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## The Right of Self-Representation and the Power of Jury Nullification

*Frank A. Kaufman\**

*The constitutional right of self-representation, guaranteed to criminal defendants by the Supreme Court in Faretta v. California, has significant impact upon the practical aspects of trial procedure. In part I Judge Kaufman, while fully espousing the majority view in Faretta, considers the adverse effect of Faretta upon the quality of the defendant's trial preparation and presentation and upon the efficient use of courtroom time. He then suggests remedial measures available to the trial court. In part II the author focuses upon the relationship between the pro se right and the nullification power of the jury—the often unarticulated prerogative of a jury in a criminal case to ignore the trial judge's instructions on the law. Judge Kaufman argues that in the highly-charged atmosphere of a political trial, the pro se litigant has a unique opportunity openly to seek jury nullification, an opportunity realistically unavailable to the litigant represented by counsel. He therefore concludes that fairness and candor demand that judges should have the flexibility to provide for a nullification instruction in appropriate cases.*

IN *FARETTA v. CALIFORNIA*<sup>1</sup> the Supreme Court of the United States held that a defendant in a criminal case has a constitutional right to represent himself, provided he knowingly and understandingly waives his right to be represented by counsel. The issue of self-representation has been the subject of concentrated focus in a number of able and piercing law review commentaries.<sup>2</sup> Commentators have

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

2. See, e.g., Robbins & Herman, *Pro Se Litigation—Litigating Without Counsel: Faretta or For Worse*, 42 BROOKLYN L. REV. 629 (1976); Rosenberg, *Self-Representation and the Criminally Accused—Evolution and Scope in the Federal Courts*, 13 CALIF. W.L. REV. 46 (1976); Recent Development, *Criminal Defendants at the Bar of Their Own Defense*, 13 AM. CRIM. L. REV. 335 (1975); Note, *Faretta v. California: The Constitutional Right to Defend Pro Se*, 5 CAP. U.L. REV. 277 (1976); Comment, *Faretta v. California: An Examination of Its Procedural Deficiencies*, 7 COLUM. HUMAN RIGHTS L. REV. 553

not only stated the pros and cons of self-representation, but they have also dissected many sub-issues. The purpose of this article is not to discuss each of those sub-issues. Rather, it is my purpose to reflect upon the basic meaning of the right of self-representation, and to discuss its relationship to the nullification power of the jury. That power is inherent in the common law which calls upon the jury in a criminal case simply to enter a verdict of guilty or not guilty.<sup>3</sup> The jurors are not asked or even permitted to state their individual reasons for reaching their verdict.<sup>4</sup> In practical effect this means that in any given case involving a verdict of acquittal, some or all of the jurors may choose not to follow the trial judge's instructions as to the law; that is, they have the power to nullify the law in that particular case.

Both issues, self-representation and jury nullification, were present in *Dougherty v. United States*,<sup>5</sup> a case to be discussed in some detail. Prior to that discussion, however, *Faretta* requires its own analysis. Accordingly, part I of this article focuses on the philosophy of *Faretta* and its practical implications. In part II, attention is directed toward *Dougherty*, the jury nullification issue, and the relationship of the self-representation right enunciated in *Faretta* to the nullification power.

## I

The name of the game of any system of law is justice—justice as the end result—justice in the bottom, right-hand corner of the page. Those of us who believe that the common law has produced the finest (though far from perfect) system of justice which man has yet devised are committed to the adversarial rather than the inquisitorial approach. That belief rests on the premise that justice is had when truth outs and

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(1975-76); Note, *Faretta v. California: The Law Helps Those Who Help Themselves*, 28 HASTINGS L.J. 283 (1976); Note, *A Fool for a Client: The Supreme Court Rules on the Pro Se Right*, 37 U. PITT. L. REV. 403 (1975); Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292 (1976).

3. The jury nullification power issue has been the subject of a great deal of scholarly writing. See generally M. KADISH & S. KADISH, *DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES* 45-66 (1973); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* (1966); Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CALIF. L. REV. 168 (1972); Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488 (1976); Comment, *Jury Nullification and the Pro Se Defense: The Impact of Dougherty v. United States*, 21 U. KAN. L. REV. 47 (1972); Note, *Jury Nullification: The Forgotten Right*, 7 NEW ENG. L. REV. 105 (1971).

4. At least the jurors are not asked until they have been discharged. Thereafter they may be quizzed by lawyers and newsmen, though many courts, including the United States District Court for the District of Maryland on which I sit, discourage jurors from talking about what is said in the jury room and limit or forbid post-trial attorney contact with them.

5. 473 F.2d 1113 (D.C. Cir. 1972).

that truth is more likely to out when each party is afforded the opportunity to produce his own case and to challenge and confront his adversary. Most of us accept the premise that highly skilled attorneys, proficient in researching and presenting the law and the facts, can best represent their clients and at the same time obtain the fairest results for society.<sup>6</sup> In this context, the question arises as to why, as *Faretta* holds, there should be a constitutional right to represent oneself in a criminal case. The answer is not a compelled one.<sup>7</sup> Justice Stewart's historical analysis in his majority opinion is most persuasive.<sup>8</sup> Yet history, as the Chief Justice and Justice Blackmun observe in dissent, often suggests more than it can prove.<sup>9</sup> Serious problems are inherent in *pro se* representation in both criminal and civil cases. A man who has himself for a lawyer usually indeed does have a fool for a client. In and out of the courtroom, a person is often better off allowing an able, well-informed advocate to speak for him rather than speaking for himself. A spokesman is usually less emotional and more objective than the subject. The spokesman can speak to the good points of his subject without appearing to brag, or to be self-serving or self-effac-

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6. The Supreme Court has often articulated this view in cases pertaining to the right of criminal defendants to counsel. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1937); *Powell v. Alabama*, 287 U.S. 45 (1932).

7. There may well be no constitutional right to self-representation in a civil case. *Faretta* holds that there is a constitutional right under the sixth amendment, which pertains only to criminal cases. That right is made applicable to the states by the fourteenth amendment. A statute, 1 Stat. 73, 92, to the same effect was enacted in 1789 by the First Congress and was signed into law by President Washington one day before the sixth amendment was proposed in the Congress. It survives as amended and is currently codified at 28 U.S.C. § 1654 (1970); its key words have remained unchanged since 1789. See note 20 *infra*. That statute is applicable to civil as well as criminal cases. It has been suggested that the Congress intended that the 1789 statute expand the then proposed constitutional right which was to be, and became, applicable only in criminal cases. See *Faretta v. California*, 422 U.S. 806, 812-13 (1975). See also *United States v. Plattner*, 330 F.2d 271, 274 (2d Cir. 1964).

8. 422 U.S. at 821-32. Justice Stewart traces an implied sixth amendment right of self-representation from English legal history, and the insistence upon that right by the colonists. He concluded:

In sum, there is no evidence that the colonists and the framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an "assistance" for the accused, to be used at his option, in defending himself. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

*Id.* at 832.

9. *Id.* at 843-45 (Burger, C.J., dissenting), 850 (Blackmun, J., dissenting). The historical roots of *pro se* representation are also analyzed at length in the legal commentaries cited in note 2 *supra*.

ing. An attorney has the benefit of some distance from the facts of the case. Also, with his learning and experience, an attorney should be able to present the case more clearly and persuasively, and to counter his opponent's contentions. He should be able to do all of this more expeditiously, more efficiently, and sometimes less disruptively than the man for whom he speaks.

While expedition and efficiency are not ends in and of themselves, the pragmatic demands of this complicated society may not be sensibly ignored. We are currently far from heeding the admonition that the government which governs best governs least.<sup>10</sup> Yet, even if we were to attain that goal and to streamline our criminal and civil law, there would remain a heavy volume of non-frivolous litigation requiring prompt decision. As a result, our litigation and decision-making processes must be designed to achieve maximum efficiency. A courthouse should be to a lawyer what we hope a hospital is to a doctor—an institution whose facilities are in short supply—which is to be entered and utilized by the patient or litigant, and his professional adviser, for no longer than those facilities can best be employed. Only in that way can such facilities be utilized to our maximum benefit.

*Pro se* representation more often than not does violence to the interest of efficiency.<sup>11</sup> It is not well-calculated to achieve the truth-seeking goal of the litigation process. There is much to the worry of the *Faretta* dissenters that society is ill-served when an individual defendant in a criminal case is permitted to make a fool of himself and to bring about his own conviction by an inept defense far short of what could have been produced by a competent lawyer.<sup>12</sup> Also, the increased danger of disruption of court decorum and procedure which the *Faretta* dissenters fear is very real.<sup>13</sup> Moreover, anyone who has served as judge, hearing officer, or arbiter, even in an informal setting, knows that he may well tend, when one advocate—whether a party or his representative—is skilled and the other is not, to probe on behalf of the less skilled, to suggest avenues of approach to the less skilled, and to play devil's advocate with the more able. Nevertheless, the judge should not be a prosecutor or a defender in a criminal case, nor an

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10. See H.D. THOREAU, CIVIL DISOBEDIENCE (1849). See also R.W. EMERSON, POLITICS (1844). The observation is often popularly associated with the philosophy of Thomas Jefferson.

11. In *Dougherty* the court noted that: "Given the general likelihood that *pro se* defendants have only rudimentary acquaintanceship with the rules of evidence and courtroom protocol, a measure of unorthodoxy, confusion, and delay is likely, perhaps inevitable, in *pro se* cases." 473 F.2d at 1124 (footnotes omitted).

12. See 422 U.S. at 839-40 (Burger, C.J., dissenting), 852 (Blackmun, J., dissenting).

13. *Id.* at 836-52.

attorney for either side in a civil case. The scales of justice can be weighed more exactly by one who has heard the best of arguments on behalf of both sides. Given the differences in training, experience, and ability of attorneys, that result is not always obtainable in a world of human beings. Yet it is an aspiration not to be shelved simply because it is not easily attained.

Why then *Faretta*? As has been asked, is *Faretta* for worse?<sup>14</sup> I do not think so. To a large degree the question is one of personal philosophy. There is considerable merit to the saying that "every man has a right to go to hell in his own way," subject of course to the limitations necessary to safeguard the rights of others. That philosophy would tolerate the negative results and implications of *Faretta* in order to permit each litigant to represent himself in his own way, even if he lessens his chances of winning, provided that he does not utilize the resources of our judicial and administrative systems too inefficiently or too inappropriately.<sup>15</sup>

The *Faretta* question may also be viewed in historical terms. "[A]n appreciation of the virtues of self-reliance and a traditional distrust of lawyers"<sup>16</sup> were values of common understanding in the American Colonies. Lawyers in colonial and revolutionary times were thought to be tainted by close association with royal authority.<sup>17</sup> Judges were even more suspect.<sup>18</sup> By contrast, jurors were the embodiment of that peer group judgment upon which democracy rested.<sup>19</sup> These perceptions, carried forward in constitutional and statutory enactments guaranteeing to the litigant the option of self-representation,<sup>20</sup> continue as significant forces today. An individual litigant may

14. Robbins & Herman, *Pro Se Litigation—Litigating Without Counsel: Faretta or For Worse*, 42 BROOKLYN L. REV. 629 (1976).

15. For this reason, the *Faretta* right must be demanded in a timely fashion. See 473 F.2d at 1122-24. See also *Recent Development*, *supra* note 2, at 357-58 (1975).

16. 422 U.S. at 826.

17. *Id.* See C. WARREN, *A HISTORY OF THE AMERICAN BAR* (1966). See also Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 VA. L. REV. 969 (1976).

18. Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CALIF. L. REV. 168, 175 (1972).

19. *Id.* at 174-76.

20. The sixth amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." The Judiciary Act of 1789, 1 Stat. 73, 92, presently provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel." 28 U.S.C. § 1654 (1970). Federal Criminal Rule 44(a) provides: "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him . . . , unless he waives such appointment" (emphasis added). For a

distrust all members of the bar, perhaps because of past experience, or for no reason at all. He may believe that he is more able to present his own case than anyone else, or that no representative will be willing to say what he wants said. He may feel that he is being unjustly and discriminatorily prosecuted, or that the claims or defenses he asserts grow out of unequal and discriminatory treatment, and that only he can relate why that is so. A litigant, if there is any merit to his assertions, may in a given case be tossing away his chances of success by proceeding *pro se*. But he sometimes feels that his sincerity,<sup>21</sup> his devotion to his cause, or his own involvement will compensate for his lack of objectivity and skill. He may feel that anyone else speaking for him will pull some of the punches he insists upon throwing, and which he is determined to throw regardless of their effect.<sup>22</sup> Particularly in trials involving politically explosive issues, a defendant may well care less about winning the case than simply being heard. Even in a non-political case, a litigant may be convinced that he alone can obtain justice, and so want personally to confront his accusers and adver-

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discussion of rights under state law, see Recent Development, *supra* note 2, at 343-44, 349.

The Court in *Faretta* found support for the constitutional right of self-representation "in the structure of the Sixth Amendment."

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process for obtaining witnesses in his favor." Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment.

422 U.S. at 819 (footnotes omitted). But in his dissenting opinion in *Faretta*, Justice Blackmun argued that since the right of self-representation had been expressly included in the Judiciary Act of 1789, then "traditional canons of construction" supported the conclusion that the omission of the right from the constitutional amendment, proposed the day after the Judiciary Act was signed, must have been intentional. *Id.* at 844.

21. In seventeenth century Pennsylvania, an accused was entitled to be found innocent "if his *personal* response to the charges against him satisfied the jury." Recent Development, *supra* note 2, at 349 (emphasis original). While that view is seemingly not embodied in the law as we know it today, the jury's *power* to acquit remains. See text following note 3 *supra*.

22. In *Faretta*, Justice Stewart reviewed at length the record in the English Court of the Star Chamber proceedings in the 16th and 17th centuries. He noted the pressures placed upon counsel by that court, and the penalties, including death, meted out to *counsel* who offended the court. 422 U.S. at 822 n.18. See also Recent Development, *supra* note 2, at 347. The problems of presentation with or without counsel in totalitarian societies are often steeped in frustration. See Luryi, Book Review, HARV. L. SCH. BULL. 4 (Fall 1976) (reviewing T. TAYLOR, A. DERSHOWITZ, G. FLETCHER, L. LIPSON, & M. STEIN, COURTS OF TERROR: SOVIET CRIMINAL JUSTICE AND JEWISH EMIGRATION (1976)).

saries.<sup>23</sup> The opportunity to have one's say, even if one makes a fool of oneself in the process, is arguably an ingredient of the right to have one's day in court. Society, it seems to me, should allow exercise of that right despite its inefficiencies, the possibility of disruptive behavior, and the occasional occurrence of a substantively wrong result.

The exercise of even the most fundamental of rights, however, must yield to some curtailment. Justice Holmes' proscription of the cry "Fire!" in a crowded theatre, and that proscription's concomitant effect on the right of free speech comes quickly to mind.<sup>24</sup> But the delays and disruptions which may occur in a *pro se* setting can be mitigated by the trial court and thus are not so appalling as to require that society impose counsel upon a litigant against the latter's will and his interests as he perceives them.

A consideration of the remedial and protective measures available to the trial court suggests several thoughts.<sup>25</sup> First, there would be less

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23. Defendants in criminal cases may have different reasons for deciding to proceed *pro se*. For a discussion of cases suggesting some of those reasons, see Note, *The Jailed Pro Se Defendant and the Right to Prepare a Defense*, 86 YALE L.J. 292, 293-94 (1976).

24. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

25. There are some litigants who determine not to have counsel simply because they cannot afford to pay them. As a practical matter the number of defendants proceeding *pro se* could be decreased (and so the problems created by *pro se* representation also decreased) if more funds were available to courts to compensate counsel. Funds are usually available to courts to compensate counsel, at least nominally, for services provided to indigent defendants in criminal cases. 18 U.S.C. § 3006A (1970). But such funds are too seldom available for the aid of indigent civil litigants in non-habeas corpus cases. An indigent prisoner in a case brought under 42 U.S.C. § 1983 (1970) may or may not be able to assert sufficient grounds under the habeas corpus statutes, 28 U.S.C. §§ 2254, 2255 (1970), to enable him to qualify for aid under the Federal Criminal Justice Act, 18 U.S.C. § 3006A (1970). See *Preiser v. Rodriguez*, 411 U.S. 475 (1973). But what about the plaintiff who has been released from confinement and subsequently proceeds under § 1983? Nearly always, such plaintiffs desire counsel but are unable to pay. Usually, the court, when it finds it appropriate, can persuade one or more members of the bar to accept appointment in such cases. Seldom, however, is there any way to pay counsel for such services, or even to reimburse them for their costs. Society should provide representation to the indigent litigant, civil as well as criminal, as a matter of right and not as a matter of charity. No indigent litigant should be a second-class citizen with regard to representation. His counsel should be paid appropriately for services rendered.

In addition, there is the case of the non-indigent who refuses to employ counsel. Seemingly, there are no funds available to compensate standby counsel in such cases, regardless of what basic fairness or the interests of society require. Because, by definition, economic concerns have not dictated his decision to proceed *pro se*, such a litigant has neither been deprived of any right nor made to feel second-class. In my own experience, I have encountered this problem only once in eleven years, and then in a civil case. The issues were disposed of without trial. If a trial had been required, however, I might well have asked a member of the bar to serve in some type of standby capacity for the plaintiff, who was totally blind.

It should be noted that it is not always necessary to have *all* standby counsel functions performed by members of the bar. Paralegals, and even lay persons, part-time



disruption resulting from *pro se* representation if we enhanced the decorum of our courtrooms by improving the behavior patterns of all participants. Perhaps it is only my own advancing age, but in my mind courtroom behavior on the part of all concerned is not as dignified nor as calculated to earn respect as it was a third of a century ago. Any person, lawyer or layman, should be able to express his dissatisfaction with a judge's actions. But that can be done in a manner best calculated to achieve respect for the democratic process. Attorneys, media representatives, and spectators today often enter a courtroom and attempt to engage in private conversation and distracting behavior. New courthouses and courtrooms are themselves sometimes not designed to achieve the utmost in respect.

Judges themselves must take the lead, together with court staff and attorneys, in improving courtroom decorum. While an anglophile, I would not trade our American system of justice for that of England. But there are certain features patently noticeable to anyone who spends any time in a British courtroom which deserve emulation. Among those, certainly, are respect and decorum. Those may be societal norms more indigenous to Britain than the United States. But there is little reason why we cannot imitate within our own halls of justice those British virtues.

Second, *Illinois v. Allen*<sup>26</sup> teaches that a trial judge may use nearly any reasonable procedure needed to control the courtroom. Thus, the Court in *Allen* concluded:

We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.<sup>27</sup>

While the judge should not use a cannon when a water pistol will cause the mouse to scamper, he can if necessary restrain a litigant, whether acting *pro se* or represented by counsel, from conduct which interferes with a fair trial.

The judge also has available the device of standby counsel to insure that if it is necessary for him to remove a litigant from the courtroom there will be counsel to step into the breach.<sup>28</sup> "Standby counsel" is

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or volunteer, may often be able to do the job. See *United States v. Glover*, 381 F. Supp. 1139 (D. Md. 1974); cf. Kaufman, *District Court Review of Department of Health Education and Welfare Decisions*, 26 Ad. L. Rev. 113, 115-16 (1974) (use of para-professionals in administrative hearings).

26. 397 U.S. 337 (1970).

27. *Id.* at 343-44.

28. *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975).

not a phrase of art. Standby counsel can play whatever role is consonant with the desires of the *pro se* litigant and the court.<sup>29</sup> Standby counsel can serve, if a *pro se* litigant so desires, as co-counsel or assistant counsel for that litigant. Such assistance can include participation with the *pro se* litigant in the examination of witnesses and in the presentation of objections, motions, and opening and closing arguments.<sup>30</sup> Moreover, if a *pro se* defendant in a criminal case is held in confinement and is either unable to make bail or is not entitled to bail, standby counsel can act as his eyes and ears in an investigative role prior to and during trial. If the litigant is jailed, he may or may not have adequate library resources available to him.<sup>31</sup> Standby counsel can research, analyze, and synthesize the law before and during trial. In any given case, there may well be a legitimate desire on the part of a litigant to handle part as opposed to all of his own case. For example, he may want to make his own opening and closing arguments and to have counsel handle examination and all other, or certain other, facets of the trial.<sup>32</sup>

If the *pro se* litigant rejects the assistant counsel role, standby counsel can be restricted to advising the court and the litigant of factual and legal issues to be explored or determined. Such advice can, when appropriate, be given on the record outside the presence of the jury, and perhaps outside the presence of the opposing party and his counsel. Even if standby counsel acts only in an advisory role, he makes it possible for the judge to devote himself to the judicial function and to refrain from being counsel to either side.<sup>33</sup> That is not to say that there is anything wrong in a judge suggesting to counsel or to litigants legal or factual points, provided of course that he does so impartially in a way calculated to avoid any inappropriate effect upon the jurors. But the less a judge feels required to protect one side against the other, or to balance the advocacy of one side as opposed to that of the other, the better.<sup>34</sup>

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29. See Note, *supra* note 23, at 309-11.

30. Counsel almost always will be better able to state objections and may well be better equipped to steer the jury selection process. See 422 U.S. at 838-40 (Burger, C.J., dissenting).

31. See *Bounds v. Smith*, 430 U.S. 817 (1977). See also Note, *supra* note 23, at 309-11.

32. I permitted essentially such a division in a recent criminal case and found that it worked out satisfactorily except that the litigant hurt himself badly in his closing argument.

33. See text following note 13 *supra*.

34. In an opinion a few years ago, I discussed a First Circuit case on this point:

In *Figueroa Ruiz v. Delgado*, 359 F.2d-718 (1st Cir. 1966), the First Circuit held unconstitutional a procedure in the Puerto Rico District Court pursuant to

If the litigant determines totally to represent himself, the court may still decide to appoint standby counsel in the event that he is needed before the trial ends. Such standby counsel would engage in no representation without the litigant's approval,<sup>35</sup> unless the court itself assigns specific representational duties. But standby counsel could be asked by the court to prepare fully before trial and to be present throughout the trial. The availability of standby counsel may well be a boon not only to a *pro se* litigant who changes his mind in mid-trial, but also to the court, in the event the court needs to remove the *pro se* litigant from the courtroom or to take other corrective action as permitted by *Illinois v. Allen*.<sup>36</sup> While there is seemingly no requirement that a trial judge appoint standby counsel,<sup>37</sup> and while such counsel

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which the Commonwealth's witnesses took the stand at the request of the trial judge and were interrogated by him and pursuant to which counsel for the defendant conducted the cross-examination and the judge conducted a redirect examination limited in scope to the subject matter elicited on cross-examination. Further, under that procedure, the judge could cross-examine the defendant and his witnesses and could call prosecution witnesses for the purpose of rebuttal. Chief Judge Aldrich held that procedure incompatible with due process of law since the judge was both prosecutor and judge.

Under the procedure in the Puerto Rico District Court the judge must alternate roles [as the prosecutor and judge] in rapid succession, or even assume both at once. Thus, when interrogating a witness he is examining for the people, but when listening to the answer to the question he has propounded, he is weighing it as judge, and at the same time considering what question, as prosecutor, to ask next. Correspondingly, when he listens to the answer to a question put by the defense, he must, as judge, impartially evaluate the answer, but, simultaneously, as prosecutor, he must prepare the next question for cross-examination. The mental attitudes of the judge and prosecutor are at considerable variance. To keep these two personalities entirely distinct seems an almost impossible burden for even the most dedicated and fairminded of men. [*Id.* at 720.]

Judge Aldrich also noted concern that the [j]udges [*sic*] of Puerto Rico were put in the position of assuming an *active* prosecutorial role at trial since the defendant usually had the services of counsel while the Commonwealth did not.

\* \* \* If a defendant has counsel, and particularly if he has effective counsel, and the people have none, it would be a rare judge who did not, at least unconsciously, seek to set the balance. While he may not be the ardent, striving, advocate that the Commonwealth's brief envisages as a public prosecutor, if he has to see that justice is done for the people's cause, he must, to some extent at least, act as prosecutor. [*Id.*; *sic*] footnote omitted.]

United States v. Glover, 381 F. Supp. 1139, 1145 (D. Md. 1974).

35. The court might, however, assign representational duties to standby counsel in the event that it is necessary to terminate the defendant's self-representation. *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975); *United States v. Dougherty*, 473 F.2d 1113, 1125 (D.C. Cir. 1972). See *Recent Development*, *supra* note 2, at 363-64.

36. 397 U.S. 337 (1970); see *Mayberry v. Pennsylvania*, 400 U.S. 455, 467-68 (1971) (Burger, C.J., concurring). See also text accompanying note 28 *supra*.

37. It may be that a defendant has a right either to have counsel or to defend himself, and no right to standby counsel. Consider Justice Blackmun's dissent in *Faretta* posing the following among what he described as "a host of other procedural questions": "If a

may not be needed in many cases, it nevertheless would seem preferable for standby counsel to be available in any case in which disruptive conduct can reasonably be anticipated. Also, it may make sense to have standby counsel in any case in which a lengthy trial is expected<sup>38</sup> or in a case which would be difficult to retry, as when the health of a party or a key witness is uncertain.

In sum, the trial judge has tools which he can use to accommodate the exercise of the *Faretta* right of self-representation with the need for court efficiency and decorum. However, before such tools can be used, the court must first be satisfied that the litigant in fact wishes to proceed *pro se*. This involves not only the exercise of the *Faretta* right, but also a waiver of the sixth amendment right to counsel. The trial judge should always make certain that the defendant completely understands his right to be represented by counsel. No waiver of that right by the defendant can be accepted unless the court is satisfied that the defendant's waiver is knowledgeable and intelligent.<sup>39</sup> In addition, the level of competency required of a defendant before his waiver of trial counsel is accepted should be perhaps a shade higher than the degree of competency to stand trial. While a defendant might be sufficiently competent to aid his counsel in presenting an adequate defense, he might not have sufficient competency to present his own defense.<sup>40</sup> In any event, the trial judge should not permit a defendant in a criminal case—or a litigant in any case—to proceed without counsel until after the court has failed in its attempt to persuade him to accept or seek representation. The court should explain the advantages of such representation, but at the same time the trial judge should take care to assure the litigant that he will receive a fair trial whether he

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defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel?" 422 U.S. at 852. See Note, *Faretta v. California: The Constitutional Right to Defend Pro Se*, 5 CAP. U.L. REV. 277, 289-91 (1976). There is seemingly no reason to limit the *pro se* defendant to an all or nothing choice. Moreover, the societal interest in a fully litigated trial, an interest made much of by the *Faretta* dissenters, can often be better fulfilled through the use of advisory counsel. See Recent Development, *supra* note 2, at 361-62.

38. Section 6.7 of the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE (Approved Draft, 1972) states:

When a defendant has been permitted to proceed without the assistance of counsel, the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion. *Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants* (emphasis added).

39. 422 U.S. at 435-36.

40. Comment, *Faretta v. California: An Examination of its Procedural Deficiencies*, 7 COLUM. HUMAN RIGHTS L. REV. 553, 567 (1975-1976). See also Recent Development, *supra* note 2, at 355-56.

proceeds with or without counsel. In short, the trial judge must walk a tightrope.<sup>41</sup>

Most courts have well-developed litanies which they follow carefully when taking guilty pleas.<sup>42</sup> As a result, it is becoming increasingly rare for the acceptance of guilty pleas to be attacked successfully after conviction and sentencing. While waivers of the right to counsel are few in number compared with tenders of guilty pleas, the development of carefully devised litanies relating to *pro se* issues is desirable. Such litanies could cover: (1) the acceptance or waiver of counsel, (2) the decision to appoint or not to appoint standby counsel, (3) a statement by the trial court of reasons why a waiver has or has not been accepted and why standby counsel has or has not been appointed, (4) an explanation by the court of the role, duties, and performance of standby counsel if he is appointed, (5) the requirement of reports on the record by standby counsel of what he has done before and during trial, including the litigant's cooperation or lack thereof, and (6) the affording of an opportunity to the litigant to comment upon each of the above. By adopting such procedures, courts can further accommodate the *Faretta* right with the court's need for orderly trials.

The development of such litanies will likely have one additional effect. If the litigant, after being fully advised, proceeds without counsel and subsequently loses his case, he will have an almost insurmountable hurdle if he attempts to urge the absence of counsel as a basis for reversal. And that is as it should be. The litigant should not be allowed to have it both ways.<sup>43</sup>

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41. As to the "predicament" in which a trial court finds itself when advising a defendant as to his rights to counsel and to self-representation, see Recent Development, *supra* note 2, at 351-57.

42. *Von Moltke v. Gillies*, 332 U.S. 708 (1948), provides guidance for the development of such litanies. Speaking for a plurality of the Court, Justice Black stated that in the case of a guilty plea, an effective waiver of the right to counsel "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." *Id.* at 724. See also *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969), *cert. denied*, 396 U.S. 1021 (1970); *Carter v. State*, 243 Ind. 584, 187 N.E.2d 482 (1962). At a minimum *Von Moltke* would appear to provide important guidance to a trial court, not mandatory standards. See, e.g., *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969).

43. Consider in this regard Justice Stewart's comment in *Faretta* that a defendant "may conduct his own defense ultimately to his own detriment" and that "whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" 422 U.S. at 834-35 & n.46. See also Note, *supra* note 23, at 294, 301. But see Recent Development, *supra* note 2, at 352-61.

## II

As the preceding analysis is designed to indicate, *pro se* representation gives rise to a host of difficult practical problems for which there are often no easy answers. When the jury nullification issue is added to the *Faretta* stew, those problems multiply. Why then add the jury nullification issue? The answer is that it adds itself—it is part of the stew—and its presence may not be disregarded.

The nullification issue arises whenever a litigant or his attorney wants to argue that the jury should exercise its power to nullify the law by acting in disregard of the instructions of the court as to the proper application of the legal rules. If counsel for a litigant can argue to a jury its nullification power, or obtain a jury instruction by the court as to the existence of that power, then a *pro se* litigant also has those same rights. The problem becomes more difficult, however, if no such argument may be made by counsel, and no such instruction to the jury is given, because as a practical matter, the *pro se* litigant who insists upon asking the jury to disregard the law can do for himself what counsel is not permitted to do. The source of the *pro se* litigant's superiority in this area is his peculiar status before the court. In a criminal or a civil jury trial, the *pro se* litigant, like counsel, is subject to the contempt power of the court. But he is not subject to the discipline and the effect of any continuing relationship with the court and the organized bar. Thus, he is not subject to the same degree of control which a court has over counsel. If a litigant represents himself, he will, in the course of examining witnesses or presenting objections, motions, or argument, be able to testify in his own behalf without taking the witness stand and without subjecting himself to cross-examination. The *pro se* litigant can similarly get before the jury, by argument, evidence inadmissible as hearsay or otherwise objectionable. The trial judge can and should instruct the jury not to take into account anything except admissible evidence. The judge can also sustain objections by counsel for the opposing party to *pro se* argument, particularly if it is not supported by evidence. But constant interruptions by judges or opposing counsel of *pro se* argument may antagonize some jurors and cause them to sympathize with the *pro se* litigant. Thus, counsel for the opposing party may find himself with a Hobson's choice in deciding when and how often to object.<sup>44</sup> The

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44. On the other hand, the *pro se* litigant can himself antagonize a jury. In addition, the judge can easily leave the jury with an even more critical impression of a *pro se* litigant who has not created jury sympathy for himself, if the judge too often or too strongly admonishes the litigant to limit argument to that allowed by the rules. In such a case standby counsel, if he is acting by the trial's end as assistant counsel, can attempt to

result is that it is far easier for the *pro se* litigant to argue that the jury should exercise its nullification power than for counsel to do so.

In *United States v. Dougherty*,<sup>45</sup> the two main issues before the appellate court involved *pro se* representation and the jury's power to nullify. The court of appeals first confronted the issue of whether the trial court's refusal to honor the pre-trial demand of certain of the so-called "D.C. Nine" for *pro se* representation required reversal and a new trial.<sup>46</sup> The second issue was whether the trial judge had erred both in failing to instruct the jury concerning its power to acquit in disregard of the court's instructions on the law, and in failing to permit argument that the jury should exercise that power. Chief Judge Bazelon and Judge Leventhal agreed that the *pro se* demand had been erroneously denied, that such error was not harmless,<sup>47</sup> and that a remand for a new trial was required.<sup>48</sup> In his opinion for the majority,<sup>49</sup> Judge Leventhal reached, though on a non-constitutional basis,<sup>50</sup> the result which *Faretta* subsequently mandated. In a separate concurring and dissenting opinion, Judge Bazelon adhered to the views he had earlier stated in *Brown v. United States*.<sup>51</sup> He wrote that he would have reached the constitutional issue in *Dougherty* on the *pro se* issue and would have decided it in favor of the *pro se* litigant.<sup>52</sup> That approach was subsequently adopted by the Supreme Court in *Faretta*.

The resolution of that second issue, which divided Judges Bazelon and Leventhal, was not necessary to dispose of the appeal in *Dougher-*

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mitigate any negative reaction by the jury to the excesses of the *pro se* litigant by stressing his client's position.

45. 473 F.2d 1113 (D.C. Cir. 1972).

46. In *Dougherty*, the defendants had vandalized the District of Columbia offices of the Dow Chemical Company in protest against the Vietnam War. Prior to trial, the district court denied motions by the defendants that they be permitted to represent themselves. While the trial judge required that motions, objections, and examination of witnesses be made through counsel, he did agree to permit each defendant to make a five-minute opening statement and to testify in narrative form without a specific time limit. There were several disruptions during trial, including shouting and a physical struggle involving spectators, marshals, and one defendant. The trial judge confined closing argument to counsel. He refused to instruct the jury that it could disregard his instructions as to the law or that "moral compulsion" was a defense. *Id.* at 1117-21.

47. *Id.* at 1121-30 (Leventhal, J.), 1138 (Bazelon, C.J., concurring in part, dissenting in part).

48. *Id.* at 1138 (Leventhal, J.) (Bazelon, C.J., concurring in part, dissenting in part).

49. 473 F.2d at 1121-27.

50. Judge Leventhal relied on the statutory right to self-representation, 28 U.S.C. § 1654 (1970). 473 F.2d at 1123.

51. 264 F.2d 363, 370 (D.C. Cir. 1959) (en banc) (Bazelon, C.J., dissenting).

52. 473 F.2d at 1138-39. In a separate dissent, Judge Adams agreed with Judge Leventhal on the existence of a statutory right to proceed *pro se*, but found that defendants' behavior amounted to a constructive waiver of the *pro se* right. *Id.* at 1146.

ty. They may well have determined, however, to reach that issue in order to provide guidance to the trial court for the retrial. Judge Leventhal concluded that the district court had correctly refused to instruct the jurors concerning their power to disregard the trial judge's instructions on the law, and had correctly refused to permit argument by counsel that those instructions were wrong and that the jury could ignore them.<sup>53</sup> While noting that a general verdict does enable a jury, in practice, to apply the law as it sees fit and to follow or reject the trial court's interpretation of it,<sup>54</sup> Judge Leventhal feared that "[T]he way the jury operates may be radically altered if there is alteration in the way it is told to operate."<sup>55</sup> Preferring not to remind jurors formally of the nullification power, he concluded: "The danger of the excess rigidity that may now occasionally exist is not as great as the danger of removing the boundaries of constraint provided by the announced rules."<sup>56</sup> Judge Bazelon, opting for candor, contended that as long as we have general verdicts in criminal cases and jurors have the power in effect to determine law as well as fact, jurors should be told of that power.<sup>57</sup>

My own views have been somewhat ambivalent on the jury power issue. Judge Roszel C. Thomsen, then the Chief Judge of the court upon which I sit, was the presiding trial judge in *United States v. Moylan*,<sup>58</sup> a case which confronted directly the jury nullification issue. During the jury instruction conference defense counsel asked to be permitted to argue to the jurors that they should not apply the law as

53. *Id.* at 1130-37.

54. *Id.* at 1133. See also Note, *Laws That Are Made to be Broken: Adjusting for Anticipated Non-compliance*, 75 MICH. L. REV. 687 (1977).

55. 473 F.2d at 1135.

56. *Id.* Judge Leventhal analogized the underscoring of the nullification power to the situation that exists when no maximum speed limit is posted. He suggested that experience teaches that while many motorists habitually exceed the posted maximum speed, they drive slower than they would were there no speed limit at all. *Id.* at 1134.

In reaching this conclusion, Judge Leventhal followed the pattern set by Judge Sobeloff in *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

No less an authority than Dean Pound has expressed the opinion that "[j]ury lawlessness is the great corrective of law in its actual administration." However, this is not to say that the jury should be encouraged in their "lawlessness," and by clearly stating to the jury that they may disregard the law, telling them that they may decide according to their prejudices or consciences . . . , we would indeed be negating the rule of law in favor of the rule of lawlessness.

*Id.* at 1006. For further discussion of the evils of "jury lawlessness," see *United States v. Simpson*, 460 F.2d 515, 519-20 (9th Cir. 1972).

57. 473 F.2d at 1139-44.

58. 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).



Judge Thomsen would state it to them and to point out that the jury had the power to ignore Judge Thomsen's instructions as to the law. Defense counsel also suggested that Judge Thomsen give an instruction explaining the jury's nullification power. Judge Thomsen denied all of those requests. He instructed counsel not to tell the jurors that the law was other than the judge would state it to them or that they had the power to ignore his instructions. Those views were, and still are, strongly held by Judge Thomsen. They were approved in unmistakable terms by the Fourth Circuit on appeal.<sup>59</sup> Judge Thomsen had consulted with several of his district court colleagues while the *Moylan* jury instruction conference was in progress. Those consulted, including myself, concurred.

I have now come over to the other side. If, as Judge Leventhal believes, juries, by osmosis or otherwise, recognize their power to disregard the trial judge's instructions as to the law,<sup>60</sup> why should not the trial judge come out in the open, when the occasion is appropriate, and discuss the existence of that power with the jury?<sup>61</sup> Juries are largely composed of dedicated, conscientious individuals. Many, if not most, jurors are proud to serve, particularly in cases of high concern. It is unlikely that all members of a jury in any case (or even a majority of them in jurisdictions in which less than unanimity for verdict is required) will disregard what the trial judge tells them the law is, unless they are dealing with a very unpopular and widely flouted law (*e.g.*, prohibition), or a rare political dissent case in which public opinion has changed faster than the law (*e.g.*, perhaps, near its end, the Vietnam War) or an occasional emotionally charged case (*e.g.*, the righteous wife's killing of her adulterous spouse and his lover). It might be that if juries in certain cases had been charged as to their power to reject the judges' instructions, there might have been more such rebuffs by verdicts contrary to law or by mistrials because of hung juries. Perhaps, however, there might have been less. In any event, when they do occur, such rebuffs may cause legislative action to come sooner than otherwise.<sup>62</sup> If the nullification issue is removed

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59. *Id.* See note 56 *supra*.

60. 473 F.2d at 1135.

61. There is a story about the mother who, just about to exit the living room one evening with the father, called back from the door to the baby sitter: "Don't let baby stick those beans [with which baby was playing] up her nose." Baby had never done so before, but did so as soon as the baby sitter turned her back. I doubt if most jurors are like that baby.

62. Consider in this regard the following passage from Chief Judge Bazelon's opinion in *Dougherty*:

If revulsion against the war in Southeast Asia has reached a point where a jury

from the realm of osmosis and projected into the open, the strengths of our legal system—experience, reason, and argument—can be best utilized by judge, counsel, and jurors alike.

I do not suggest that a power instruction be given in any but the occasional case. Indeed, I would think it should rarely be given even if requested. It perhaps should sometimes be given to try to insure *against* jury nullification in an emotion-laden criminal case (*e.g.*, the bedroom triangle). In such a case, it might be well not only to remind the jurors of their duty to act impartially and without bias, prejudice, or sympathy, but also to emphasize that the jury as a body, and each juror as an individual, should never exercise the nullification power to reach a verdict, or to cause a jury to “hang,” simply because one or more jurors sympathize with the defendant. Sympathy may appropriately play a part in sentencing, but not in determining guilt or innocence.<sup>63</sup>

The jury’s power to nullify also may be an appropriate subject for candid discussion by the judge in his charge, in certain cases which present important and divisive issues, such as the Vietnam War. In such a case the jurors will hardly be able to ignore their gut reactions.

In both *Moylan* and *Dougherty*, the defendants were motivated by strong political convictions.<sup>64</sup> But they violated the law not by means which might in some circumstances be morally acceptable to a sizable segment of the population, but by destruction of property and by breaking and entering. That could have been pointed out by the trial judges in the course of permitting nullification arguments, along with a strong statement of reasons why in each case the jury should not come close to exercising the nullification power.

Along with Judge Bazelon,<sup>65</sup> and contrary to the view I once held, I think there was a need for a power charge in *Moylan* and *Dougherty*, though I hazard a guess that the jury verdicts in those cases would have been “guilty” even if the trial judges had instructed the jurors along

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would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist.

473 F.2d at 1144.

63. *People v. Anderson*, 64 Cal. 2d 633, 414 P.2d 366, 51 Cal. Rptr. 238 (1966). See *United States v. DeAlessandro*, 361 F.2d 694, 697 (2d Cir. 1966). *But see* *People v. Vaughn*, 71 Cal. 2d 406, 455 P.2d 122, 78 Cal. Rptr. 186 (1969).

64. In *Moylan*, the defendants, known as the “Catonsville Nine,” destroyed Selective Service Commission files in protest against the war in Vietnam. In *Dougherty*, the so-called “D.C. Nine” vandalized the offices of Dow Chemical Company in reaction to that company’s support of American military efforts in Vietnam.

65. For the text of Chief Judge Bazelon’s opinion in *Dougherty*, see 473 F.2d at 1138–44.

the following lines: (1) in a democracy, the way to change a law is not to violate it, whether by passive, non-violent, or any other means, but instead by expression of views at the polls and otherwise; (2) a juror should never fail to enforce a law as defined in the judge's instructions unless the very roots of his conscience and his very guts will not permit him to do so; (3) a juror should never act out of bias, prejudice or sympathy; (4) a juror should rarely, except in that once in a lifetime type of case when he just cannot permit himself to do otherwise, reject and fail to follow the court's instructions on the law. Rather than encourage jury nullification, such a charge might well tend to forestall a rejection of the trial judge's instructions by one or more or all of the jurors because it emphasizes the jury's awesome responsibility when it chooses to utilize the nullification power.

In a case in which the defendant's conduct might perhaps be morally acceptable, the trial judge could emphasize that the jury has the duty to follow his instructions as to the law and not to exercise its nullification power unless the jury is overwhelmingly convinced of a compelling, irresistible moral necessity to do so. If the jury is so convinced, and it still acts to nullify the law in that case, that is hardly anarchy or the end of the world. Indeed, in our early history, when there may have been as many divisive forces in the midst of the citizenry as there are today, the jury was expected so to act.<sup>66</sup>

#### CONCLUSION

In *Dougherty*, both the *pro se* and the jury power issues were present. The two issues were discussed separately, but there is language in Judge Leventhal's opinion recognizing their intimate relationship.<sup>67</sup> The alleged unconstitutionality and immorality of the Vietnam War was the "linchpin" of the justification urged by the defendants for their admitted violation of the criminal law in mutilating property of the Dow Chemical Company.<sup>68</sup> That was their only defense and probably their only reason for not joining other co-defendants in pleading *nolo contendere* or guilty. They desired to represent them-

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66. See Howe, *Juries as Judges of Criminal Law*, 52 HARV. L. REV. 582 (1939).

67. Judge Leventhal wrote:

Finally, we are aware that the denial of defendant's request for a nullification instruction will be considered by them to negative some, or perhaps most, of the value of the right of *pro se* representation which we have recognized. This point could be answered in terms of logic: the right of self-representation is given for reasons recognized by the law, and cannot be a springboard to establish the validity of other advantages or conditions that lie in its tactical wake.

473 F.2d at 1137.

68. *Id.* at 1139.

selves because they wanted to set forth a political rather than a legal defense. A litigant untrained in the law but verbally skilled may be well equipped to pursue such a defense. Moreover, he may justifiably fear that counsel might be unwilling, or would be forbidden by the court, to place the litigant's views before the jury as forcefully as would the litigant himself—views which urge the jury to disregard the law and to nullify the judge's instructions for political and moral reasons.<sup>69</sup> There are few counsel who will brave the pressures of the trial judge, the bar, the community, and perhaps other clients to argue with abandon what a *pro se* litigant will say on his own behalf.

There are many who say that the litigant, *pro se* or through counsel, should not be permitted to argue for jury nullification. My response is that in a democratic society I am willing to trust the common sense of the jury. Further, regardless of what the trial judge says or does, *pro se* litigants in politically charged and certain other types of cases will get across that they are asking the jury not to apply the law as instructed by the judge. Faced with that fact, are we not giving the *pro se* litigant an opportunity denied to the litigant represented by counsel if we adopt the majority view espoused in *Moylan* and *Dougherty*? I suggest the answer is rather clearly "yes." I also suggest that that answer not be seized upon as a reason for rejection of the *Faretta* decision.

Jury nullification is not out of harmony with the basic tenets of our legal system. If a judge holds a statute unconstitutional and enters judgment for a defendant, the government as prosecutor usually has a right of appeal. That makes sense. If the judge holds a statute constitutional, and the jury subverts that holding by nullifying the court's instructions, and acquits the defendant, the case is over and the government loses. Why should that be? The answer lies in our heritage. We make it hard to convict a defendant. We require proof beyond a reasonable doubt. We utilize the general verdict and thus empower the jury to determine guilt or innocence without any statement of reasons for the verdict. We permit a trial judge to tell a jury that it *should* not convict, given such and such circumstances, but only to tell it that it *may* convict, *not* that it *should* convict, under other circumstances.<sup>70</sup>

In civil cases, jury nullification can be disclosed and so made

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69. The trial judge may have the right to cite a *pro se* defendant for contempt for arguing or continuing to argue to a jury along lines forbidden by the court. But such use of the contempt power is hardly attractive to contemplate, particularly in a case in which an explosive, divisive issue such as Vietnam is involved.

70. 473 F.2d at 1135.

subject to reversal, when it does occur, by the trial judge's use of special verdicts, or a general verdict accompanied by written interrogatories.<sup>71</sup> In civil cases, the judge can reduce,<sup>72</sup> and in some jurisdictions increase,<sup>73</sup> damages. He can set aside a jury verdict and order a new trial<sup>74</sup> or enter judgment notwithstanding the verdict.<sup>75</sup> In a criminal case, the judge can overturn a guilty verdict and order a new trial<sup>76</sup> or enter judgment of acquittal notwithstanding a jury verdict against the defendant.<sup>77</sup> But he cannot change the jury's verdict if the jury acquits, whether in accord with or in the face of the law. That is a risk inherent in our criminal jury system as we know it. It is a risk which will hardly be stretched to the breaking point by the majority pronouncements in *Faretta* which in practical effect give many *Moylan* and *Dougherty*-type *pro se* litigants the opportunity to seek jury nullification. Nor, I suggest, would that breaking point be reached if the law should espouse, when appropriate, the candor approach to the jury's nullification power, whether or not the litigant has proceeded *pro se* or with counsel. We can have confidence in the vitality, common sense, and integrity of our legal principles and of our fellow citizens when they act as jurors.<sup>78</sup> That confidence is at the root of our ability to permit a litigant to exercise his free choice to have counsel or not. That confidence should also overcome the fears which lead us to mask the jury's nullification power.

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71. See FED. R. CIV. P. 49.

72. *E.g.* *Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *Gilbert v. St. Louis-San Francisco R.R. Co.*, 514 F.2d 1277 (5th Cir. 1975).

73. *E.g.* *Jehl v. Southern Pacific Co.*, 66 Cal. 2d 821, 427 P.2d 988, 59 Cal. Rptr. 276 (1967); *O'Connor v. Papertarian*, 309 N.Y. 465, 131 N.E.2d 883 (1956).

74. *E.g.* FED. R. CIV. P. 59.

75. *E.g.* FED. R. CIV. P. 50.

76. *E.g.* FED. R. CRIM. P. 33.

77. *E.g.* FED. R. CRIM. P. 29.

78. In a sense, both the *Faretta* right and the jury nullification power are recognitions of the importance *and* the imperfections of our huge, and largely efficient machines of justice—courts, lawyers, and other officials—and constitute checks retained by society upon the otherwise professional administration of justice.