The Court thereafter extended constitutional protection to a range of personal decisions and activities including the right to procreate,[165] the right to marry,[166] the right to travel freely through the states,[167] and the right to live with one's nuclear or extended family.[168] In its First Amendment jurisprudence, the Court has applied the guarantees of religious liberty, association, and free speech to protect the ability of individuals to create and to act on their own values and preferences "often precisely against the conflicting standards of reasonable value held by the state or persons who control the state."[169] Most spectacularly, the Court has applied the so-called "right to privacy" to protect the right of individuals to use contraceptives,[170] the right of women to terminate early pregnancies,[171] and the right of gays and

159. JOSEPH RAZ, THE MORALITY OF FREEDOM 369–70 (1986).

160. *See* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 57–58 (1988).

161. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 74–79 (H. J. Paton trans., Harper & Row 1964).

162. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 58–60 (Walter Kaufman et al. trans., Vintage 1969).

163. *See generally* PAUL W. KAHN, LEGITIMACY AND HISTORY 154–70 (1992) (detailing the Court's constitutionalization of individual autonomy).

164. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

165. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

166. Loving v. Virginia, 388 U.S. 1, 12 (1967).

167. Shapiro v. Thompson, 394 U.S. 618, 629 (1969).

168. Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977).

169. David A.J. Richards, *Autonomy in Law*, *in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 246, 252 (John Christman ed., 1989).

170. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965).

171. Planned Parenthood v. Casey, 505 U.S. 833, 860–61 (1992); Roe v. Wade, 410 U.S. 113, 153 (1973).

lesbians to engage in intimate sexual conduct.[172]

"Privacy," of course, is a misnomer for the legal protection that the Court recognized in *Griswold v. Connecticut*[173] and thereafter applied to other personal decisions. Privacy "consists of the ability of an individual to maintain control of the information about himself that is available to others."[174] In deciding to prohibit the use of contraception, Connecticut was attempting to interfere with its citizens' procreative decisions, not scrutinize their intimate lives.[175] To the extent that *Griswold* and *Roe v. Wade*[176] are seen as attempts to protect individuals' self-determination, they fit in well with the Court's other autonomy-based rulings.

The Court forcefully recapitulated its vision of autonomy in its recent sodomy decision, *Lawrence v. Texas*.[177] The liberty protected by the Due Process Clause, it wrote, "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[178] Courts uphold this presumption by shielding a range of fundamental individual behaviors and decisions—including "decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"[179]—from unwarranted governmental intrusion. The Court restated the constitutional basis for autonomy first set forth in *Casey*:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.

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172. Lawrence v. Texas, 539 U.S. 558, 578 (2003).

173. 381 U.S. 479 (1965).

174. DWORKIN, *supra* note 160, at 103 (1988).

175. The concepts of privacy and autonomy are related in that violations of each "exhibit a common failure to respect another person as an independent moral agent," but they "do so in different ways and ought not to be assimilated." *Id.* at 103–04; *see also* RONALD DWORKIN, LIFE'S DOMINION 53 (1993) (distinguishing between "territorial" sense of privacy, confidentiality, and "sovereignty over personal decisions"). The Court has extended constitutional protection to a range of privacy interests, properly understood, including the interests against "disclosure of personal matters," Whalen v. Roe, 429 U.S. 589, 599–600 (1977), unwarranted intrusions into the privacy of one's home, Stanley v. Georgia, 394 U.S. 557, 564 (1969), and invasions of bodily integrity, Rochin v. California, 342 U.S. 165, 172–73 (1952).

176. 478 U.S. 186 (1986).

177. 539 U.S. 558 (2003).

178. *Id.* at 562.

179. *Id.* at 574.

> Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[180]

Some have argued that *Faretta* is the logical application of these principles to criminal defendants.[181] A few have gone so far as to argue that *Faretta* represents the apex of the Court's respect for individual autonomy and should be replicated more fully *outside* the criminal-trial context.[182] Given the individualistic rhetoric that animates both *Faretta* and the Court's substantive due process jurisprudence, the connection is not wholly disingenuous. Indeed, one of the longstanding objections to the Court's substantive due process jurisprudence has been its lack of obvious limits. While the Court has stated that the Constitution protects those decisions and activities that are "fundamental" to the ability of persons to determine their own existence, the line on what qualifies as fundamental is far from clear.[183] To some, this problem reflects the fact that there are "no obvious limits" on the philosophical concept of autonomy itself, since "any act at all can be vested with vast personal significance by a particular person."[184] Nevertheless, the Court has made clear that some line, however arbitrary, will be observed in its constitutional jurisprudence. As the Court wrote in *Washington v. Glucksberg*,[185] a decision rejecting the right to assisted suicide, "[t]hat many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected."[186]

In *Lawrence*, the Court characterized its jurisprudence as

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180. *Id.* (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)).

181. *See, e.g.*, Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1747–53 (1992) (arguing that the adversarial process and such procedural protections as the privilege against self-incrimination, the right to counsel, and the right to self-representation "further reflect the high value the Constitution places on individual autonomy").

182. *See, e.g.*, Lois Shepherd, *Dignity and Autonomy After* Washington v. Glucksberg*: An Essay About Abortion, Death, and Crime*, 7 CORNELL J.L. & PUB. POL'Y 431, 466 (1998) ("Why, for example, should we not be required to treat women walking from their cars to abortion clinics in the exercise of their autonomous choices with at least the degree of respect we accord criminal defendants exercising their pro se rights in court . . . .").

183. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 268–72 (1977); *see also* Rubenfeld, *supra* note 81, at 752 ("To define 'fundamental' rights as those that cover matters 'fundamentally affecting persons' is less than entirely satisfactory.").

184. KAHN, *supra* note 163, at 156.

185. 521 U.S. 702 (1997).

186. *Id.* at 727–28 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33–35 (1973)).

involving certain areas of human activity: "marriage, procreation, contraception, family relationships, child rearing, and education."[187] This catalog could hardly be more removed from the kinds of decisions a criminal defendant makes at trial. Of course, the Court has applied principles of substantive due process in the criminal realm. It has, for example, held that prisoners have liberty interests in avoiding an involuntary transfer to a mental hospital,[188] and in avoiding the unwanted administration of psychotropic drug.[189] The Court has also applied the Due Process Clause to protect the rights of pretrial detainees to humane treatment and conditions,[190] and reversed state convictions in cases where the defendant was denied "fundamental fairness" at trial.[191] These cases reflect the breadth of issues that the Court has addressed under the rubric of substantive due process. In none of them, however, has the Court suggested that the value of autonomy that has emerged in *Griswold*, *Roe*, *Casey*, and *Lawrence* applies to the decisions of criminal defendants at trial, or commands any degree of deference to defendants' preferences by trial judges.

It is telling that while *Roe* was decided only two years before *Faretta*, that latter case—so concerned with the "free choice" of defendants—made no mention of the earlier landmark ruling protecting the personal decisions of women in the free world. The disconnect continues to the present day. The same five justices that championed autonomy as a constitutional value in *Lawrence* joined the majority decision so dismissive of defendant autonomy in *Martinez* three years earlier.[192] And Justice Scalia, who in *Lawrence* ridiculed the "famed sweet-mystery-of-life passage" of *Casey* quoted above,[193] wrote a concurring opinion in *Martinez* disclaiming the

187. *Lawrence*, 539 U.S. at 574.

188. Vitek v. Jones, 445 U.S. 480, 493 (1980).

189. Washington v. Harper, 494 U.S. 210, 221–22 (1990); *see also* Sell v. United States, 539 U.S. 166, 169 (2003) (establishing limited conditions under which government may involuntarily administer antipsychotic drugs to render mentally ill defendant competent to stand trial).

190. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Bell v. Wolfish, 441 U.S. 520, 538–39 (1979).

191. *See* Meares, *supra* note 124, at 217–20. Meares discusses the Court's "fundamental fairness" jurisprudence as a counterpoint to the Court's focus on the Sixth Amendment in *Gideon*—in her view, a "foundational shift" from "public-regarding justice" to the autonomy-based jurisprudence exemplified by *Faretta*. *Id.* at 225.

192. Justice Kennedy, the author of *Lawrence*, joined the opinion in *Martinez* but stated that it was "unnecessary to cast doubt upon the rationale" of *Faretta*. Martinez v. Court of Appeal of Cal., 528 U.S. 152, 164 (2000) (Kennedy, J., concurring).

193. *Lawrence*, 539 U.S. at 588 (Scalia, J., dissenting).

majority's "apparent skepticism" about *Faretta*.[194]

While this disconnect might be explained as a consequence of the Court's general failure to integrate its criminal and non-criminal constitutional principles,[195] a better explanation is the fact that free-world autonomy and the idea of autonomy at issue in *Faretta* are alien concepts. As the next Section will explain, it is simply not coherent to speak of autonomy in the context of the artificial and limited decisions that arise in criminal trials. The concept of autonomy has come to play a vibrant and resilient role in the Court's greater constitutional jurisprudence, but as used in *Faretta* and its progeny, it is an illusion.

B. *The Absence of Conditions for Autonomy*

1. Mental Competence, Independence, and an Adequate Range of Options

While autonomy has been said to have a "protean" nature, resisting easy definition,[196] scholars generally agree that it is a far richer concept than "free choice." The etymology of the word indicates that it is the "law" or "rule" of oneself.[197] Rather than simply the ability to choose from a fixed menu of options at a particular point in time, autonomy involves the determination or authorship of one's own life.[198] Justice Scalia's derision

194. *Martinez*, 528 U.S. at 165 (Scalia, J., concurring) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.").

195. *See generally* AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997) (noting the rift between traditional constitutional law and criminal procedure and arguing for a renewed synthesis).

196. Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994); *see also* DWORKIN, *supra* note 160, at 6 (stating that autonomy has at various times been "equated with dignity, integrity, individuality, independence, responsibility, and self-knowledge"); Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 31–32 (2001) (explaining that autonomy "has remained a surprisingly nebulous and ill-defined term in philosophical inquiry").

197. *See* DWORKIN, *supra* note 160, at 12–13; FEINBERG, *supra* note 154, at 27. Based on the more frequent application of the term to states and institutions, Feinberg notes that the idea of *individual* autonomy may be a "political metaphor." FEINBERG, *supra* note 154, at 27–28. For a discussion of the Supreme Court's use of "autonomy" to describe the rights of states, Indian tribes, and businesses, see John P. Safranek & Stephen J. Safranek, *Can the Right to Autonomy Be Resuscitated After* Glucksberg*?*, 69 U. COLO. L. REV. 731, 737–38 (1998).

198. Joseph Raz, *Autonomy, Toleration, and the Harm Principle*, *in* ISSUES IN CONTEMPORARY PHILOSOPHY: THE INFLUENCE OF H.L.A. HART 313–14 (Ruth Gavison ed., 1987). *See also* DWORKIN, *supra* note 175, at 166 (describing autonomy as

notwithstanding, many have found the "right to define one's own concept of existence" formulation of *Casey* to be an elegant encapsulation of the idea of autonomy. Others have cited Isaiah Berlin's account of what he called "positive liberty":

> I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men's, acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside. I wish to be somebody, not nobody; a doer—deciding, not being decided for, self-directed and not acted upon by external nature or by other men as if I were a thing, or an animal, or a slave incapable of playing a human role, that is, of conceiving goals and policies of my own and realizing them.[199]

How incomprehensible and unattainable this wish list would be to a person undergoing a criminal trial! In the United States, most criminal defendants charged with serious offenses spend the time leading up to their trial in jails, "total institutions" which subject inmates to comprehensive and absolute rules and commands[200] and generally afford them no more safe or humane living conditions than convicted prisoners. Even if released before trial, the looming presence of a pending criminal charge severely constrains the choices a defendant can make in life. At the trial itself—the forum within which the *Faretta* notion of "autonomy" specifically applies—the defendant has no ability to "conceive of his own goals and policies and realize them." He is free only to choose among the options that "external forces" afford him, options both created and bounded by the rules of procedure, rules of evidence, and substantive law: for example, how to plead, what defenses to present, whether to testify or remain silent, what information should be presented to the jury and

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the right "to confront the most fundamental questions about the meaning and value of their own lives for themselves, answering to their own consciences and convictions"); Gerald Dworkin, *The Concept of Autonomy*, *in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 54, 60 (John Christman ed., 1989) (stating that while autonomy encompasses the entire way one lives one's life, freedom is "decided at specific points in time").

199. Isaiah Berlin, Inaugural Address Before the University of Oxford (Oct. 31, 1958), *in* Isaiah Berlin, *Two Concepts of Liberty*, *in* LIBERALISM AND ITS CRITICS 118, 131 (1969).

200. *See* ERVING GOFFMAN, ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES 1–124 (1961); *see also* RAZ, *supra* note 159, at 418–19 ("Imprisoning a person prevents him from almost all autonomous pursuits.").

how, what objections and legal arguments to make. These limited choices are a far cry from the rich vision of liberty contemplated by Berlin, or even the minimal degree of free movement, independence, and choice that ordinary Americans would consider essential to their sense of self.

As discussed in Part II, the only condition that courts impose on the exercise of *Faretta* autonomy is a minimum level of mental competence. Under the *Johnson* "voluntary, knowing, and intelligent standard," courts ask whether the defendant actually understands the consequences of a particular decision and whether he is acting voluntarily.[201] Yet while a minimum level of mental ability is a necessary condition for autonomy, it is not sufficient. As the philosopher Joseph Raz has explained, for a person to be "significantly autonomous,"[202] she must also be independent and have an adequate range of options.[203]

The condition of independence requires that one's choices not be dictated by personal needs. It also requires that one's choices not be coerced or manipulated. Both coercion and manipulation are intentional acts that "subject the will of one person to that of another":[204] coercion by diminishing a person's options; manipulation by perverting "the way that person reaches decisions, forms preferences or adopts goals."[205] While the degree of independence necessary for autonomy has been debated, a defendant in a criminal trial clearly cannot be described as independent in this way. All of the relevant choices are coerced and manipulated by the law. Indeed, the entire criminal justice system is, by design, coercive: it is the state, through its legal rules, procedures, and other authority, that establishes the defendant's choices and constraints on what he may do.

The "voluntariness" component of the *Johnson* standard considers whether the defendant has been coerced in expressing his preferences with respect to the choices afforded him in court. It does not consider the artificiality of those choices, or the fact that the defendant's preferences have been shaped, if not altogether

201. *See* Godinez v. Moran, 509 U.S. 389, 401 n.12 (1993); Johnson v. Zerbst, 304 U.S. 458, 465, 469 (1937).

202. RAZ, *supra* note 159, at 154.

203. *Id.* at 372; *see also* Fallon, *supra* note 196, at 886 (arguing that necessary conditions for descriptive autonomy include "(i) critical and self-critical ability, (ii) competence to act, (iii) sufficient options, and (iv) independence of coercion and manipulation").

204. RAZ, *supra* note 159, at 378.

205. *Id.* at 377.

generated, by the criminal justice system itself. It is only this narrow perspective that allows courts to speak of "autonomy" when allowing mentally competent capital defendants to waive the presentation of mitigating evidence, without giving any thought to the factors that led the defendants to form their preference for execution or considering whether they would have developed such a death wish in the outside world.

As Gerald Dworkin and Harry Frankfurt have explained, autonomy involves not merely the voluntary expression of a person's immediate or "first-order" preferences, but rather the capacity to make those preferences "authentic" through independent and critical reflection and consideration of "higher-order" preferences and values.[206] A person is autonomous only "if he identifies with his desires, goals, and values, and such identification is not influenced in ways which make the process of identification in some way alien to the individual."[207] Authenticity is not possible for defendants making decisions within the closed, regimented, and circumscribed context of the criminal justice system, and it is a mistake for courts to assign special constitutional value to particular preferences on the ground that they are somehow intrinsic to the defendant's sense of self.

Nor is the other necessary condition for autonomy—the existence of an adequate range of options—available to criminal defendants. To be autonomous, a person needs options of sufficient variety to enable him "to sustain throughout his life activities which, taken together, exercise all the capacities human beings have an innate drive to exercise, as well as to decline to develop any of them."[208] There is, of course, some circularity in a conception of autonomy that says people should be allowed to exercise all the capacities that they have "an innate drive to exercise." Yet no matter where the line is drawn, it is clear enough that significant autonomy does not lie with respect to the decisions and actions taken by a defendant in a criminal trial. Again, the state's coercive authority sharply limits the options available to the defendant. This point hardly needs illustration: a defendant may be afforded the

206. DWORKIN, *supra* note 160, at 61; Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, *in* THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY 64 (John Christman ed., 1989); *see also* John Christman, *Introduction*, *in* THE INNER CITADEL 3, 13 (John Christman ed., 1989) ("[A]t its most basic level of application, autonomy is more properly seen as a property of preference or desire formation.").

207. DWORKIN, *supra* note 160, at 61.

208. RAZ, *supra* note 159, at 375; *see also* Fallon, *supra* note 196, at 888 & n.83 (noting that the " 'happy slave' is not autonomous just because her goals and desires have shrunk adaptively to fit the options open to her").

opportunity to present certain evidence or register certain objections during the course of a trial, but the choices *not* available to such a person—e.g., to shut the trial down, visit Europe, enroll in medical school—are limitless.

It is of no consequence that the few choices afforded a defendant may have grave consequences. Clearly, criminal trials fundamentally affect the defendants involved, and a defendant's decision can sometimes mean the difference between life and death. The question, however, is whether sufficient conditions, including independence and a sufficiently diverse range of options, exist to say that the defendant can define his own existence. That cannot be said of any defendant, capital or otherwise. As Raz wrote of his hypothetical Hounded Women, hunted perpetually by a carnivorous animal on a small desert island: even if she has enough resources to choose between survival and death, it cannot be said that this choice has anything to do with autonomy—"and we need not deny that she may be very grateful that at least she was left this choice."[209]

2. Ascriptive Autonomy

To this point, the Article has discussed the empirical condition of autonomy. Building on an analysis by Joel Feinberg,[210] Richard Fallon explained that "descriptive" autonomy regards autonomy as a matter of degree and recognizes that while people "who are able to deliberate with critical insight and self-awareness and to choose from abundant options are highly autonomous," others may not be autonomous at all.[211] Normative or "ascriptive" autonomy, by contrast, regards all persons as fully autonomous, regardless of whether the necessary conditions under the descriptive conception exist. Under this view, autonomy is "a moral entitlement of personhood": a right to have one's decisions respected in all circumstances, not overridden by the paternalistic concerns of others.[212] It is, to use Feinberg's terminology, "autonomy as right."[213]

The distinction between the descriptive and ascriptive

209. RAZ, *supra* note 159, at 374–76.

210. Feinberg identified at least four usages of the term autonomy: the capacity to govern oneself, the actual condition of self-government and its associated virtues, an ideal of character derived from that conception, and a right to personal sovereignty. FEINBERG, *supra* note 154, at 28. In setting forth the descriptive/ascriptive dichotomy, Fallon acknowledged that he was painting with a broader brush. Fallon, *supra* note 196, at 879 n.20.

211. Fallon, *supra* note 196, at 877.

212. *Id.* at 878, 890–93.

213. FEINBERG, *supra* note 154, at 47.

conceptions is useful to philosophical and legal thought. As Fallon showed, autonomy-based policy arguments can produce dramatically different results depending on how the term is used.[214] In the First Amendment context, for example, competing claims of descriptive and ascriptive autonomy can produce arguments both for and against government regulation of private speech and property.[215] Applying this dichotomy to the *Faretta* line of cases, however, is less fruitful. It is one thing to ascribe autonomy to citizens generally, notwithstanding the differences in conditions that may exist, for the purpose of evaluating paternalistic government action. It is quite another to begin with a closed system with rigidly circumscribed options, created and maintained by the state, and argue that the individuals placed within that system must be treated as autonomous—that notwithstanding the obviously inadequate conditions for autonomy in a criminal trial, the defendant's choices must be respected out of respect for her moral sovereignty.

Such a claim raises the question of the extent to which even ascriptive autonomy requires minimal threshold conditions. Fallon acknowledged, for example, that a certain minimal threshold of competence is required for ascriptive autonomy, which children and the mentally retarded may not meet.[216] A certain minimum independence and range of options must also be necessary, since to assume otherwise would lead to absurd results. The idea of autonomy simply makes little sense, for example, when applied to slaves or inmates in prisons, asylums, and concentration camps. Such "total institutions" exist for the purpose of denying individuals autonomy. It is similarly nonsensical to claim that the victim of a highway robbery acts autonomously—even if he remains in full possession of his mental faculties—when deciding how to answer the demand, "your money or your life."[217] To make the ascriptive claim in such narrow, coerced circumstances is to render the very idea of autonomy meaningless.

So too does the ascription of autonomy to criminal defendants who must decide whether relinquish their right to legal representation, present mental health defenses, or offer mitigating evidence. These choices are created and circumscribed by the full manipulative and coercive power of the state and neither qualitatively or quantitatively involve the minimum range of options that people

214. Fallon, *supra* note 196, at 903.
215. *Id.*
216. *Id.* at 891 n.97.
217. *See* Gerald Dworkin, *Acting Freely*, 4 NOUS 367, 372 (1970).

rightfully expect in a free society. To paraphrase Raz, we need not deny that a capital defendant, facing a lifetime in a prison cell, might be grateful for the opportunity to secure a comparatively quick death by execution[218]—but that is no reason to conclude that in making that decision he is, in any meaningful respect, autonomous.

CONCLUSION: BREAKING THROUGH THE ILLUSION

Today, phrases such as "autonomy" and "free choice" resonate throughout our constitutional and public discourse. The vision of liberty that opens Justice Kennedy's opinion in *Lawrence*—speaking of "an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"[219]—is one with appeal to citizens across the political spectrum and cultural divides of this nation, even if some strongly disagree with its application in particular cases.

The rhetoric of autonomy and free choice, however, can also mask or divert attention from inequality and injustice in our society. Feminist scholars have shown that it is a mistake in our "era of pervasive choice rhetoric" to overlook how women's choices are exercised within a context of socially-constructed constraints.[220] This insight applies with even greater force in the completely constructed and constrained context of the criminal justice system.

In writing the Court's most recent ruling on the right to self-

218. *See, e.g.*, BRUCE SPRINGSTEEN, *Johnny 99*, *on* NEBRASKA (Columbia Records 1982) (describing the desire of a young man sentenced to life in prison to be "put . . . on that killin' line" instead).

219. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

220. Marion Crain, *Rationalizing Inequality: An Antifeminist Defense of the "Free" Market*, 61 GEO. WASH. L. REV. 556, 574–80 (1993) (reviewing RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992)) (criticizing Professor Richard Epstein's "soulless" challenge to the antidiscrimination principle and his assumption that women freely choose their occupations); Martha Minow, *Choices and Constraints: For Justice Thurgood Marshall*, 80 GEO. L.J. 2093, 2100 (1992); *see also* Lucinda Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 931–40 (1987) (arguing that "individual choice" is not a fixed concept in society where humans are interdependent and expectations are socially constructed); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1799–1815 (1990) (arguing that judges have helped to establish the conditions for sex segregation in the workplace by the ways in which they interpret working women's rights and choices); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1562–73 (1992) (examining the "covertly gendered" ideology of the "republic of choice" as it has been applied to working mothers who choose abortions).

representation, *Martinez v. Court of Appeal of California*,[221] Justice Stevens chose a telling metaphor. Discussing the historical evidence relied on in *Faretta*, Stevens observed that before counsel was guaranteed, self-representation was the only option for the indigent defendant seeking to present *any* defense. "Thus," he wrote, "a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a 'right' to take shelter in the sewers of Paris."[222]

Today, the rhetoric of rights continues to mask systemic inequality and injustice. To be sure, more than forty years after *Gideon*, there are few jurisdictions where the right to appointed counsel is ignored altogether. Nevertheless, in too many American courtrooms, the quality of counsel appointed for the poor is little better than the quality of accommodations in the Paris sewers. Pervasive deficiencies are reported in indigent defense systems of many states.[223] Courts routinely appoint lawyers who are overburdened, inexperienced, or incompetent, and defendants bear the consequences of their lawyers' poor performance.[224]

This was the real conundrum at issue in *Faretta*: not whether the Constitution broadly protects the freedom of defendants to act in a self-destructive manner, but what to do about the "rare instances" in which a defendant "might in fact present his case more effectively by conducting his own defense."[225] Anthony Faretta himself believed

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221. 528 U.S. 152 (2000).

222. *Id.* at 156–57.

223. A committee recently appointed by the Pennsylvania Supreme Court concluded that the state was inadequately funding county public defender offices. FINAL REPORT OF THE PENNSYLVANIA SUPREME COURT COMMITTEE ON RACIAL AND GENDER BIAS IN THE JUSTICE SYSTEM 163–98 (2003), *at* http://www.courts.state.pa.us/Index/Supreme/BiasCmte/FinalReport.ch5.pdf (last visited Feb. 15, 2005) (on file with the North Carolina Law Review). A Georgia Supreme Court commission described that state's system as inadequate, unconstitutional, and responsible for much needless incarceration. Bill Rankin, *Indigent Defense Rates F*, ATLANTA J.-CONST., Dec. 12, 2002, at A1. A report by the NAACP Legal Defense and Educational Fund documented cases in which poor Mississippi defendants—many charged with misdemeanor or juvenile offenses—waited in overcrowded county jails for months, even years, before speaking to a lawyer. NAACP LEGAL DEF. & EDUC. FUND, ASSEMBLY LINE JUSTICE: MISSISSIPPI'S INDIGENT DEFENSE CRISIS (Feb. 2003), *at* http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/ms-assemblylinejustice.pdf (last visited Feb. 15, 2005) (on file with the North Carolina Law Review).

224. *See* Dix, *supra* note 22, at 222 (discussing the ability of defense counsel to waive certain trial rights without consulting the defendant); Stuntz, *supra* note 154, at 796 (noting that "[a]ppointed counsel are, sadly, often of poor quality").

225. Faretta v. California, 422 U.S. 806, 834 (1975); *see also* McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) (stating that self-representation may "allow the presentation of what may, at least occasionally, be the accused's best possible defense"); Stuntz, *supra*

this was true in his case, and while we cannot confirm or deny his belief from the available record, we can certainly acknowledge that the concern he raised about his appointed public defender's "heavy case load" may have been valid.[226] And, of course, if Faretta were convicted as a result of his overworked lawyer's failure to take the necessary steps to prepare an adequate defense, it would be Faretta, not his lawyer, who would go to prison.[227]

This problem was compounded, in the Court's view, by the current rules on the allocation of power between defendants and defense attorneys. "[L]aw and tradition" had given attorneys substantial authority over how defendants' cases were presented at trial: they retained the power to make a wide range of binding strategic decisions over their clients' objections.[228] This allocation of power, the Court found, was inconsistent with the fundamental notions of agency underlying the Sixth Amendment:

> The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.[229]

For those who share the *Faretta* Court's concern about defendants being punished for their lawyers' poor performance, the current rules on the allocation of power between attorney and client *are* troubling—particularly in the context of appointed indigent representation, where the client has no financial leverage over his lawyer's performance. (Unlike defendants who retain their own counsel, the indigent cannot simply fire their appointed counsel and obtain another.) Having noticed the problem, the Court might have been expected to hold that the traditional allocation of power between attorney and client violates the Sixth Amendment and take the first step toward restructuring that relationship, so that defendants retain authority to make reasonable strategic decisions in their defense.[230] Such a change to the attorney-client relationship, it

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note 154, at 795–96 (acknowledging the "exceptional case" where defendant "would really be better off" without counsel).

226. *Faretta*, 422 U.S. at 807.

227. *Id.* at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.").

228. *Id.* at 820, and cases cited therein.

229. *Id.* at 820. The Amendment contemplates counsel as an "assistant" to the defendant, not a master. *Id.*

230. This is not to say that there is a clear and obvious way to reform the current rules

should be noted, would not undermine the accusatorial and adversarial traditions discussed in Part II, since courts would retain their longstanding authority and duty to prevent defendants from making manifestly self-destructive decisions. Instead, it would allow defendants to participate in deciding which of the range of reasonable defense strategies should be employed at their trials.

The Court did not choose this path. Instead, it reverse-engineered the self-representation solution through the following syllogism: (1) a defendant who accepts "counsel as his representative" in effect consents to the traditional allocation of power;[231] (2) such a relinquishment of power can be considered consensual only if a viable alternative exists;[232] (3) therefore, the right to self-representation is implied by the Sixth Amendment.

This backwards logic allowed the Court to sing the constitutional virtues of defendant control without challenging the structural rules that deny it. In a subsequent case, *Jones v. Barnes*,[233] the Court fortified the status quo by rejecting the ineffective assistance claim of a defendant whose appellate counsel refused to brief a nonfrivolous claim that the defendant wanted raised.[234] With the exception of a few "fundamental decisions," the Court wrote, "an attorney's duty is to take professional responsibility for the conduct of the case, after consulting with his client."[235] As a result of these rulings, self-representation has become the only way indigent defendants can guarantee personal control over their defense strategies. The result

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on the attorney-client relationship. Scholars continue to debate the proper allocation of authority between defense counsel and criminal defendant. *Compare* Rodney J. Uphoff, *Who Should Control the Decision To Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 834 (2000) (distinguishing between the traditional view of the lawyer-client relationship and "client-centered lawyering," and outlining an approach by which defense counsel can balance the defendant's wishes with the duty "to prevent clients from inflicting harm upon themselves") *with* Johnson, *supra* note 70 (forthcoming Jan. 2005) (arguing that while defense counsel should carefully consider the defendant's broader interests, the defendant should have the right to make decisions opposed by counsel only in limited circumstances).

231. *Faretta*, 422 U.S. at 821.

232. *See id.*

233. 463 U.S. 745 (1983).

234. *Id.* at 745–46.

235. *Id.* at 753 n.6; *see also* Taylor v. Illinois, 484 U.S. 400, 417–18 (1988) ("Although there are basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client, the lawyer has—and must have—full authority to manage the conduct of the trial."); Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 33–34 (1986) (noting the *Barnes* Court's approval of "lower courts' generally authoritarian view of counsel's proper relationship to the accused").

for the adversarial system is doubly perverse. Defendants seeking to present their strongest defense face the "all-or-nothing" dilemma of choosing to accept representation and sacrificing control over their case, or waiving counsel and forgoing the benefits of professional representation.[236] Defendants who seek their own destruction or some other deviant objective are empowered.

Without question, it is encouraging that a majority of the current justices appear ready to overturn *Faretta*. That step, however, should not be taken without addressing the underlying systemic problems that led the Court to rule the way it did. The Court made a mistake in *Faretta* by concluding that establishment of the right of self-representation was an appropriate response to the legitimate concerns about indigent defense representation raised by the petitioner. It made an even bigger mistake in using the rhetoric of "free choice" to bolster its decision, without an appreciation of the larger impact that rhetoric might have.

In correcting these mistakes, the Court should avoid the reductionist approach to the problem of indigent defense representation it took in *Martinez*. Disloyalty is far from central to the problems that indigent defendants face in America's courtroom.[237] Rather, it is lawyers who do not take the basic steps necessary to prepare an adequate defense for their clients and thereby put the lives and freedom of innocent defendants in jeopardy. Nor should the Court settle for the unsatisfactory assertion that even when a defense lawyer's performance is ineffective, it is "more effective than what the unskilled [defendant] could have provided for himself."[238] The "rare instances" when this assertion is false should be acknowledged and addressed, not dismissed out of hand.

So, too, courts should examine structural problems that may exist with mental health defenses and capital sentencing proceedings rather than automatically defer to defendants' preferences under the guise of respecting their "autonomy." There are good reasons why a defendant might object to the presentation of a mental health defense at trial, given the prospect of indefinite civil confinement and the stigma attached to the designation "criminally insane." When faced

236. *See Jones*, 463 U.S. at 759 (Brennan, J., dissenting).

237. *Cf.* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 160–61 (2000) (suggesting that the concern about defendant autonomy in *Faretta* involved mainly the fear of disloyalty by a court-appointed attorney and then concluding that the concern is too insignificant to require a right of self-representation in appellate proceedings). *See supra* Part I.A.

238. *Martinez*, 528 U.S. at 161.

with such an objection, courts should determine how best to reconcile society's interests in withholding punishment from the mentally irresponsible and restraining those believed to be dangerous, and whether the traditional dichotomy between "remedial" civil confinement and "punitive" imprisonment still makes sense.[239] When defendants in capital sentencing hearings express a preference for execution over life imprisonment, courts should consider whether the Eighth Amendment's individualized consideration requirement extends only so far as the defendant himself desires to present mitigating evidence, or whether relevant mitigating evidence must be presented in all cases. If a court concludes that evidence or a defense should be presented in spite of the defendant's wishes, a variety of procedures can be used to depart from the normal adversarial mode of proceedings.[240]

This Article does not claim that any of these structural problems are easily resolved. Indeed, they raise complex and fundamental questions about the Constitution and the traditions and purposes of our criminal justice system. How best to deal with defendants who are trapped in failing indigent defense systems? What decisionmaking authority should be reserved for defendants under the Assistance of Counsel Clause of the Sixth Amendment? How should courts enforce the individualized consideration requirement of the Eight Amendment when defendants seek death? What purpose does the "insanity defense" serve when institutionalization imposes more of a burden on the individual than the applicable criminal sanction? The important point is not to let these difficult questions become obscured by vague and incoherent choice rhetoric. Setting aside platitudes about the "inestimable worth of free choice" will allow for a more honest debate and, we can hope, a fairer and more effective criminal justice system.

239. *See* Overholser v. Lynch, 288 F.2d 388, 394 (D.C. Cir. 1961), *rev'd* 369 U.S. 705 (1962).

240. *See* Carter, *supra* note 70, at 96; Sabelli & Leyton, *supra* note 66, at 217 (proposing "a legislative recognition of a right to a bifurcated trial, in which a defendant could first present her chosen defense and then defense counsel could present a defense based on mental illness"); Laura A. Rosenwald, Note, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants to Die*, 68 WASH. L. REV. 735, 750–52 (1993).