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Criminal Procedure - Sixth Amendment - Accused's Right to Defend *Pro Se* - Rights Necessary for Fair Administration of Justice *Faretta v. California*, 422 U.S. 806 (1975).

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Recent Case

CRIMINAL PROCEDURE—SIXTH AMENDMENT—ACCUSED'S RIGHT TO DEFEND *PRO SE*—RIGHTS NECESSARY FOR FAIR ADMINISTRATION OF JUSTICE. *Faretta v. California*, 422 U.S. 806 (1975).

I. INTRODUCTION

In 1975, the United States Supreme Court, in *Faretta v. California*,[1] held that a criminal defendant has a qualified constitutional right to self-representation, derived from the sixth amendment.[2] The state cannot force counsel upon a defendant in a criminal prosecution who voluntarily and intelligently elects to represent himself.

Faretta is the most recent in a series of cases which have expanded the meaning of the sixth amendment right to counsel. The development began primarily with the recognition by the Court in *Powell v. Alabama*,[3] that the right to counsel in capital cases is a fundamental right, and therefore protected by the fourteenth amendment from state infringement. In successive cases, the Court announced additional situations in which counsel must be present to ensure the protection of the defendant's rights under the fourteenth amendment due process clause. In *Gideon v. Wainwright*,[4] it was held that in all felony cases there is a right to counsel, and the further right to have counsel appointed if the defendant is indigent. In addition, the Court has held that there is a right to counsel in misdemeanor cases where there is the possibility of detention,[5] in certain "critical" pretrial stages,[6] and in certain post-conviction proceedings.[7]

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1. 422 U.S. 806 (1975).

2. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

3. 287 U.S. 45 (1932).

4. 372 U.S. 335 (1963).

5. Argersinger v. Hamlin, 407 U.S. 25 (1972).

6. *See, e.g.*, Coleman v. Alabama, 339 U.S. 1 (1970) (preliminary hearing); United States v. Wade, 388 U.S. 218 (1967) (line-ups); Hamilton v. Alabama, 368 U.S. 52 (1961) (pretrial insanity hearings).

7. Townsend v. Burke, 334 U.S. 736 (1948) (sentencing). *Cf.* Gagnon v. Scarpelli, 411 U.S. 778 (1973) (under certain circumstances, due process requires the assistance of counsel at parole or probation revocation hearings).

Underlying these decisions are two interdependent premises: "[N]otice and hearing . . . constitute basic elements of the constitutional requirement of due process of law," [8] and "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." [9] The Court, explaining the need for professional legal representation, stated:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crimes, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[10]

Due process is not satisfied merely by the appointment of counsel. The appointment must occur at a stage in the proceedings which will result in *"effective* aid in the preparation and trial of the case." [11] Despite recognition of the importance of representation by counsel and the pitfalls facing the *pro se* defendant, the Court in *Faretta* held that the sixth amendment does not preclude a *pro se* defense. Self-representation is an independent, fundamental right protected by the fourteenth amendment.

This Note will first examine the Court's analysis in *Faretta.* It will then consider the implications of *Faretta* in a society which tends to overlook the need for independent, autonomous decision-making.

II. The Facts

The circumstances of Faretta's conviction comported with the established standards for a fair trial.[12] He had been charged with

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8. Powell v. Alabama, 287 U.S. 45, 68 (1932).
9. *Id.* at 68-69.
10. *Id.* at 69.
11. *Id.* at 71 (emphasis added).
12. "The Court deliberately . . . declines to characterize this case as one in which the defendant was denied a fair trial." 422 U.S. 806, 837 n.2 (1975).

grand theft on an information filed in Superior Court of Los Angeles County, California.[13] At his arraignment, the judge appointed counsel. However, prior to trial, Faretta requested that he be allowed to represent himself, stating as one of his reasons that the public defender's office was overloaded.[14] The trial judge questioned Faretta and discovered that he had a high school education, and that he had represented himself unsuccessfully in a previous criminal prosecution. The judge, reserving the right to reverse his decision if warranted by future developments, then made a preliminary ruling that Faretta could represent himself. Weeks later, the judge held a hearing, questioning Faretta on different points of the law.[15] The judge concluded that

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13. *Id.* at 807.

14. *Id.*

15. The judge's questioning of Faretta is reproduced here from the opinion to indicate that Faretta did seem strikingly capable. It further suggests that the Supreme Court was eager to face the issue of a constitutional right to self-representation, but had delayed until it was presented with a case wherein the defendant was clearly capable of learning the law to defend himself. The excerpt demonstrates that *Faretta* was the ideal test case for a difficult issue. The colloquy was as follows:

> THE COURT: In the Faretta matter, I brought you back down here to do some reconsideration as to whether or not you should continue to represent yourself.
>
> How have you been getting along on your research?
>
> THE DEFENDANT: Not bad, your Honor.
>
> Last night I put in the mail a 995 motion [for setting aside the indictment or information] and it should be with the Clerk within the next day or two.
>
> THE COURT: Have you been preparing yourself for the intricacies of the trial of the matter?
>
> THE DEFENDANT: Well, your Honor, I was hoping that the case could possibly be disposed of on the 995.
>
> Mrs. Ayers informed me yesterday that it was the Court's policy to hear the pretrial motions at the time of trial. If possible, your Honor, I would like a date set as soon as the Court deems adequate after they receive the motion, sometime before trial.
>
> THE COURT: Let's see how you have been doing on your research.
>
> How many exceptions are there to the hearsay rule?
>
> THE DEFENDANT: Well, the hearsay rule would, I guess, be called the best evidence rule, your Honor. And there are several exceptions in case law, but in actual statutory law, I don't feel there is none [sic].
>
> THE COURT: What are the challenges to the jury for cause?
>
> THE DEFENDANT: Well, there is twelve peremptory challenges.
>
> THE COURT: And how many for cause?
>
> THE DEFENDANT: Well, as many as the Court deems valid.

both Faretta's demeanor and his responses to the questions indicated that he could not have made an intelligent and knowing waiver of his right to counsel. He ruled that Faretta must have counsel, there being no constitutional right in California to defend *pro se*.[16] Faretta's requests to act as co-counsel and to make various motions on his own behalf were also rejected. The court ruled that for the duration of the proceeding Faretta's defense must be conducted only through the lawyer appointed from the public defender's office.

THE COURT: And what are they? What are the grounds for challenging a juror for cause?

THE DEFENDANT: Well, numerous grounds to challenge a witness—I mean, a juror, your Honor, one being the juror is perhaps suffered, was a victim of the same type of offense, might be prejudiced toward the defendant. Any substantial ground that might make the juror prejudice[d] toward the defendant.

THE COURT: Anything else?

THE DEFENDANT: Well, a relative perhaps of the victim.

* * *

THE COURT: Have you looked in any of the California Codes with reference to trial procedure?

THE DEFENDANT: Yes, your Honor.

THE COURT: What codes?

THE DEFENDANT: I have done extensive research in the Penal Code, your Honor, and the Civil Code.

THE COURT: If you have done extensive research into it, then tell me about it.

THE DEFENDANT: On empaneling a jury, your Honor?

THE COURT: Yes.

THE DEFENDANT: Well, the District Attorney and the defendant, defense counsel, has both the right to 12 peremptory challenges of a jury. These 12 challenges are undisputable. Any reason that the defense or prosecution should feel that a juror would be inadequate to try the case or to rule on a case, they may then discharge that juror.

But if there is a valid challenge due to grounds of prejudice or some other grounds, that these aren't considered in the 12 peremptory challenges. There are numerous and the defendant, the defense and the prosecution both have the right to make any inquiry to the jury as to their feelings toward the case.

422 U.S. 806, 808-10 n.3 (1975). It should be noted that Faretta's lack of success in his first *pro se* effort should not be read as an indication of incompetence. If one's reputation for skill depended solely upon not-guilty verdicts, there would be few practicing attorneys with presentable reputations.

16. *Id.* at 811 n.6. Shortly before the California Supreme Court decided in People v. Sharp, 7 Cal.3d 448, 233, 499 P.2d 489, 103 Cal. Rptr. that there was no state constitutional right to a *pro se* defense, the California Constitution had been amended to require counsel in felony cases. *See* CAL. PEN. CODE §§ 686(2), 686.1, 859, 987 (West 1972).

Faretta was convicted and appealed unsuccessfully on the grounds that he had been denied due process. He asserted that the trial court's rejection of his attempted waiver and the imposition of counsel were unconstitutional. A petition for rehearing and a further appeal to the California Supreme Court were both denied. The United States Supreme Court then granted certiorari, addressing the question "whether a defendant in a state criminal trial has the constitutional right to proceed *without* counsel when he voluntarily and intelligently elects to do so."[17]

III. The Majority Opinion

Justice Stewart, writing for the majority of the Court, concluded that a state cannot force counsel upon an accused. The decision was premised upon three main arguments. First, the right of self-representation was found to be implicit in the sixth amendment.[18] Second, support for such a reading of the sixth amendment seemed clear from an analysis of seventeenth and eighteenth century colonial practice and contemporaneous developments in British law.[19] Finally, a survey of contemporary federal and state decisions led to the conclusion that the Court was confronted with a "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."[20]

A. *The Implicit Right to Self-Representation*

Justice Stewart's interpretation of the sixth amendment comprises the primary argument. He asserts that both the structure and the logic of the sixth amendment would be violated if the accused were not granted the constitutional right to self-representation. Justice Stewart relies upon the directive language of the sixth amendment granting in sum the "right . . . to make a defense as we know it."[21] He states that the right to a defense is not merely provided for the accused; it is given to him personally. The most personal defense, the right to self-representation is "necessarily implied by the structure of the sixth amendment."[22] Further-

17. 422 U.S. at 807.
18. *Id.* at 818.
19. *Id.*
20. *Id.* at 817.
21. *Id.* at 818.
22. *Id.* at 819.

more, the logic of the sixth amendment is contravened when counsel is forced upon the accused.[23]

To reach his conclusion, Justice Stewart views the assistance of counsel as a supplement to the bundle of other rights guaranteed by the sixth amendment. Assistance means an aid, not a master. If the accused is forced to accept the representation of counsel against his will, he enjoys not a personal defense, but a defense imposed by the will of the state. The power of counsel to make decisions binding on the defendant is justified only by the initial consent of the defendant. Absent that consent, the theory that counsel "represents" the defendant is an "unacceptable legal fiction."[24] In short, "[u]nless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it not *his* defense."[25]

The dissenters did not make a serious effort to refute Justice Stewart's reasoning concerning the sixth amendment. They saw the majority's conclusion as stating only the "trivial proposition" that it is the accused who is on trial and in need of a defense.[26] The thought that counsel is a mere tool was an untenable proposition in light of the Court's determination in a number of previous decisions that assistance of counsel is an integral, rather than supplemental, part of the sixth amendment.[27]

Justice Stewart's construction of the sixth amendment is not unreasonable despite the dissent's objections. Indeed, he recognizes that self-representation is not to be found in the Constitution "in so many words."[28] However, Justice Stewart believes that the intent of the Framers of the Constitution was to protect the right to a personal defense. If the defendant could not choose to represent himself, this right would be a nullity. Moreover, the absolute denial of a constitutional right to self-representation is inconsistent with that purpose of due process which concerns itself with "insur-

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23. *Id.* at 820.
24. *Id.* at 821.
25. *Id.* (emphasis original).
26. *Id.* at 837-38 (Burger, C.J., dissenting).
27. *Id.* at 838-39. Justice Burger argues that the "right to a defense as we know it" cannot be had without counsel. *Id. See* Argensinger v. Hamlin, 407 U.S. 25, 27-33 (1972); Gideon v. Wainwright, 372 U.S. 335, 344 (1963); *In re* Oliver, 333 U.S. 257, 273 (1948).
28. 422 U.S. at 819.

ing respect for the dignity of the individual."[29] The policies which find expression in a prohibition against unreasonable searches and seizures,[30] and the inadmissibility of tainted evidence[31] indicate that due process contemplates more than procedural accuracy of guilt determination.[32] Forcing the defendant to stand dumb against his will while another argues his case reflects a low regard for the individual.

B. *Historical Basis*

The second basis for the majority decision was drawn from a survey of seventeenth and eighteenth century practice.[33] Lawyers were distrusted by the colonists, and the Constitution was written at a time when anti-lawyer sentiment ran particularly high.[34] Nearly all the early colonial charters and bills of rights provided a defendant with the choice of the right to counsel or the right of self-representation.[35] State constitutions passed after the Declaration of Independence contained provisions allowing for self-representation. If assistance of counsel were granted, it was only in the alternative, and was not meant to disparage the essential right to defend *pro se*.[36]

Justice Stewart found additional historical evidence to support his finding that self-representation was well recognized. Congress passed the Judiciary Act of 1789 making the right to self-representation statutory in federal cases.[37] That act was signed into law one day before the sixth amendment was proposed by Madison. However, the virtual absence of any debate on the assistance of counsel clause of the sixth amendment indicated to Justice Stewart that it

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29. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 347 (1957). Kadish argues that the aims of due process are to achieve accuracy in the guilt determination process while maintaining the dignity of the individual.

30. "The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

31. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643 (1961); Weeks v. United States, 232 U.S. 383 (1914).

32. Kadish, *supra* note 28, at 347.

33. 422 U.S. 806, 826-32.

34. *Id.* at 827.

35. *See generally* I.B. SCHWARTZ, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY (1971).

36. 422 U.S. at 828.

37. "[I]n all courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel. . . ." Judiciary Act of 1789 § 35, 28 U.S.C. § 1654 (1970).

was meant only to supplement rights already existing. He reasoned: Had the Congress anticipated that Madison's proposal would work to the exclusion of self-representation, surely there would have been argument. Self-representation played too great a role in the seventeenth century for the Founding Fathers to allow it to be discontinued without remark. Wary colonists were reluctant to trust most lawyers. Justice Stewart concluded that silence must be construed as an expectation that *pro se* rights were protected or "undoubtedly [there would] have been some debate or comment on the issue."[38] In short, the majority read the sixth amendment as granting certain rights in federal cases which many of the states had already provided. It was not meant to preclude or diminish rights already recognized on the state level.

The dissenters rejected this second argument. Chief Justice Burger interpreted the historical setting of the sixth amendment as suggesting the opposite conclusion. He argued that if the sixth amendment were meant to provide for self-representation, then Congress would have had no need to enact section 35 of the Judiciary Act. The contemporaneous action of Congress in granting a statutory status to self-representation and a constitutional one to counsel clearly indicated the appropriate protection for each.[39]

Justice Stewart's historical interpretation presumes consideration of the overriding purpose of the Framers in enacting the Bill of Rights; he does not focus upon the specific words which they used. Commentators note that debate centered upon the need for amendments, not on their substance.[40] The Constitution described a limited government. No prior existing rights had been nullified so as to require specific protection. The accepted belief seems to have been that criminal procedure would continue much as before.[41] Protection of the defendant's rights to be informed of the charges against him and to confront witnesses reflects the expectation that the accused would be in court presenting his defense. A trial in the defendant's absence was inconceivable. Trial without the assistance of counsel was more easily anticipated.

Because assistance of counsel was granted only in capital cases, it was a right requiring the more certain protection of a constitu-

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38. 422 U.S. at 832.

39. *Id.* at 844.

40. U.S. GOV'T PRINTING OFFICE, THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION 897-98 (1973).

41. W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 23 (1955).

tional amendment. The difference in treatment accorded self-representation and assistance of counsel suggests that the right to counsel was indeed only supplemental to a basic expectation that the accused would present his own case. Perhaps it is precisely because the use of counsel was not commonplace that it needed the more expanded and certain protection given by the sixth amendment.

It was not crucial, however, that Justice Stewart reconcile the Judiciary Act and the sixth amendment in order to reach his conclusion. A determination of the Framers' actual intent is certainly not dispositive in the determination of what rights exist under a modern reading of the Constitution. The tendency of recent courts to expand the scope of individual liberties granted by the Bill of Rights demonstrates that the original intention underlying constitutional provisions is seldom an appropriate gauge for modern constitutional interpretation.[42] Therefore, whether a personal defense as understood in the twentieth century requires a constitutional right to self-representation remains unanswerable from a purely historical perspective.

C. *Modern Decisions*

The third argument Justice Stewart presented was that of consistency with modern federal and state opinions. He felt his reading of the sixth amendment was compatible with the prevailing modern practice.[43] Justice Stewart asserted that the case of *Adams v. United States ex rel. McCann*[44] lends clear support to the proposition that there exists a constitutional right to self-representation. There, the "right to dispense with a lawyer's help"[45] was described as correlative to the right to assistance of counsel. In *Adams*, the Court also recognized that "[t]o deny an accused a choice of pro-

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42. Indeed, it is seldom that the intent of the Framers, as it might be gleaned from contemporary writing, can be dispositive of what the Constitution might require in the twentieth century. The debate regarding the original understanding of the first amendment protection of speech is a clear example. *Compare* L. LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960) *with* Z. CHAFEE, FREE SPEECH IN THE UNITED STATES (1948).

43. 422 U.S. at 816-17.

44. 317 U.S. 269 (1942). The Court held that in a criminal prosecution in a federal court, an accused, in the exercise of a free and intelligent choice and with the considered approval of the court, may waive trial by jury, and also the assistance of counsel.

45. *Id.* at 279.

cedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms."[46] The *Adams* dicta was unequivocally reaffirmed in *Carter v. Illinois.*[47] The Court there stated:

> Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel could be forced upon a defendant.[48]

However, the language upon which Justice Stewart relied is somewhat misleading. The Court in *Adams* and *Carter* was speaking of the right to waive counsel. The issue was not whether a constitutional right to waive existed, but merely whether waiver was constitutionally permissible within the facts of each case. The dissent in *Faretta* properly noted that one cannot rely wholly upon the dicta of a court in determining an issue as important as a constitutional right when the court from which support is derived was not itself faced with constitutional issues. Indeed, the Supreme Court in *Singer v. United States,*[49] specifically indicated that "[t]he ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."[50] However, Justice Stewart stated that *Singer* was not controlling. The right of self-representation is a separate, independent, constitutionally compelled right—not just a corollary to the right to counsel.[51]

The precise language and context of the Supreme Court waiver cases is not conclusive. The chief significance of the *Adams* and *Carter* dicta is the Court's demonstrated concern that the defendant not be fettered by constitutional safeguards. The cases do not explicitly support a finding that self-representation is a constitutional right. However, their language and reasoning do indicate that Justice Stewart was justified in finding that a state may not impose counsel against the wishes of the accused.

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46. *Id.* at 280.
47. 329 U.S. 173 (1946).
48. *Id.* at 174-75.
49. 380 U.S. 24 (1965).
50. *Id.* at 34-35.
51. 422 U.S. at 819-20 n.15.

The quoted language from the *Adams* and *Carter* decisions had been cited by those state and lower federal courts which held self-representation to be a constitutionally protected right. In *Faretta*, Justice Stewart noted especially *United States v. Plattner*[52] in which the Second Circuit reversed a conviction for which the defendant had not been allowed to defend *pro se*. The *Plattner* decision can be distinguished from *Faretta*. The Court there determined that the defendant had been prejudiced by counsel who failed to present as effective a defense as Plattner himself might have. However, the Second Circuit reaffirmed its holding in subsequent cases.[53] In addition, many state courts have expressly recognized the constitutional nature of the right to self-representation.[54]

Although he searched carefully among the available precedent for evidence that self-representation was "fundamental," Justice Stewart was not successful in creating a persuasive argument to that effect. Not one of the three main arguments Justice Stewart presents is conclusive that self-representation is so fundamental it must be given absolute constitutional status. Instead, after reading the alternative arguments of the dissenting Justices, one is left with the impression that the majority cut some very sharp corners. However, even though the majority is unable to precisely and unequivocally support its decision, the result is compelled by a longer look at a prevailing undercurrent in constitutional theory. The sharp division on the Court indicates that it was a most unusual matter that was facing the Court in *Faretta*. Indeed, the Court was asked to hold that to interpret one of the seminal rights of due process adjudication as being absolutely mandatory was in itself a violation of the fourteenth amendment.

IV. The Implications for Autonomy

The Court in *Faretta* held that due process demands that a criminal defendant be given the right to make an independent decision to represent himself. This may present an inherent in-

52. 330 F.2d 271 (2d Cir. 1964).

53. *See, e.g.*, United States *ex rel.* Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965).

54. *See, e.g.*, Lockard v. State, 92 Idaho 813, 451 P.2d 1014 (1969); People v. Nelson, 47 Ill. 2d 570, 268 N.E.2d 2 (1971); State v. Mems, 281 N.C. 658, 190 S.E.2d 164 (1972); People v. McLaughlin, 291 N.Y. 480, 53 N.E.2d 356 (1944); State v. Verna, 9 Ore. App. 620, 498 P.2d 793 (1972).

consistency with other due process requirements. Because self-representation was extended through the fourteenth amendment, one must conclude that freedom of choice, from which the accused's *pro se* right is derived, is an element of liberty protected by the fourteenth amendment from state infringement. However, the choice to defend *pro se* may, in effect, deny the defendant the effective assistance of counsel also required by the sixth and fourteenth amendments. Forcing one essential element of due process —effective counsel—upon the defendant, is to deprive him of another. The cost to the defendant which Justice Sutherland described[55] suggests the importance which the Court ascribes to individual choice.

The decision in *Faretta* is essentially a statement on autonomy. The Constitution grants the accused the right to decide whether counsel is beneficial to his trial. It is an area of decisionmaking in which the state has limited power to interfere. The concept of autonomy has been asserted throughout the development of constitutional law. Although the Court's opinion in *Faretta* appears to be at variance with "right to counsel" cases, the right of the accused to decide follows logically from recent cases in areas other than criminal justice.

Modern recognition of individual autonomy is a resurgence of older theory. It can be traced to the eighteenth century vested or natural rights concept underlying the whole constitutional structure.[56] The combination of those rights comprises the liberty of the individual.[57] A government cannot create those rights, for they inhere in the individual by merit of his very existence.[58] The Constitution, therefore, does no more than define the degree to which their free exercise may be restricted.[59] A constitutional government is by definition a government whose power is limited by

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55. *See* text accompanying note 9 *supra*.

56. Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1412 (1974). *See generally*, E. CORWIN, LIBERTY AGAINST GOVERNMENT (1948). Consider also the language of the Declaration of Independence "[t]hat all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness." Briefly, natural rights are "those which grow out of the nature of man and depend upon personality, as distinguished from such as are created by law and depend upon civilized society." BLACK'S LAW DICTIONARY 1487 (rev. 4th ed. 1968).

57. Henkin, *supra* note 56, at 1412.

58. *Id.*

59. *Id.*

the consent of the people governed. Natural rights can be circumscribed by government regulation only to the extent necessary for the people to exist peaceably in a community.[60] The regulation must be directed towards achieving a legitimate state purpose; the means chosen to effectuate that purpose may not cause a greater infringement upon individual rights than is necessary.[61]

The term "natural" or "vested" rights was also popular in early state court decisions.[62] The common belief was that the states could not impair the exercise of individual freedom. To be sure, there has been fluctuation in the Court's readiness to read unwritten rights into the Constitution.[63] However, with the advent of the

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60. Consider, for example, a statement by the early Court: "[A]n *Act* of the Legislature, . . . contrary to the *great first principles* of the *social compact* cannot be considered a *rightful exercise* of *legislative* authority. . . ." Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) (emphasis original).

61. "[T]he *nature* and *ends* of *legislative* power will limit the *exercise* of it. . . . There are acts which the Federal or State legislatures cannot do *without exceeding their authority.*" *Id.* (emphasis original); *see* Corwin, *supra* note 56, at 58-116.

62. *See, e.g.*, Proprietors v. Laboree, 2 Greenl. 275, 294 (Me. 1823); Emerick v. Harris, 1 Binn. 416 (Pa. 1808); Jackson v. Catlin, 2 Johns. 247 (N.Y. Sup. Ct. 1807).

63. For example, Justice Iredell, concurring in the result reached in *Calder*, stated:

> It is true that some speculative jurists have held, that a legislative act against natural justice must, in itself, be void; but I cannot think that, under such a government, any Court of Justice would possess a power to declare it so. . . .
>
> [T]he ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature (possessed of an equal right of opinion), had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice.

3 U.S. (3 Dall.) 386, 398-99. Compare this statement with Justice Black's dissent in Griswold v. Connecticut, 381 U.S. 479 (1965):

> I discuss the due process and the Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

Id. at 511. *See also* Justice Holmes' dissent in Lochner v. New York, 198 U.S. 45 (1905), wherein he decries the tendency of the majority to interpret the fourteenth amendment in terms of prevailing economic theory. "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." *Id.* at 75. As indicated by the recurrent arguments noted above, it is dubious whether the "proper method" of constitutional interpretation will ever be found. Natural rights language seldom actually disappears; when it reappears it is often in label only—for example, the concept of reserved ninth amendment rights put forth by Justice Goldberg in Griswold v. Connecticut, 381 U.S. 479, 486 (1965).

fourteenth amendment the prominence of vested rights language in court decisions was reestablished.

The interpretation given the fourteenth amendment reflected a different approach to the vested rights theory.[64] The individual was no longer perceived as a priori immune from government regulation (save of course for the reasonable exercise of power). Instead, the liberty of the individual was the sum of the rights left to him after the state had imposed legitimate restrictions for the public welfare.[65] Gradually, the Court developed the concept of substantive due process. Liberty and property were defined as the composite of the individual's natural rights.[66] The initial emphasis was upon the protection of property,[67] but this term was given an increasingly broad interpretation.[68] It came to embrace the right of the individual to contract freely without interference by the government. The right to contract was also an important element of liberty.[69] The concepts of liberty and property were overlapping and that complementary interpretation served to preserve the individual's autonomy, leaving him still essentially free in his pursuits.[70] Eventually, generous interpretation, joined with a pervasive espousal of laissez-faire economic attitudes and uncertain notions of the permissible scope of police power, propelled the

64. Henkin, *supra* note 56, at 1114.

65. Henkin notes that those justices who developed substantive due process spoke in language tending to suggest not a priori autonomy of the individual, as implied in pure natural rights theory, but liberty described by the rights left to him after others had been granted to the government. *Id.* at 1414 n.8.

66. Consider the following language by the "father of substantive due process":

> [I]n my view, a law which prohibits a large class of citizens from adopting a lawful employment . . . does deprive them of liberty as well as property, without due process of law. Their *right of choice* is a portion of their liberty; their occupation is their property.

Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 122 (1873) (Bradley, J., dissenting) (emphasis added). One notes that Mr. Justice Bradley, was, to the irony of constitutional history, on the "losing" side, before the Court espoused his theories without reservation.

67. *See* R. McCLOSKEY, THE AMERICAN SUPREME COURT 121-35 (1960).

68. Henkin, *supra* note 56, at 1415.

69. "Included in the right of personal liberty and the right of private property . . . is the right to make contracts." Coppage v. Kansas, 236 U.S. 1, 14 (1915). *See also* Adair v. United States, 208 U.S. 161 (1908).

70. Consider the Court's language in Loan Association v. Topeka, 87 U.S. (20 Wall.) 655 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist. . . ." *Id.* at 662-63.

Court into full-blown judicial indiscretion.[71] Substantive due process became an epithet for what many considered inappropriate judicial activism in the protection of economic rights.[72]

However, that same exegesis which led the Court to invalidate economic legislation also produced important restatements of the freedom of individuals. The curbs imposed on government's power to regulate the economy similarly protected the individual from government regulation of his daily affairs. For example, in *Allgeyer v. Illinois*,[73] an early economic due process case, the Court stated: "Liberty . . . means not only the right of the citizen to be free from the mere physical restraint of [one's] person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties . . . ."[74] Economic regulation has long since been considered a proper matter for state control.[75] However, certain noneconomic definitions of liberty promoted in the era of substantive due process have remained the basis for modern cases on autonomy.

In *Meyer v. Nebraska*,[76] Justice McReynolds stated: "[w]ithout doubt, [liberty] denotes . . . also the right of the individual to

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71. *See, e.g.*, Buck v. Bell, 274 U.S. 200 (1927) (sterilization of a "third generation imbecil"); Gitlow v. N.Y., 268 U.S. 652 (1925) (freedom of speech subordinated to the public good of furthering the war effort without interference); Adkins v. Children's Hospital, 261 U.S. 525 (1923) (police power does not extend to regulation of wages and prices because it interferes with rights of offer and acceptance); Coppage v. Kansas, 236 U.S. 1 (1915) (police power does not extend to protecting the individual laborer against "yellow-dog" contracts); Muller v. Oregon, 208 U.S. 412 (1908) (police power does extend to protect women from having to work too long hours); Lochner v. New York, 198 U.S. 45 (1905) (no protection for the number of hours a male may work in a bakery); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (police power extends to compulsory vaccination); Holden v. Hardy, 169 U.S. 366 (1898) (police power may limit working hours in the mines to eight hours); Mugler v. Kansas, 123 U.S. 623 (1887) (prohibiting the sale of liquor); Munn v. Illinois, 94 U.S. 113 (1877) (the state may regulate the rates charged for grain elevators).

72. *See, e.g.*, Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926), for an argument that liberty means no more than freedom from restraint in the common law sense of the term.

73. 165 U.S. 578 (1897).

74. *Id.* at 589.

75. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726 (1963); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952); United States v. Carolene Products Co., 304 U.S. 144 (1938); West Coast Hotel Co. v. Parrish. 300 U.S. 379 (1937); Nebbia v. N.Y., 291 U.S. 502 (1934). *See also* R. G. MCCLOSKEY, *supra* note 67, at 161-64.

76. 262 U.S. 390 (1923).

contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." [77] Accordingly, a German teacher could not be restricted from seeking employment, and the state could not control the parents' right to choose the education of their children. This theory was applied two years later to strike down an Oregon statute which required public education for children.[78] It was for the parents to exercise their own choice in deciding between private and parochial schools.

With the rejection by the Court of the discredited substantive due process approach went the sweeping articulation of individual liberty and autonomy.[79] Protection of the individual proceeded instead through the gradual recognition of certain fundamental rights.[80] Those rights were "incorporated" into the fourteenth amendment, further qualifying the permissible range of state infringement.[81] There developed "a congeries of particular discrete rights enjoying some protection against infringement even for public good." [82] Presumptively immune in varying degrees to state regulation, those rights define "special zones of autonomy." [83] In sum, they represent the liberty which an individual retains. In the last decade, the Court has continued to refer to and build upon those rights recognized by earlier decisions. They are the basic underpinnings of the Court's clearest modern pronouncements on autonomy.

In 1965 the Court announced a new fundamental right—the right of privacy. The Court held in *Griswold v. Connecticut*[84] that

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77. *Id.* at 399.

78. Pierce v. Society of Sisters, 268 U.S. 510 (1925). Disgruntled parents sought a parochial education for their children.

79. Henkin, *supra* note 56, at 1417.

80. *Id.* at 1418.

81. *See generally* Henkin, *"Selective Incorporation" in the Fourteenth Amendment*, 73 YALE L.J. 74 (1963) for an excellent analysis of the Court's struggle to develop an acceptable interpretation of the fourteenth amendment due process requirement. Clearly, as the Court applied an increasing number of the original rights in the first eight amendments to the states, the states were more severely restricted in their power to control the individual.

82. Henkin, *supra* note 56, at 1418-19.

83. *Id.*

84. 381 U.S. 479 (1965).

the state legislature had infringed upon the plaintiff's right of privacy by banning the use of contraceptives without showing that there was a compelling state interest to do so. The restrictions imposed upon their use produced an unwarranted interference with the marital relationship. Drawing upon the rights guaranteed by five different amendments,[85] Justice Douglas announced that "various [constitutional] guarantees create zones of privacy."[86] Marriage was a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[87] Although Justice Douglas disclaimed any suggestion that the Court was returning to substantive due process in its interpretive methodology, he was unsuccessful in dispelling that appearance.[88]

However, the necessity of recognizing the demand for individual choice, which produced a renewed contemplation of vested rights, indicates the concern of the Court with increased protection for individual autonomy. The element of individual choice subsumed within the right of privacy was made more certain in subsequent language of the Court.[89] The right of the individual to make important personal decisions, without interference by the state, was reasserted.

Finally, the Court in *Roe v. Wade*[90] held that the right of privacy encompassed the decision of a woman to terminate a pregnancy. It established (with certain limits) the right of the woman to make an independent decision regarding abortion free from the strictures of prohibitory state regulation. Justice Stewart, concur-

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85. The amendments upon which Justice Douglas relied were the first, with the "freedom to associate and the privacy in one's association"; the third, in its prohibition against quartering soldiers "in any house" without consent of the owner; the fourth and fifth, for their "protection against all governmental invasions of the sanctity of a man's home and the privacies of life"; and the ninth, which provides for the retention by the people of rights not otherwise enumerated.

86. *Id.* at 484.

87. *Id.* at 485.

88. *See, e.g.*, Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965). Again, expansive definitions of liberty and the Court's inability to find an explicit grant of the right to privacy generated the basic question of the appropriate function of the Court. *See* note 63 *supra.*

89. "If the right of privacy means anything, it is the right of the *individual*, . . . to be free from unwarranted governmental intrusion into matters fundamentally affecting a person as the decision whether to bear or beget a child." (emphasis original). Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

90. 410 U.S. 113 (1973).

ring, noted explicitly that the liberty protected by the fourteenth amendment was a "freedom of personal choice" [91] in certain matters.

The *Griswold* and *Wade* decisions are important theoretical precursors to *Faretta.* For, there are two distinct elements to the right of privacy.[92] One contemplates freedom from government intrusion; the other relates to government regulation of certain types of choices.[93] It is the latter which concerns us here. While the ostensible purpose of permitting the use of contraceptives is to remove state restrictions upon certain activity within the marital relationship, the relief from regulation works primarily to preserve the right to independent decisionmaking. Indeed, the Court cited *Meyer v. Nebraska*[94] and *Pierce v. Society of Sisters*[95] as indication that certain decisions belong peculiarly to the individual and not to the state. This freedom from government regulation has also been described as "a prima facie zone of autonomy." [96] The right of privacy guarantees immunity to regulation in certain areas fundamentally affecting the individual.

The relationship between the right of self-representation and the right of privacy may not be immediately apparent. However, the same concern with autonomy which led the Court in *Griswold* to establish the right of privacy was implicit in *Faretta.* The concept of autonomy is basic to the Court's affirmation of privacy. It is clear that one element of privacy is private, independent decisionmaking. As Justice Stewart maintained in *Faretta,* "[w]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." [97] The distinction between *Faretta* and the privacy cases lies primarily in their factual context. But both rest on common ground, for surely there can be no decision more fundamental to the individual than that which concerns his very freedom.

In short, the Court in *Faretta* has come full circle. The individual of the seventeenth and eighteenth centuries was endowed

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91. *Id.* at 169.

92. *See generally* Gross, *Privacy and Autonomy,* in PRIVACY 169 (J. Pennock & J. Chapman eds. 1971); Note, *Roe and Paris; Does Privacy Have a Principle,* 26 STAN. L. REV. 1161 (1974).

93. Henkin, *supra* note 56, at 1424.

94. 262 U.S. 390 (1923).

95. 268 U.S. 510 (1925).

96. Henkin, *supra* note 56, at 1425.

97. 422 U.S. at 833-34.

with vested natural rights. He was regarded as presumptively free from regulation to which he did not consent. As the Court moved through successive phases of constitutional interpretation, the autonomy of the individual was promoted through different judicial constructions. Within the last decades, the concept of natural rights has made a tentative reappearance. More importantly, however, the Court has chosen to refer explicitly to freedom in decision-making—a mark of individual autonomy.

V. The Implications of *Faretta*

Notwithstanding the theoretical justifications for the Court's decision to grant the right of self-representation, there are difficulties with its acceptance which fall into three broad categories. The first objection and one put forth by the dissenters is that in looking primarily to the interests of the defendant, the majority seems to have ignored legitimate state concerns. It devotes only minimal attention to the conflicting demands of the state and the individual. A second weakness of the Court's opinion lies in Justice Stewart's inability to rest his holding directly upon textual language. Indeed, the sixth amendment from which he draws his principal support might also be read to explicitly preclude a right to self-representation. The third obstacle is that in recognizing a fundamental right to self-representation, the majority has made the criminal justice system an "instrument of self-destruction." In light of the high cost which self-representation may impose upon the defendant, there is a certain moral reluctance to declare the existence of such a right. However, appreciation of the discomfort which the Court's opinion generates imparts to *Faretta* its primary significance as a statement on individual autonomy.

A. *Competing Interests of the Defendant and the State*

The first obstacle mentioned above, and, ostensibly the most serious weakness in Justice Stewart's opinion, lies in the seemingly narrow view which he brings to the criminal justice system. Because the state has a distinct interest in the outcome of the issue it is important to examine closely the competing interests. It is also necessary to recognize that not only is there a tension between the defendant and the system, but there is also tension between the different elements within the system itself. The proposition that the defendant alone suffers the consequences of a conviction is crucial to Justice Stewart's thesis.

Chief Justice Burger argues that this is an inaccurate assessment:

> Although we have adopted an adversary system of criminal justice, . . . the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, . . . is achieved in every criminal trial. That goal is ill served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel.[98]

There are two distinct approaches one can take in analyzing the Justices' debate over the significance that should be granted the competing state interest. Viewing the issues argued by both men, it seems clear that each is stressing the policies and values with which he is more concerned. Justice Stewart's position is simply that the person who is the accused is the one who will be incarcerated if convicted, and therefore, he should not be deprived of the fundamental choice of determining what approach his defense should take so as to ensure the most beneficial result.

By contrast, Chief Justice Burger has difficulty viewing the defendant apart from the whole system. If the accused is convicted because of a poor defense, the public also suffers—though not in the same way. The treatment of the defendant is a reflection upon the entire criminal process. Whatever transpires within the criminal justice system reflects upon society.

Neither approach is inaccurate. The disagreement merely emphasizes the priority of values which the Justices bring to the conflict. Justice Stewart's point is clear if Faretta is seen as an individual who has demanded his autonomy. However, Justice Burger squarely presents the side of the issue which Justice Stewart seems to have slighted.

Justice Burger would assert that the system has an interest in the defendant's protection. Because it is a system, one element cannot be manipulated without regard for its effect upon the coexistent elements. The defendant is not alone in the criminal justice system. The three-fold interests of the state cannot be ignored, even if the result is a loss of a certain degree of the defendant's autonomy. This is Justice Burger's concern.

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98. *Id.* at 839 (citations omitted).

The needs of the defendant seem clear; he would prefer not to be convicted. Short of that, it would appear that he must be allowed to maintain a sense of independence of action, free from the feeling of having been "railroaded" or controlled by counsel. It is in his interest that he present the defense he regards as most appropriate or effective for him.

The state interests fall into three categories, reflecting the state's own concern for the defendant, the prosecution, and the public. For the defendant, the state demands the greatest possible measure of protection. Crucial to this aim is the effective assistance of counsel. In addition, the state makes various concessions to ensure that the defendant's rights are duly preserved. One such protection is the inadmissibility of illegally obtained evidence even if that evidence might be significant in attaining a conviction. No less than for the defendant, the state must provide the prosecution with a certainty of procedure. However, self-representation by the accused brings an imbalance to the system by virtue of the apparent handicap which the *pro se* defendant bears. The technical niceties of the trial are disturbed.[99] There is a greater amount of time consumed in a *pro se* trial.[100] There is also the necessity of greater caution imposed upon the prosecution in consideration of the defendant's compromised position.[101]

Last, and perhaps most important, are the interests of the people. A system of criminal justice is developed with essentially two goals—to achieve accuracy in the guilt determination process and, at the same time, to commit the smallest possible offense against the dignity and freedom of the defendant.[102] Achievement of these goals is necessary to preserve public confidence in the working of the system.[103]

Thus, it is clear that the state does have legitimate concerns which must be recognized. What is not certain is how to promote the needs of both the individual defendant and the needs of the system. Mandatory assignment of counsel would appear to satisfy both of those demands. It preserves a relatively equal status

99. Comment, *The Right to Appear Pro Se: The Constitution and the Court*, 64 J. CRIM. L. 240, 249 (1973).

100. *Id.*

101. *Id.*

102. Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 347 (1957).

103. *Id.* at 350.

between the adversaries by refusing to permit the defendant to handicap himself. It protects the defendant from his own intemperate judgment. Thus, in granting the right to self-representation, the majority appears to deny the state a twofold benefit: (1) self-representation may diminish the protection of the defendant and the public perception of the fairness of the criminal justice system by permitting him to engage in the foolhardy pursuit of presenting an inadequate defense; and (2) (possibly even more damaging) the majority now subjects the states to a flood of courtroom disruption, unfounded appeals by unsuccessful *pro se* defendants, and calendar congestion.[104] While such predictions may be exaggerated, they seem to deserve a greater show of concern than expressed by Justice Stewart. The disharmony between the majority and dissenters in *Faretta* would seem to indicate that compromise between the needs of the defendant and the needs of the system may not be easy.

Therefore, in this surface view of the issues debated by Justice Burger and Justice Stewart, it appears that Justice Burger has determined that the state interests override the defendant's right of total autonomy of choice. Justice Stewart, on the other hand, seemingly takes an absolutist position in protecting the defendant's autonomy and refusing to consider the contrary interests of the state.

However, Justice Stewart's conclusion may not be as inflexible as the above discussion might indicate. Looking beneath the surface of both positions and viewing the practical result of the decision one can argue that the policies which the dissent espouses are actually furthered by Justice Stewart's decision. It may be the dissent that has taken an unrealistic view of the most effective method of furthering these policies, and, ironically, takes an absolutist position by asserting that the *only* way to further these policies is by imposing counsel upon the defendant.

All of the language concerning counsel and representation obscures the real issue. The true aim of our system is effective representation,[105] not merely the assistance of counsel. The dis-

104. 422 U.S. 806, 845.

105. "The right is of course to the 'effective assistance of counsel.' Obviously, the effective assistance of counsel could be denied because incompetent or indifferent counsel was appointed, although the Court has yet to deal with the issue." U.S. Gov't Printing Office, The Constitution of the United States 1222 (1971).

tinction between the two is crucial in appreciating *Faretta's* potential impact. Presumably, the purpose of appointing counsel is to ensure effective representation. However, a pragmatic look at the way the criminal justice system is functioning today indicates that those defendants who depend upon court-appointed lawyers or public defenders may not be receiving "effective assistance." Delays result because overloaded attorneys need continuances to handle the overload.[106] Although the public defenders may demonstrate a high level of skill, it is simply not possible to find the time and expend the interest necessary to prepare a thorough case.

In light of the present state of affairs one must recognize the real choice the defendant has been granted. It is not a question of being represented either by a good, conscientious, interested attorney, or stumbling blindly into court alone without a chance of success. The merits of being assisted by counsel are, in fact, not always overwhelming. It is conceivable that at least as adequate a defense might be mounted by an intelligent defendant whose sole concern is his own circumstance, and who has the time and singular motivation to explore possible defenses.

The second misconception of the dissenters is that Justice Stewart sees only the defendant, ignoring the system and society. He was accused of granting a constitutional "right to self-destruction" via the criminal justice system.[107] But a close reading of the majority opinion indicates a different conclusion. Justice Stewart qualified the right to self-representation.[108] He made provisions for state appointment of "stand-by" counsel.[109] Finally, he limited the disruption of the trial process that would be permitted during a *pro se* defense.[110]

The most important of the restrictions which the majority imposed is that the defendant be capable of a voluntary and in-

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106. L. KATZ, JUSTICE IS THE CRIME 59 (1972).

107. 420 U.S. 806, 840 (1975).

108. *Id.* at 835-36.

109. *Id.* at 834-35 n.46.

110. Justice Stewart has again indulged in what seems to be a favorite procedure of the Court—relegating to a footnote that which is an especially significant point. *See, e.g.*, U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4, which is generally recognized as the genesis of the double standard in recent constitutional adjudication concerning protection to be given to personal fundamental liberties and mere economic interests. *See* G. GUNTHER, CONSTITUTIONAL LAW 593-95 (9th ed. 1975).

telligent choice. The plain language of the opinion suggests little as to what level of ability must be demonstrated before the defendant is allowed to proceed *pro se*. Justice Stewart cites the standard requirements noted in *Adams v. United States* ex rel *McCann* for waiver of constitutional rights.[111] The ability to understand and know the consequences of a choice, however, is different from the ability to avoid those consequences. Presumably, the competence of the defendant will be explored in a pretrial hearing as it was in *Faretta*.[112] It remains to be seen, however, how stringent the requirement will be.[113] Precisely because Justice

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111. 420 U.S. 806-08.

112. *See* note 15 *supra*.

113. The waiver of certain constitutional rights has been defined by the Supreme Court as the "intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 465 (1937). The validity of the waiver depends upon both the significance of the right and the circumstances of the waiver itself. The Court will not readily infer a valid waiver of important rights. A waiver of counsel must follow the guidelines which the Court has established in order to be considered effective against a later claim that no waiver was intended. Like a guilty plea, waiver will not be presumed in the absence of a clear record. Mere failure to request counsel is not to be taken as a waiver. Miranda v. United States, 384 U.S. 436, 475 (1965).

The broadest requirement is that the trial judge must determine whether the waiver is "an intelligent and competent one." Adams v. United States *ex rel.* McCann, 317 U.S. 269, 275 (1942).

There is no question that the trial court must conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice. Von Moltke v. Gillies, 332 U.S. 708 (1947). The intelligence of the choice is to be determined on a case by case basis. Clearly what might suffice as intelligent for a relatively simple case may not be enough in a very complicated one.

The most widely accepted view of the essence of an intelligent waiver is the defendant's full understanding of the consequences. That particular determination depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1937).

Competence also speaks to the steps which the court itself must take. The accused must know, for instance, that he has a right to counsel. He must be apprised of what he gives up when he waives counsel. The most definitive accounting of what information the trial court must impart to the defendant was made by Justice Black. A waiver "must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter." Von Moltke v. Gillies, 332 U.S. 708, 724.

The Court in *Faretta* spoke very briefly of waiver. The standard reference to intelligent and competent waiver was made, but Justice Stewart provided no further elucidation. Considering that the right to waive counsel

Stewart gives no definite standards, it might be expected that the individual states will have a measure of choice.[114] If *Faretta* is read narrowly and a defendant is held to the level of ability Faretta himself displayed, then the consequences of the majority's decision will not be so great. For, if a defendant has similar skill and ability, the gap between his *pro se* defense and that presented by an overworked public defender is less significant. Presumably the bias of the state and the court will be to demand a fairly significant showing of ability. If that expectation is accurate, Justice Stewart will have permitted only a small percentage of defendants access to the right of self-representation. If the case is read broadly so as to require a lesser degree of competence than Faretta displayed, then there will be a greater number of defendants affected.

Even assuming that the decision is read broadly, Justice Stewart has provided safeguards so as to protect the credibility of the system. Stand-by counsel may be appointed and, if the occasion should arise when the defendant is clearly, or even probably, un-

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has now become constitutional, and that it does "fly into the face" of effective counsel requirements, it is apparent that the acceptable standard for an intelligent waiver may be very high. That is to say, the defendant still does not have an absolute right to self-representation. It is to be expected that the courts will be especially diligent in assessing the individual capacity of those intrepid *pro se* candidates which come before them. Insofar as Justice Stewart explicitly allowed for the appointment of stand-by counsel and foreclosed the possibility of appeals on the grounds of ineffective assistance, the trial courts ought to be on notice that the pretrial hearing is not to be performed in a cursory manner. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); United States v. McGee, 335 U.S. 17 (1957) *vacating and remanding per curiam*, 242 F.2d 520 (7th Cir. 1957); Von Moltke v. Gillies, 332 U.S. 708 (1948); Rice v. Olson, 324 U.S. 786 (1945); United States v. Adams *ex rel.* McCann, 317 U.S. 269 (1942); Johnson v. Zerbst, 304 U.S. 458 (1938); Powell v. Alabama, 287 U.S. 45 (1932).

114. Here, Justice Stewart effectively meets another argument of the dissenters. Justice Burger had urged that, in the tradition of Betts v. Brady, 316 U.S. 455 (1942) (holding that the right to counsel in noncapital felony cases is not fundamental and hence not a fourteenth amendment requirement upon the states) the wisdom of federalism must be faithfully acknowledged and the question of self-representation left to the individual states to decide. 422 U.S. at 844. However, in drawing vague standards, Justice Stewart makes it clear that the states have considerable latitude. *Faretta* requires that there be some bottom line where, if a defendant demonstrates ability to defend *pro se*, he must not be forced to have a lawyer. However, between the extremes of an individual obviously incompetent and one who is obviously very clever, the states are relatively unrestricted in the absence of more specific direction from the Court.

able to proceed as had originally been determined, the state may provide counsel. In addition, self-representation is not to be regarded as a license for courtroom abuse. Nor will the inadequate quality of a *pro se* defense be considered as the sole grounds for appeal, despite its failure as "effective assistance." Each of these provisions serves a vital function in preserving the balance between the individual and the state.

Chief Justice Burger is correct in contending that the system must maintain its credibility and at least the appearance of justice and fair administration. However, Justice Stewart effectively furthers these policies without sacrificing the dignity of the individual and his right to independent decisionmaking. Although there still remains a small margin of harm for potential defendants who, for one reason or another, are not protected by Justice Stewart's carefully drafted procedure, it is a degree of risk that is less discomforting than a system so inflexible that it would force counsel on every defendant—counsel whose capacity to provide effective representation is itself open to debate.

Therefore, to the extent that Justice Burger would complain that Justice Stewart takes no account of society's expectations, the reply is clear. Society's chief interests *are* considered. The defendant must demonstrate an acceptable level of ability before he may represent himself. He is further protected by the appointment of counsel. The integrity of the criminal justice process has not been ignored. In addition, the prosecution is relieved of its burden of excessive caution; the judge can remain a judge without having to feel obliged to present the *pro se* defendant's case for him.

In short, if society does "have the right to expect that, when courts find new rights implied in the Constitution, their potential effect upon the resources of our criminal justice system [must] be considered,"[115] the majority has fulfilled its duty. Further, if the true need of a defendant is for quality representation, *Faretta* does little damage.[116] If indeed there is harm for those defendants who choose the *pro se* route, the risk is one that each has voluntarily assumed. Moreover, it is a risk which the Constitution demands the defendant be permitted to choose.

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115. *Id.* at 845.

B. *Textual Support for the Right to Self-Representation*

The second weakness of the majority opinion is Justice Stewart's inability to rest his holding directly upon textual language. There are two basic questions raised by his approach. The first is whether it is an acceptable interpretation of the sixth amendment in light of the Court's prior interpretations of that amendment's explicit grant of a right to counsel. If not, is there legal support to justify the holding or has the court indulged in the judicial extravagance which colored the development of substantive due process and which rendered the *Griswold* and *Wade* decisions so open to criticism?

Turning to the first problem, as was noted above Justice Stewart was unable to find the right to self-representation "in so many words."[117] Accepting that the sixth amendment does not provide explicit support, is his position nonetheless defensible? Such inquiry directs one to the longstanding debate over what constitutes legitimate judicial interpretation.[118] Forced to reach a decision on priority of social values, Justice Stewart adopted an approach similar to that developed by the Court in the area of procedural due process to ensure that his judgment did not appear to be an arbitrary substitution for that of the state legislature. He sought support for his position from legislative and judicial sources which indicated to him that self-representation ought to be considered a fundamental right.[119] Further, because it is fundamental, the right must be protected from infringement by the state. This is circuitous reasoning, but the chief difficulty with "due process" is that it is such a vague term there will be persistent debate over whether the justices picked the "proper" right to be protected. In *Griswold,* there was no clear language which defined the right to privacy. However, the Court affirmed the approach that different amendments create penumbral protection giving certain unexpressed rights constitutional status. Self-representation, being only a variant form of assistance of counsel, can thus fall within the scope of the sixth amendment.

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116. 422 U.S. at 834-35 n.46.

117. *Id.* at 819.

118. *See generally* Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703 (1975).

119. This technique seemingly complies with the Court's primary methodology for discovering fundamental rights. For an extended discussion of the Court's fundamental rights adjudication and an examination of the flaws inherent in that approach to constitutional interpretation *see* Kadish, *supra* note 102.

There is a final argument in defense of Justice Stewart's interpretation. It has been observed: "The dominant norms of decision are those large conceptions of government structure and individual rights that are best referred to and whose content is scarcely at all specified in the written Constitution—dual federalism, vested rights. . . ." [120] If the measure of autonomy granted by self-representation is in fact a logical derivative of the vested rights theory, Justice Stewart has not moved beyond the limits of acceptable interpretation. Indeed, a holding that the defendant must be bound by counsel would be patently incorrect.

C. *Danger of Self-Inflicted Harm*

The third weakness of the majority's decision lies in the potential for harm to a *pro se* defendant. The earlier analysis which indicated that Justice Stewart has not been so bold as it initially appears is based upon the supposition that society's expectation is that each defendant is entitled to at least some level of adequate representation. As was also indicated, the ability of the system to provide that quality of representation for each defendant is under serious challenge. The result is that a fairly competent defendant may provide nearly the same caliber representation *pro se* as might a harried public defender. However, such a proposition presupposes that those who would elect self-representation are primarily those relying upon the state for appointed counsel. It must also be recognized that there are some defendants who may be able to afford to retain very competent counsel. At that point there will be a considerable gap between the potential quality of representation and the actual skill of the *pro se* defendant. Although the Constitution does not require that all defendants have the "best" representation, *Faretta* now suggests that it permits a defendant to pursue a potentially less skillful defense. That is one of the implications of autonomy in *Faretta*.

The second difficulty lies in the latitude offered to the states by Justice Stewart's guidelines. The right to self-representation is limited; appropriate protective measures are to be implemented by the individual states. What remains to be seen is whether the states will in fact assume the responsibility for seeing that what is now only fearful speculation by Justice Burger does not become

120. Grey, *Do We Have An Unwritten Constitution?* 27 STAN. L. REV. 703, 708 (1975).

a reality. If *Faretta* is applied narrowly and the states do accept the burden of careful preexamination, the criminal justice system will seldom be subverted. Unfortunately, the record of speedy and eager compliance with new constitutional demands upon state criminal justice systems is not encouraging.[121] It is not possible to predict whether states will be aggressive in requiring a high level of demonstrated competence, or whether they will be content to accept less than *Faretta* suggests.

Even assuming that the states implement all of Justice Stewart's devices for protecting the defendant, it is likely that some defendants will in fact be permitted to represent themselves incompetently. In all cases of *pro se* defense the defendant does not even have the technical and procedural familiarity with the local court system of an overworked public defender. The latter maintains an undisputed advantage over a *pro se* defendant merely by virtue of his ability to move about easily and be recognized in a labyrinthic system.

The final criticism flows from the possibility of incompetent self-representation, and the probability that states might not be so quick to implement the safeguards Justice Stewart proposes. Must the majority justify its position that "although he may conduct his own defense ultimately to his detriment,"[122] the defendant must nonetheless be granted a constitutional right to an independent choice? Probably not. Justice Stewart qualified the right to self-representation; he does not apologize for it: "[The accused's] choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"[123] In its role as a symbol creator and as a reflector of contemporary values,[124] the Court demonstrates that the preeminence of individual choice must be affirmed as against the prospect of excessive state control. Notwithstanding that the holding in *Faretta* will necessarily permit some defendants to reject a measure of the protection which the Constitution grants, the greater societal interest in individual autonomy will be served as a result.

Finally, the querulous dissents of Justices Burger and Blackmun generate the impression that tension must exist between the state and the individual. Such a view misrepresents society's expecta-

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121. A. LEWIS, GIDEON'S TRUMPET 193-97 (1966).
122. 422 U.S. at 834.
123. *Id.*, *quoting* Illinois v. Allen, 397 U.S. 337, 350-51 (1969).
124. R. MCCLOSKEY, *supra* note 67, at 18-23.

tions. By considering primarily the defendant, Justice Stewart focuses on an issue which transcends the notion of a simple state-defendant contest. Society's goals need not be measured against private rights.[125] The public good is served equally by "the promotion, protection, and enjoyment of private right[s]."[126] Society has an interest in the proper functioning of the criminal justice system, but it has designated the preferable social goal. There is a more urgent public need to preserve the dignity of the individual than merely to protect him and to streamline the system.

Faretta is not the first decision of the Court which casts an uneasy reflection upon society. The Court's holding in *Roe v. Wade*, that the state could not prohibit a woman from obtaining an abortion, created an appearance of insensitivity to the value of potential life. But what must be appreciated is that individual autonomy and personal liberty cannot be encouraged without a concommitant loss to society. The comfort of a wholly protected and regulated society must be surrendered in part to permit the individual to control matters fundamental to his own intellectual and emotional security. It is a legitimate argument that self-representation subjects the *pro se* defendant to the potentially unfortunate ends of his own folly. The only alternative is to deny self-representation constitutional status. But, as Justice Stewart concluded, that is an untenable choice.

VI. Conclusion

Faretta v. California presented the Court with an unusual challenge. In order to protect the freedom of choice implicit in the liberty granted by the fourteenth amendment, the Court recognized the constitutional right of a defendant to represent himself in a criminal prosecution. Justice Stewart, writing for the majority, held that respect for individual autonomy required the recognition that the sixth amendment implicitly necessitates that constitutional right. No state can force counsel upon a defendant competent to choose a *pro se* defense.

Whether Justice Stewart's approach will be successful is still to be seen. The state which does in fact scrupulously adhere to the protective safeguards—stringent pretrial examination and appointment of standby counsel—will not be jeopardizing its criminal

125. Henkin, *supra* note 56, at 1410.
126. *Id.*

justice system. Nor will its *pro se* defendants be ignored. But the fact that all the safeguards were not made mandatory leaves room for abuse. One can only hope that the states show a sensitivity to the sixth amendment rights of defendants and develop careful guidelines to protect them.

Nevertheless, Justice Stewart's vehement defense of the individual's right to self-determination is certainly consistent with the Court's enhancement of individual autonomy, and it speaks well for the evolving values of our society.

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