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TRAIN WRECKS AND FREEWAY CRASHES: AN ARGUMENT FOR FAIRNESS AND AGAINST SELF REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM

MARTIN SABELLI & STACEY LEYTON*

In early 1998, as the trial of Theodore Kaczynski approached, the public learned of a profound conflict between the accused Unabomber and his well-respected team of defense attorneys. For several weeks, the public, previously sensitized to the realities of self representation by the trial of Colin Ferguson,¹ watched as Kaczynski and his attorneys struggled

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¹ Colin Ferguson, accused of shooting nineteen individuals on the Long Island Railroad (killing six), exercised his right to represent himself in order to present a fantastic defense theory that could only have been the product of a deep-seated psychosis. See Jan Crawford Greenburg, *Delusional Clients Challenge Lawyers*, CHI. TRIB., Jan. 11, 1998, at C3. Directly at odds with the testimony of numerous eyewitnesses, Ferguson argued to the jury that an unknown white man had stolen his firearm while he was asleep and conducted the shooting rampage of which he stood accused. *Id.* Ferguson's theory and manner rendered absurd the nationally televised trial. Ferguson's original counsel (who Ferguson believed to be part of a conspiracy to

over control of the defense. Federal Public Defenders Judy Clarke and Quinn Denvir had concluded that Kaczynski suffered from a severe mental disease and that professional ethics compelled them to present evidence of this disease in the hope of saving him from the death penalty.² Kaczynski, in contrast, affirmed his own sanity and the importance of his acts as strategic means for accomplishing an urgent political objective. This struggle, therefore, seemed to pit the most fundamental of norms of professional ethics—zealous advocacy—against the most fundamental expression of individual autonomy—the dignity of the person. The struggle between Kaczynski and his counsel also implicated the fundamental purpose of our criminal justice process: the capacity to assign criminal responsibility in the context of a life-and-death determination.³

cause him to go blind to prevent him from identifying the real murderer) had urged a variation of the insanity defense. See Ronald L. Kuby & William M. Kunstler, *So Crazy He Thinks He is Sane: The Colin Ferguson Trial and the Competency Standard*, 5 CORNELL J. L. & PUB. POL'Y 19, 20 (1995).

² The severity and even the existence of Kaczynski's mental disability have been the subject of dispute. Dr. Sally Johnson, a respected prison psychiatrist, rendered a provisional diagnosis of paranoid schizophrenia in her forensic evaluation of Kaczynski. Dr. Sally Johnson, Psychiatric Report, *United States v. Theodore John Kaczynski*, No. CR-S-96-259GEB, 1998 WL 611123, at *34 (E.D. Cal. Sept. 11, 1998). This diagnosis was in accord with defense psychiatrists, who concluded that Kaczynski was delusional and paranoid schizophrenic. *Id.* at *17-18. A recent book by Michael Mello, a former capital defense attorney who corresponded with Kaczynski after his conviction, argues that Kaczynski was sane and that those who concluded that he was schizophrenic rested their judgment on disapproval of his political ideology and lifestyle. See generally MICHAEL MELLO, *THE UNITED STATES OF AMERICA VERSUS THEODORE JOHN KACZYNSKI* (1999). Interestingly, those who preferred to view Kaczynski as a political dissident rather than as insane found themselves lending a fair amount of credence to his political views. James Q. Wilson, for example, maintained that Kaczynski's Manifesto was well argued and rational, and claimed that, "[i]f it is the work of a madman, then the writings of many political philosophers—Jean Jacques Rousseau, Tom Paine, Karl Marx—are scarcely more sane." William Finnegan, *Defending the Unabomber*, THE NEW YORKER, Mar. 16, 1998, at 61 (quoting James Q. Wilson).

³ The conflict was diverted by a semi-operatic finale following Judge Burrell's ruling that defense counsel had the authority to present a mental health defense over Kaczynski's objection. See Pre-Trial Transcript, *United States v. Theodore John Kaczynski*, No. CR-S-96-259GEB, 1998 WL 3338, at *3 (E.D. Cal. Jan. 7, 1998); William Glaberson, *Assault on Unabomber Defense Cites Defendant's Wishes*, N.Y. TIMES, Jan. 16, 1998, at A10. Judge Burrell's ruling prompted Kaczynski to request substitution of counsel and then, when Judge Burrell denied this request, to assert his right to self representation. See Official Trial Transcript, *United States of America v. Theodore John Kaczynski*, No. CR-S-96-259GEB, 1998 WL 4657, at *1 (E.D. Cal. Jan. 8, 1998). Judge Burrell denied Kaczynski's request, in a highly questionable ruling that raised

It is not surprising that Kaczynski resisted his counsel's efforts to present evidence of mental illness; it is a natural, human instinct to resist being branded crazy. Nor is it surprising that committed advocates like Denvir and Clarke differed from their client's assessment of his own mental welfare and were determined to present the only defense they thought might save Kaczynski's life.⁴

It is surprising, however, that our criminal justice system did not have the capacity to resolve this conflict in a manner which allowed Kaczynski to maintain his dignity, authorized Clarke and Denvir to advocate zealously on Kaczynski's behalf, and facilitated the fact finder's determination of Kaczynski's mental state. Each of these functions corresponds to a fundamental

the prospect of a successful appeal based on the denial of the right to self representation. See Paul Van Slambrouck, *Kaczynski Trial Ended Before Questions Could Be Answered*, CHRISTIAN SCI. MONITOR, Jan. 26, 1998, at 3. This prospect effectively forced both Kaczynski and the prosecution to settle the case—not as a consequence of deliberation, but inspired by the potential for disaster from their respective perspectives: Kaczynski's fear of being labeled mentally ill in a public forum and the prosecution's fear of a successful appeal based upon denial of self representation. See Harriet Chiang & Kevin Fagan, *Government Strikes Best Deal Possible: Case Risked Being Overturned on Appeal*, S.F. CHRON., Jan. 23, 1998, at A8; Jenifer Warren, *The Unabomb Plea Bargain*, L.A. TIMES, Jan. 23, 1998, at A24; William Booth, *Kaczynski Pleads Guilty to Bombings*, WASH. POST, Jan. 23, 1998, at A1.

The Ninth Circuit recently rejected Kaczynski's challenge to his conviction, in which Kaczynski claimed that his guilty plea was rendered involuntary by the denial of his request to represent himself and by his attorneys' decision to present evidence of his mental illness. See *United States v. Kaczynski*, 239 F. 3d 1108 (9th Cir. 2001). In a decision authored by Judge Pamela Rymmer, the court held that Judge Burrell had not erred in concluding that Kaczynski's request for self representation was made for purposes of delay and thereby denying it. The court declined to decide whether attorney or client controls the decision whether to present mental state evidence to the jury, but rejected Kaczynski's claim on the ground that his willingness to allow such evidence at the penalty phase undermined his contention that presentation of the evidence was unbearable. *Id.* Judge Reinhardt dissented, praising the district judge's effort to ensure the fairness of Kaczynski's trial but concluding that his denial of the request for self representation was contrary to controlling law. *Id.* at 1119-20, 1127-28.

⁴ The Kaczynski defense team argued that Kaczynski's inability to tolerate psychiatric examination and presentation of evidence of mental disability was a direct result of his mental disability. See Defendant's Opposition to Motion to Preclude Expert Mental Health Testimony at Guilt Phase and to Require Defendant to Undergo a Mental Examination Before Sentencing, *United States v. Theodore John Kaczynski*, 1997 WL 716546, at *5 (E.D. Cal. Nov. 12, 1997) (CR-S-96-259GEB) (Kaczynski had "pathological dread of examination by psychiatrists"); *id.* at *10 (Exhibit A, Declaration by Dr. David Vernon Foster, M.D.) ("deeply ingrained fear of being considered mentally ill" was "essential component of . . . [his] disorder").

value of the criminal process—personal dignity, zealous advocacy, and accurate fact-finding—which, in concert, reflect the humanity and fairness of the criminal process.⁵ The fact-finding function in particular—understood as the capacity to assign criminal responsibility as intended by applicable laws—defines the concept of justice. From this perspective, the criminal process failed Kaczynski, his counsel, and the public.

This failure is particularly surprising because the Kaczynski dilemma is not *sui generis*. An increasing number of mentally ill individuals enter the criminal process at the local, state, and federal level each year, and, as in the Kaczynski case, resist presentation of evidence of mental illness. The conflict between Kaczynski and counsel, in fact, exemplifies an increasingly frequent conflict between competent yet severely disturbed criminal defendants and their counsel over control of the defense. This conflict often occurs over presentation of evidence of mental illness and very often, as in the Kaczynski case, involves the assertion of the right of self representation.

This article focuses on one aspect of this dilemma: a defendant's abuse of the right to self representation in order to block presentation of mental health evidence. The right to self representation, recognized in *Faretta v. California*, effectively endows mentally ill defendants with the power to veto the decision to present evidence of their mental illness.⁶ This power, in practice, filters relevant evidence of mental illness from the fact-finding process and does so by focusing the inquiry on the *validity of the waiver* rather than *the fairness of the trial*.⁷ The *Faretta* right, in brief, fixes the judicial gaze on autonomy and away from justice, as suggested by Judge Reinhardt:

We thus become a judiciary "with eyes wide shut." The whole course of proceedings, most particularly the trial, is rendered irrelevant for constitutional purposes despite the fact that it is wholly apparent to any judge reading the transcript that it was marred by a series of egregious errors,

⁵ Personal dignity and accurate fact-finding should be viewed as first order values or interests, and zealous advocacy as a second order value in that it serves or facilitates these first order values. Within the logic of the adversarial process, however, the task of determining facts accurately cannot be accomplished in the absence of zealous advocacy.

⁶ See generally *Faretta v. California*, 422 U.S. 806 (1975).

⁷ See generally Judge Stephen Reinhardt's special concurrence in *United States v. Farhad*, 190 F.3d 1097 (9th Cir. 1999).

any one of which could have inhibited a fair determination of guilt or innocence, and despite the fact that it was equally apparent at the time of the waiver that the defendant's chances of receiving a fair trial would be remote. Such was the case here and, as required by *Faretta*, we have averted our gaze—as one might from a train wreck or a freeway crash—from Farhad's pitiful attempt to, in his own words, “make a more glorious kind of a defense.”⁸

In this article, we join our voices to the growing chorus of judicial officers, practitioners, and commentators who question the legitimacy and wisdom of *Faretta* because the right of self representation *in practice* undermines the fairness of the criminal process. This is particularly true in cases involving mentally ill defendants who are nonetheless deemed competent to stand trial under the competency standard established in *Dusky v. United States* and *Drope v. Missouri*.⁹ In this connection, *Faretta* has been recently limited to self representation at the trial stage, and even at the trial stage, *Faretta* has been challenged in light of mounting evidence that it empowers criminal defendants to subvert, intentionally or unintentionally, the process.¹⁰

In our opinion, the right to self representation, together with confusion in the case law (over defense counsel's authority to present evidence of mental illness) and ethical canons, maximizes both the frequency of attorney-client conflicts over presentation of mental health evidence and the potential of these conflicts to distort the fact-finding process. Ultimately, this failure of the criminal justice process flows from the profound philosophical tension in our legal and moral tradition between respect for individual autonomy, which militates toward maximizing the control of the accused person over her fate, and our commitment to justice, which demands *meaningful* representation within the adversarial process.

ROADMAP

This paper explores the legal and ethical contours of this struggle in the rapidly expanding context of cases involving

⁸ *Id.* at 1102.

⁹ *Dusky v. United States*, 362 U.S. 402 (1960); *Drope v. Missouri*, 420 U.S. 162, 171 (1975).

¹⁰ There are strong suggestions in *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152 (2000), that some members of the Court may be open to reconsidering *Faretta*. See notes 204-205 *infra* and accompanying text.

mentally ill criminal defendants. We suggest that fairness requires the presentation of all evidence of mental disability relevant to determining criminal intent even if the client opposes this presentation. In Section I, we define the problem: a criminal justice system increasingly overloaded with mentally ill individuals who wrestle with counsel over control of the defense. These clients, by virtue of their right to self representation, distort the fact-finding process by effectively filtering out evidence of mental illness relevant to the issue of criminal intent. We define this filtering process as a fairness issue and trace its origin to (1) the tension between the Sixth Amendment rights to counsel and self representation and (2) the lack of clarity, under case law and ethical canons, regarding the allocation of authority within the attorney-client relationship.

In Section II, we conclude that the fairness issue has been obscured by the tendency of scholars and courts to frame the conflict solely in terms of a client's autonomy interest as balanced against her best interests, and that courts have almost uniformly focused on autonomy. Both have substantially undervalued a shared, societal interest in the integrity and fairness of the criminal justice process. We advocate, in Section III, that society's interest in the fairness of the proceedings by which culpability is measured be given a higher value on the theory that all persons associated with the criminal process—either as participants in a criminal case or as residents of the jurisdiction—have an interest in ensuring that the process would accord each of us the fullest measure of justice. From this perspective, we advocate that the criminal process ensure that the trier of fact consider important evidence related to guilt or punishment even over an individual defendant's opposition. This rationale for allocating these decisions to counsel is far more weighty than the individually focused best interests argument.

Finally, in Section IV, we propose three major reforms to the criminal justice system in order to restore the proper balance among these values and interests. First, this paper identifies a category of exculpatory evidence—evidence of mental illness—that must be presented to a trier of fact in order to guarantee the integrity of the criminal justice process. We propose that the authority to present such evidence over a defendant's objection—in the form of an insanity plea, a diminished capacity defense, or as mitigation at sentencing—must be clearly allocated

to defense counsel.¹¹ Second, we propose that *Faretta's* recognition of an absolute right to self representation be overruled. Finally, in order to protect a defendant's autonomy interest and personal dignity, we propose the bifurcation of criminal trials in order to allow the presentation of both the defense preferred by the mentally ill defendant, and, in the event that this defense fails (as it almost surely will), the defense preferred by defense counsel.¹² These solutions would, in concert, best vindicate society's interest in avoiding adjudication of guilt or imposition of sentence without consideration of crucial exculpatory or mitigating evidence. In this connection, it is significant that a criminal defendant may be denied the *Faretta* right where the trial court finds that he will not maintain the order or decorum of the courtroom.¹³ This limitation on the *Faretta* right is significant—and instructive for the purposes of this article—because it demonstrates that the societal interest in order and decorum justifies a limitation on the right of self representation. Why, then, should not the societal interest in fairness justify such a limitation?¹⁴

¹¹ Although Judge Burrell ruled that Kaczynski's attorneys enjoyed this authority, he was stepping onto thin ice. Ethical codes and case law fail to clearly allocate this decision-making authority. See notes 26-76 *supra* and accompanying text.

¹² Infringing personal dignity, particularly in the context of mentally ill persons, may result in a range of injuries from the psychological to the physical. Kaczynski, for example, reportedly attempted suicide in response to the judicial ruling that his lawyers could interpose a mental health defense over his objections. See MELLO, *supra* note 2, at 89-90, 109.

¹³ *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

¹⁴ The answer is, in the opinion of the authors, clear. Nonetheless, we realize that our perspective might be misinterpreted to justify reform of the criminal process in favor of "truth seeking." Paradoxically, this paper could be interpreted as coinciding with the perspective of the "Truth School" that all relevant evidence, including evidence obtained in violation of the exclusionary rule of the Fourth Amendment, should be presented to the trier of fact. See, e.g., AKHIL REED AMAR, *THE CONSTITUTION & CRIMINAL PROCEDURE: FIRST PRINCIPLES* (1997); Paul G. Cassell, *The Statute that Time Forgot: 18 U.S.C. § 3501 and the Overhauling of Miranda*, 85 IOWA L. REV. 175 (1999); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost Confessions—and from Miranda*, 88 J. CRIM. L. & CRIMINOLOGY 497 (1998). This paper, however, departs from a very different premise than that of the Truth School. First, we believe that fairness, not "truth," is the objective of the criminal process. Second, we believe that fairness follows from a balanced, adversarial process. The Truth School, in contrast, pursues an objective notion of "truth" defined independently of the adversarial process.

I. PYRRHIC VICTORIES: COMPETENCE, MENTAL ILLNESS AND THE STRUGGLE OVER CONTROL OF THE DEFENSE

As discussed above, state and federal criminal justice systems face mounting numbers of mentally ill individuals who exercise their *Faretta* right (or threaten to do so) in order to block the presentation of evidence of mental illness. Because this evidence is highly relevant to the issue of criminal intent, this widespread abuse of the *Faretta* right distorts the fact-finding process to the detriment of the holders of that right.

This distortion flows from three sources of confusion: first, the inherent tension between the Sixth Amendment rights to counsel and self representation; second, the low standard of competency required to stand trial (or, rather, the lack of distinction between competency to stand trial and competency to elect self representation); and third, the lack of clarity, under case law and ethical canons, regarding the allocation of authority within the attorney-client relationship. The interplay between these three sources of confusion maximizes the potential for conflict over control of the defense and the corresponding distortion of the fact-finding process.

A. GIDEON V. FARETTA: THE INHERENT TENSION BETWEEN THE RIGHT TO COUNSEL AND THE RIGHT TO SELF REPRESENTATION

The Sixth Amendment to the United States Constitution guarantees the effective assistance of counsel to all persons facing loss of life or liberty through the criminal justice process.¹⁵ This guarantee provides the foundation for the relatively recently discovered procedural rights to counsel, *Gideon v. Wainwright*,¹⁶ and to self representation, *Faretta v. California*.¹⁷ Despite a

These differing premises lead to very different analyses. Based upon our definition of the objective of the criminal process, we seek to preserve the adversarial nature of the process which, in our opinion, requires presentation of relevant evidence of mental illness. In contrast, in the Fourth Amendment context, we believe that exclusion of illegally obtained evidence preserves the adversarial nature of the process because exclusion of such evidence serves the adversarial process through policy—that is, by discouraging police misconduct. There is no analogous policy consideration favoring exclusion in the context discussed in this paper.

¹⁵ U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.”).

¹⁶ 372 U.S. 335 (1963); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending *Gideon* to any case in which a sentence of imprisonment is imposed).

¹⁷ 422 U.S. 806 (1975).

common constitutional foundation, these procedural rights serve distinct substantive rights and constitutional interests. The right to counsel helps to ensure the integrity of the criminal justice process—a common, societal interest embodied both in the Due Process Clause of the Fifth Amendment and in the Cruel and Unusual Punishment Clause of the Eighth Amendment. The right to self representation, in contrast, protects the autonomy of the accused—an individual, personal interest reflected in the structure of the Sixth Amendment itself.

In this sense, the right to counsel and the right to self representation have existed in philosophical tension during their relatively brief lives. This philosophical tension may play a constructive role in the criminal justice process; Clarence Gideon, after all, secured the right to counsel acting *pro se*.¹⁸ This tension may, however, play a much less desirable role in the criminal justice process when the *Faretta* right is exercised by a person of significantly lesser, or less organized, mental resources than Mr. Gideon. In such cases, the *Faretta* right has allowed, even encouraged, mentally ill, often paranoid criminal defendants to forego court-appointed counsel. In this way, the *Faretta* right often corrupts the criminal process by replacing trained and experienced counsel with an autonomous yet ineffective advocate. One adversary, in effect, is removed from the adversarial process in the name of autonomy.

The central truth of the post-*Faretta* attorney-client relationship, therefore, is that a defendant may elect self representation if she perceives her counsel to be unwilling or unable to advance her personal, political, or religious agenda.¹⁹ In this way, the *Faretta* right injects an element of negotiation between attorney and client over the strategy and objectives of representation and, if important disputes arise, the negotiation has the potential to undermine, distort, or altogether destroy the attorney-client relationship. This reality makes sense if our only goal is individual autonomy.

¹⁸ Gideon, of course, did not “exercise” a “right” to represent himself. He had no choice. On retrial, when represented by counsel, Gideon was acquitted. See ANTHONY LEWIS, *GIDEON’S TRUMPET* 223-38 (1964).

¹⁹ Currently, courts may not limit the *Faretta* right even to protect a defendant’s right to a fair trial. See notes 161-63 *infra* and accompanying text.

B. BIGGER THAN A BREADBOX, SMALLER THAN YUGOSLAVIA: THE STANDARD FOR COMPETENCY TO ELECT SELF REPRESENTATION UNDER GODINEZ

The *Faretta* right may be exercised by any criminal defendant who is deemed competent to stand trial and makes a knowing and voluntary waiver of the right to counsel. The test for competence, as defined by the Supreme Court, is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as factual understanding of the proceedings against him."²⁰ The defendant's understanding of the proceedings must be sufficient to allow him to consult with his lawyer and assist in preparing a defense.²¹ Many commentators have suggested that the standard is unreasonably low and allows individuals whose ability to reason is severely clouded by a mental illness or other disability to be found competent.²² The inadequacy of the competency standard may in large part be attributable to the reality that "decision-making about defense strategy encompasses cognitive skills and capacities for rational thinking

²⁰ *Dusky v. United States*, 362 U.S. 402 (1960).

²¹ *Drope v. Missouri*, 420 U.S. 162, 171 (1975). It is constitutionally permissible to require the defendant to prove that he is incompetent, see *Pate v. Robinson*, 383 U.S. 375, 385-86 (1966), but if it is the defendant's burden then a clear and convincing evidentiary standard is not permissible. See *Cooper v. Oklahoma*, 517 U.S. 348, 355-56 (1996). Most defendants who undergo competency examinations are found competent to stand trial. See Bruce J. Winick, *Reforming Incompetency to Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 578 (1995) (75% to 96% of defendants who submit to examinations are found competent).

²² One study found that, while fewer than one-third of the criminal defendants diagnosed with major mental illnesses were found incompetent by a court-appointed psychiatrist, in over two-thirds of these cases defense attorneys doubted their clients' capacity to participate in their own defense. Richard J. Bonnie et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubtful Client Competence*, 87 J. CRIM. L. & CRIMINOLOGY 48, 52-53 (1996). Defense counsel suspected that rational decision-making was impaired in 63% of the cases, the ability to understand the charges in 37%, and the ability to understand the nature and purpose of a criminal prosecution in 44%. *Id.* at 53. See also Steven K. Hoge et al., *The MacArthur Adjudicative Competence Study: Development and Validation of a Research Instrument*, 21 LAW & HUM. BEHAVIOR 141 (1997) (attorneys doubt client competence in 8% to 15% of felony cases).

that assisting counsel, as defined in *Dusky* and *Drope*, does not require."²³

In the decades following the *Faretta* decision some courts held that due process required a higher standard of competency when a defendant elects to represent himself.²⁴ In 1993, however, in *Godinez v. Moran*, the Supreme Court rejected any notion that an enhanced competency standard is constitutionally required and concluded that the decision to waive counsel does not require an appreciably higher level of rational functioning than the decision to waive other trial rights.²⁵ Therefore, as long as a defendant meets the minimal standard of competence established in *Dusky*, she is by definition competent to represent herself at trial.

C. THE CURRENT ALLOCATION OF AUTHORITY WITHIN THE ATTORNEY-CLIENT RELATIONSHIP

Given this constitutional arrangement, conflicts develop regularly between attorneys and clients over whether to present relevant evidence of mental illness. While in the past there was some recognition that a mentally ill defendant was not in the position to decide to forego presentation of such evidence, in-

²³ Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 567 (1993).

²⁴ See *Blackmon v. Armontrout*, 875 F.2d 164, 166 (8th Cir. 1989) ("The standard for determining whether a person is capable of making a knowing and intelligent waiver of the right to counsel is not coextensive with the test for determining competency to proceed to trial"); *United States v. McDowell*, 814 F.2d 245, 250 (6th Cir. 1987) (competency required to waive counsel is "vaguely higher" than competency to stand trial, but non-disabled, literate, defendant who had high school education and was fluent in English was clearly competent); *United States ex rel. Konigsberg v. Vincent*, 526 F.2d 131, 133 (2d Cir. 1975) ("standard of competence for making the decision to represent oneself is vaguely higher than the standard for competence to stand trial"). In a decision that was overturned by the Supreme Court, the Ninth Circuit relied on such reasoning: "A defendant is competent to waive counsel or plead guilty only if he has the capacity for 'reasoned choice' among the alternatives available to him." *Moran v. Godinez*, 972 F.2d 263, 266 (9th Cir. 1992). Many of these decisions cited language from two older Supreme Court cases suggesting that such a higher standard might be required. See *Westbrook v. Arizona*, 384 U.S. 150, 150 (1966) (per curiam); *Massey v. Moore*, 348 U.S. 105, 108 (1954).

²⁵ *Godinez v. Moran*, 509 U.S. 389, 402 (1993). In *Godinez*, Justice Blackmun, joined by Justice Stevens, dissented and argued that the competency standard should be a functional inquiry, measuring the understanding needed based on the context. *Id.* at 412-13, 416.

creasingly since the 1970s, courts have proved unwilling to override a defendant's autonomy and have therefore afforded respect to a defendant's choices. Thus, courts have increasingly refused to allow imposition of an insanity plea against a defendant's wishes and declined to require presentation of mitigation in capital proceedings. This judicial restraint is typical even where it is clear that the defendant is pursuing a self-destructive path that renders the proceeding fundamentally unfair and incomplete.

1. Case Law

The Decision to Plead Not Guilty by Reason of Insanity. Before the 1980s, some courts allowed the interposition of an insanity plea upon an unwilling defendant. The courts of the District of Columbia, where a disproportionate number of cases involved an insanity defense (for reasons that invite creative speculation), emerged as proponents for both sides of the debate over this issue.²⁶

In a series of decisions that became known as "the *Whalem* approach," the District of Columbia Circuit concluded that, "when there is sufficient question as to a defendant's mental responsibility at the time of the crime . . . in the pursuit of justice, a trial judge must have the discretion to impose an unwanted [insanity] defense on a defendant . . ." ²⁷ State courts in California, Colorado, Maine, Maryland, Minnesota, Missouri, New Jersey, New York, and Washington followed the *Whalem* approach, and allowed the entry of insanity pleas and the presen-

²⁶ See *The Right and Responsibility of a Court to Impose the Insanity Defense Over the Defendant's Objection*, 65 MINN. L. REV. 927, 928 n.5 (1981).

²⁷ *Whalem v. United States*, 346 F.2d 812, 818-19 (D.C. Cir. 1965). In the most well-known of this series of cases, a defendant refused the insanity defense recommended by his attorney and instead insisted on asserting a racial or political justification for murder and other crimes. See *United States v. Robertson*, 507 F.2d 1148, 1158 (D.C. Cir. 1974). Although no federal courts followed the District of Columbia Circuit's approach, the language in some ineffective assistance of counsel cases has suggested that little weight should be afforded the wishes of a mentally ill defendant who resists an insanity plea. See, e.g., *Brennan v. Blankenship*, 472 F. Supp. 149, 156-57 (W.D. Va. 1979) ("It is no answer . . . that [the defendant] conclusively rejected an insanity defense. . . . [I]t can scarcely be said that defense counsel discharged their professional responsibility by allowing their case to be guided simply by the uninformed wish of their client to avoid a long period of mental commitment. . . . Under any professional standard, it is improper for counsel to blindly rely on the statement of a criminal client whose reasoning abilities are highly suspect.").

tation of evidence of mental illness against defendants' wishes.²⁸ In contrast, the District of Columbia Court of Appeals became the most well-known proponent of the opposite position (termed "the *Frendak* approach"), which insisted that as long as a defendant's rejection of an insanity defense was "voluntary and intelligent" the court had no right to impose such a defense.²⁹

In the 1980s, courts ultimately reached a consensus that the decision to enter an insanity plea belonged solely to the crimi-

²⁸ See, e.g., *People v. Merkouris*, 297 P.2d 999, 1008-09 (Cal. 1956) (error to allow withdrawal of insanity plea in light of conflicting evidence about defendant's sanity at time of crime and trial); *People v. Bolden*, 160 Cal. Rptr. 268, 270 (Cal. Ct. App. 1979) (attorney may take over client's decisions when he doubts client's sanity); *Les v. Meredith*, 561 P.2d 1256, 1259 (Colo. 1977) (upholding a trial court's discretion to enter insanity plea "irrespective of the defendant's wishes"); *State v. Fernald*, 248 A.2d 754, 760-61 (Me. 1968) (proper for judge to deny defendant permission to withdraw insanity plea when defense counsel opposed motion); *Walker v. State*, 321 A.2d 170, 174 (Md. Ct. Spec. App. 1974) ("Where . . . the court has before it uncontradicted, competent evidence that the accused was insane at the time of the commission of the offenses, it would be a manifest injustice to allow the withdrawal of a plea of insanity . . ."); *List v. State*, 308 A.2d 451, 456 (Md. Ct. Spec. App. 1973) (holding it is within defense counsel's authority to enter insanity plea despite defendant's explicit opposition, because it is a "matter of trial strategy"); *State v. Pautz*, 217 N.W.2d 190, 192-93 (Minn. 1974) (proper for judge to raise insanity defense on own motion, though evidence of mental disability in this case was insufficient); *State v. Hermann*, 283 S.W.2d 617, 620 (Mo. 1955) ("Evidence of insanity may be admitted even against the will and objection of defendant if his friends or counsel set up this defense."); *State v. Khan*, 417 A.2d 585, 590 (N.J. Super. Ct. App. Div. 1980) (even if defendant is found competent, court must follow his wishes to waive insanity defense only if his decision is voluntary and knowing); *State v. Ramseur*, 524 A.2d 188, 262 n.62 (N.J. 1987) (approving jury instruction on insanity although defendant had waived this defense); *People v. Baldi*, 429 N.E.2d 400, 405-07 (N.Y. 1981) (not ineffective assistance for attorney to argue insanity defense rather than actual innocence); *People v. Baxter*, 302 N.Y.S.2d 456, 457-58 (N.Y. App. Div. 1969) (allowing for possibility that judge may impose insanity defense upon defendant of questionable competency); *State v. Smith*, 564 P.2d 1154, 1159 (Wash. 1977) (upholding judge's decision to impose insanity defense upon competent defendant).

²⁹ *Frendak v. United States*, 408 A.2d 364, 367 (D.C. 1979). The *Frendak*: "voluntary and intelligent" inquiry focused on the defendant's state of mind at the time that he entered a plea rather than at the time of the offense itself. *Id.* at 379-80. The Supreme Court's only explicit discussion of the permissibility of imposing such a plea occurred in *Lynch v. Overholser*, 369 U.S. 705, 710-11 (1962), in which the Court interpreted a statute not to allow mandatory commitment when an insanity defense was imposed on an unwilling defendant, and raised the possibility of constitutional problems with an alternative reading. Only the *Lynch* dissent discussed whether imposition of the insanity defense was even permissible, arguing that it was. *Id.* at 720 (Clark, J., dissenting).

nal defendant. This trend was influenced in large part by two decisions of the United States Supreme Court in the 1970s, *Faretta v. California* and *North Carolina v. Alford*,³⁰ which were interpreted as sending a strong message about the value of a criminal defendant's individual autonomy.³¹ Shortly thereafter, in the 1980s, society's commitment to the insanity defense also began to wane. These legal developments seriously undermined the notion that society's interest in avoiding conviction of the mentally ill could justify imposition of an unwanted defense, and many of those jurisdictions that had afforded courts the power to do so reversed themselves.³² Other decisions since

³⁰ *Faretta v. California*, 422 U.S. 806, 819 (1975) (upholding the right of self representation for competent defendants); *North Carolina v. Alford*, 400 U.S. 25, 39 (1970) (upholding acceptance of guilty plea by defendant who insisted on his innocence of the crime but wanted to enter the plea to avoid the death penalty).

³¹ Commentators have viewed *Alford* as emphasizing autonomy at the expense of societal concerns because it permits a defendant to maintain his innocence but "choose" to enter a guilty plea in order to reduce the likely punishment. This logic subordinates a justice interest—namely, the accurate determination of culpability—to an autonomy interest—the right to govern one's own choices.

It should be noted that *Faretta* and *Alford*, the maximum expressions of the autonomy interest, did not involve insanity defenses and, for that reason, do not directly address the balance at issue in this article between the justice interest and an autonomy interest weakened by the mental disability of the accused person. As recognized by one appellate court analyzing the relevance of *Faretta* and *Alford* in the context of a mentally ill defendant:

When a criminal defendant's sanity is subject to question, doubt is cast not only on his competence to stand trial but also on the very capacity of our legal system to assign blame. The issue becomes whether . . . he can be considered an autonomous, choice-making actor deserving blame for alleged wrongdoing. Protection granted a competent individual's choice has no bearing on this issue, which basically challenges the justification for punishment.

United States v. Wright, 627 F.2d 1300, 1310 (D.C. Cir. 1980). It is clear, then, that *Alford's* reasoning assumed the full exercise of reason by the accused person in sharp contrast to the *Kaczynski* scenario presented in this article. In this sense, the jurisprudence of *Alford*—its subordination of the justice interest to the autonomy interest—should be distinguished from the balance to be struck in the *Kaczynski* context.

³² See *United States v. Marble*, 940 F.2d 1543, 1547-48 (D.C. Cir. 1991) (reasoning that Supreme Court decisions emphasizing the importance of defendant autonomy and abandonment of insanity defense by many jurisdictions justified the overruling of *Whalem*); *People v. Gauze*, 542 P.2d 1365, 1370 (Cal. 1975) (distinguishing *Merhousis* on the ground that there was a doubt as to the defendant's competency); *Treece v. State of Maryland*, 547 A.2d 1054, 1062 (Md. 1988) (overruling *List*); *State v. Debler*, 856 S.W.2d 641, 655 (Mo. 1993) (en banc) (defense counsel must "implement[] the client's decision" to not raise mental defect defense); *State v. Cecil*, 616 A.2d 1336, 1344 (N.J. Super. Ct. App. Div. 1992) (upholding defendant's waiver against counsel's

1980 have uniformly rejected courts' power to impose such a defense,³³ with the exception of one decision by the Supreme Court of Colorado that relied on a unique statutory provision allowing defense counsel to impose an insanity defense with court approval.³⁴ Accordingly, the only modern decisions that place any limitation upon what is otherwise absolute deference to a defendant's decision to forego entry of an insanity plea are this single, statutory-based decision and a handful of Sixth Amendment cases that hold that attorneys should fully investigate the defense so that, if the defense is warranted, they can strongly advise a defendant to accept it—in order to ensure that a defendant's refusal, if it persists, will at least be fully informed.³⁵

advice); *People v. Morton*, 570 N.Y.S.2d 846, 849 (N.Y. App. Div. 1991) (“[C]ounsel had no authority to pursue any defense other than the one authorized by defendant”); *State v. Jones*, 664 P.2d 1216, 1221 (Wash. 1983) (overruling *Smith*).

³³ See *Edwards v. United States*, 795 F.2d 958, 963 (11th Cir. 1986) (reasoning that the decision to raise the insanity defense belongs to defendant and attorney, not to the court); *Alvord v. Wainwright*, 725 F.2d 1282, 1289 (11th Cir. 1984) (“[G]iven Alvord's competency, . . . [his attorney] was ethically bound to follow his client's wishes” and to not assert an insanity defense); *Foster v. Marshall*, 687 F. Supp. 1174, 1176 (S.D. Ohio 1987) (“[N]ever will a court be authorized by the Constitution to impose an attorney's will on an unwilling, rational defendant”); *Jacobs v. Commonwealth*, 870 S.W.2d 412, 418 (Ky. 1994) (concluding that the insanity defense may not be raised if defendant has knowingly, intelligently, and voluntarily waived it). Other courts have dismissed defendants' claims on appeal that the trial judge should have imposed an insanity defense due to evidence of mental illness. See *United States v. Moody*, 763 F. Supp. 589, 606 (M.D. Ga. 1991); *United States ex rel. Laudati v. Terullo*, 423 F. Supp. 1210, 1217 (S.D.N.Y. 1976). Courts have also dismissed defendants' claims that defense counsel was ineffective for failing to insist on entry of an insanity plea against their wishes. See *Snider v. Cunningham*, 292 F.2d 683, 685-86 (4th Cir. 1961); *United States ex rel. Martin v. Brierley*, 464 F.2d 529, 530 (3^d Cir. 1972).

Despite this trend in the case law, one survey concluded that approximately one-third of jurisdictions that have insanity defenses allow imposition of the defense under certain circumstances. See Robert D. Miller et al., *Forcing the Insanity Defense on Unwilling Defendants: Best Interests and the Dignity of the Law*, 24 J. PSYCHIATRY & L. 487, 500-01 (1996).

³⁴ See *Hendricks v. People*, 10 P.3d 1231, 1242-44 (Colo. 2000).

³⁵ See *Brennan v. Blankenship*, 472 F. Supp. 149, 156-57 (W.D. Va. 1979) (ineffective assistance of counsel to forego development of insanity defense because of client's opposition, when strong psychiatric testimony would have supported defense); *Mendenhall v. Hopper*, 453 F. Supp. 977, 986-87 (S.D. Ga. 1978), *aff'd*, 591 F.2d 1342 (5th Cir. 1979) (inadequate investigation and advice to client regarding viable insanity defense constituted ineffective assistance of counsel). These decisions may reflect courts' discomfort with deferring to a defendant's refusal to permit presentation of a meritorious defense. Alternatively, they may be cases in which the courts suspect that

Treatment of Mental Health Issues in Capital Sentencing. The treatment of cases involving death sentences has followed a similar trend. In the 1980s, state courts in California and New Jersey overturned death sentences that, in line with the defendants' wishes, had been imposed without any presentation of mitigating evidence.³⁶ These courts reasoned that a death sentence is illegitimate if imposed without an individualized inquiry into the circumstances of the crime and the characteristics of the defendant. In California, however, the Supreme Court later reversed itself and now will not vacate a death sentence merely because an attorney has presented no mitigating circumstances.³⁷ Moreover, no federal courts and few state courts have followed this line of reasoning. Many have held that a competent defendant has the right to waive presentation of any mitigating evidence.³⁸ In fact, in at least three cases the United States Supreme Court has upheld death sentences in cases in which the defendants had blocked the presentation of any case for mitigation, in one case going so far as to lift a stay of execution that had been imposed to allow the defendant's mother to

the failure to present an insanity defense was primarily the product of defense counsel's laziness rather than the defendant's intransigence. Moreover, despite the success of some ineffective assistance claims, courts have generally been unsympathetic to defendants who appeal based on decisions for which they bear some responsibility, and unwilling to "reward" defendants for errors that they themselves have caused. See *Alvord*, 725 F.2d at 1289; *Foster v. Strickland*, 707 F.2d 1339, 1343-44 (11th Cir. 1983); *Snider*, 292 F.2d at 685-86; *Debler*, 856 S.W.2d at 655; *State v. Thomas*, 625 S.W.2d 115, 123-24 (Mo. 1981); *Morton*, 570 N.Y.S.2d at 848-49.

³⁶ See *People v. Deere* (Deere I), 710 P.2d 925, 933-34 (Cal. 1985); *State v. Koedatich*, 548 A.2d 939, 993-94 (N.J. 1988).

³⁷ See *People v. Kirkpatrick*, 874 P.2d 248, 262-63 (Cal. 1994) (en banc), *cert. denied*, 514 U.S. 1015 (1995); *People v. Howard*, 824 P.2d 1315, 1345-47 (Cal. 1992); *People v. Sanders*, 797 P.2d 561, 592-94 (Cal. 1990); *People v. Bloom*, 774 P.2d 698, 718-19 (Cal. 1989). See also *People v. Clark*, 789 P.2d 127, 149-50 (Cal. 1990) (upholding *Faretta's* application to capital sentencing phase, despite societal interest in reliable penalty determination).

³⁸ See, e.g., *People v. LaValle*, 697 N.Y.S.2d 241, 242-43 (N.Y. Sup. Ct. 1999); *State v. Ashworth*, 706 N.E.2d 1231, 1236-39 (Ohio 1999); *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1998), *cert. denied*, 528 U.S. 829 (1999); *Mize v. State*, 501 S.E.2d 219, 230 (Ga. 1998); *Wallace v. State*, 893 P.2d 504, 510-13 (Okla. Crim. App. 1995); *Koon v. Dugger*, 619 So. 2d 246, 249-50 (Fla. 1993); *Morrison v. State*, 373 S.E.2d 506, 509 (Ga. 1988). The Georgia Supreme Court left open the possibility that a court may have an independent obligation to investigate evidence. See *Morrison*, 373 S.E.2d at 509.

present evidence that the defendant was seriously mentally ill.³⁹ Thus, at a minimum, an attorney is not constitutionally required to override a defendant's wishes and present a case for mitigation.

As in the insanity defense cases, a few courts have used ineffective assistance of counsel claims as a vehicle to address the problem of imbalanced sentencing proceedings, and have held attorneys who failed to present any mitigating evidence ineffective under the Sixth Amendment.⁴⁰ Rather than confront the question whether an attorney should present such evidence against a defendant's wishes, however, many of these decisions have instead relied primarily on the failure of an attorney to *investigate* mitigating circumstances, noting that this failure prevents the attorney from "knowing what evidence . . . [the defendant] was foregoing" and from "advis[ing him] . . . fully as to the consequences of his choice . . ."⁴¹ They have therefore avoided the more difficult question of what an attorney who has thoroughly investigated and found mitigating evidence should do when a client insists that no such evidence be presented.⁴²

³⁹ See *Lambert v. Vargas*, 525 U.S. 925 (1998) (vacating stay of execution granted to allow defendant's mother to present "next friend" petition); see also *Lenhard v. Wolff*, 444 U.S. 807, 809-10 (1979) (Marshall, J., dissenting) (allowing defendant who had represented self at trial and prevented standby counsel from presenting any mitigating evidence to waive all remaining appeals); *Blystone v. Pennsylvania*, 494 U.S. 299, 306-08 n.4 (1990) (rejecting challenge to constitutionality of state death penalty statute and upholding death sentence despite defendant's decision to present no evidence of mitigation at penalty phase, although some relevant evidence had been introduced during the guilt phase); *Silagy v. Peters*, 905 F.2d 986, 1008 (7th Cir. 1990) ("The implication of the Court's decision in *Blystone* . . . is that one can choose to forego the presentation of mitigation evidence even over the contrary advice of counsel and the warnings of the court.").

⁴⁰ See *Emerson v. Gramley*, 91 F.3d 898, 906 (7th Cir. 1996); *Eutzy v. Dugger*, 746 F. Supp. 1492 (N.D. Fla. 1989). In *Stafford v. Saffle*, 34 F.3d 1557, 1563-64 (10th Cir. 1994), *cert. denied*, 514 U.S. 1099 (1995), the court held that an attorney's failure to present any mitigating evidence was deficient performance even though the defendant had said he wanted no mental health or family history presented, but rejected the ineffective assistance claim on the ground that no prejudice had been shown.

⁴¹ *Blanco v. Singletary*, 943 F.2d 1477, 1501 (11th Cir. 1991). See also *Thompson v. Wainwright*, 787 F.2d 1447, 1451 (11th Cir. 1986); *Eutzy v. Dugger*, 746 F. Supp. 1492, 1497-1500 (N.D. Fla. 1989).

⁴² In fact, in some of these decisions the courts have indicated that, once an attorney has investigated and advised a client, he must defer to whatever the client desires. See, e.g., *Blanco*, 943 F.2d at 1502 ("[A]lthough the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the

Moreover, the cases in which representation has been defective despite conformance with client wishes are in the minority; in far more cases, courts have held that as long as a defendant has told his attorney that he does not want mitigation evidence presented he cannot later complain of the attorney's failure to convince the jury that his life should be spared.⁴³ Some of these decisions have explicitly rejected the notion that a death sentence may not be imposed without the presentation of mitigation evidence, or explicitly stated that an attorney should defer to a client under these circumstances.⁴⁴ However, while following a client's wishes will generally insulate an attorney against an ineffective assistance claim, this does not necessarily make it the best course of action.⁴⁵ Drawing conclusions

client of those offering potential merit"); *Thompson*, 787 F.2d at 1451 ("[T]he decision whether to use such evidence in court is for the client") (citation omitted).

⁴³ See *Wallace v. Ward*, 191 F.3d 1235, 1247-48 (10th Cir. 1999) (counsel did not challenge prosecution's presentation or present mitigating evidence in accord with client's wishes); *Langford v. Day*, 110 F.3d 1380, 1383 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 208 (1997) (in accord with defendant's wishes, lawyer presented no mitigating evidence and told court that defendant wanted death sentence); *Jeffries v. Blodgett*, 5 F.3d 1180, 1197 (9th Cir. 1993), *cert. denied*, 510 U.S. 1191 (1994) (defense counsel presented minimal mitigation evidence in respect for defendant's wishes); *Silagy v. Peters*, 905 F.2d 986, 1007 (7th Cir. 1990) (defendant represented self, offered no mitigating evidence, and requested death sentence); *Autry v. McKaskle*, 727 F.2d 358, 360-61 (5th Cir. 1984) (attorney presented no mitigating evidence). For decisions resting in part on approval of the strategic decision and in part on respect for defendant preferences, see *Lowenfield v. Phelps*, 817 F.2d 285, 290-91 (5th Cir. 1987) (approving decisions in accord with defendant's wishes not to present psychiatric or family testimony, when relatives were unavailable and both were reasonable tactical decisions); *Mitchell v. Kemp*, 762 F.2d 886, 889-90 (11th Cir. 1985) (finding no ineffective assistance for attorney failure to present mitigating witnesses, when defendant wanted to leave family alone and family appeared unresponsive to attorney's overtures). For state cases upholding death sentences in such circumstances, see *Anderson v. State*, 574 So. 2d 87, 94-95 (Fla. 1991); *Trimble v. State*, 693 S.W.2d 267, 279-80 (Mo. Ct. App. 1985); *State v. Felde*, 422 So. 2d 370, 393-95 (La. 1982); *Bishop v. State*, 597 P.2d 273, 274-76 (Nev. 1979). Many of these cases have relied on an estoppel or invited error rationale. See *People v. Kirkpatrick*, 874 P.2d 248, 7 Cal.4th 988, 1013 (Cal. 1994), *cert. denied*, 514 U.S. 1015 (1995); *People v. Lang*, 782 P.2d 627, 49 Cal.3d 991, 1029-30 (Cal. 1989). Concerns about defense counsel "sandbagging" the penalty phase have also driven such an analysis. See *Felde v. Blackburn*, 817 F.2d 281, 284 n. 3 (5th Cir. 1987); *Trimble*, 693 S. W.2d at 279.

⁴⁴ See, e.g., *McKaskle*, 727 F.2d at 362 ("If . . . [the defendant] knowingly made the choices, . . . [his lawyer] was ethically bound to follow . . . [the defendant's] wishes.").

⁴⁵ Some courts that held attorneys effective nonetheless used language that implies that the decision to present mitigating evidence is a strategic one and belongs to the attorney, suggesting that while the attorney was not ineffective for failing to pres-

from ineffective assistance cases is further complicated by the fact that in those cases in which an attorney decides to *override* a defendant's decision and offers mitigating evidence, the issue is less likely to arise on appeal. Such a decision would decrease, rather than increase, the likelihood that a death sentence would be imposed. Therefore, while there are many reported decisions evaluating whether it is ineffective to accede to defendants' preference for death, there are none that consider whether it was ineffective to *refuse* to respect such feelings.⁴⁶

Diminished Capacity. The lack of clarity in the law as to whether a defendant may block presentation of evidence of mental illness is at its worst in cases addressing the decision whether to present a mental health defense that mitigates culpability.⁴⁷ The absence of controlling or even persuasive author-

ent the evidence he would have had the authority to do so. See, e.g., *Mitchell*, 762 F.2d at 890 ("It is important to note that Mitchell's attorney did not blindly follow Mitchell's command to leave his family out of it."). Some courts have, in the course of rejecting ineffective assistance claims, even suggested that overriding the defendant's wishes and presenting a case for mitigation may be the *preferred* course of action. See *Jeffries*, 5 F.3d at 1198 (explaining that, while ABA standards suggest that the attorney should have presented mitigating evidence, they are only a guide and do not establish ineffectiveness); *Knight v. Dugger*, 863 F.2d 705, 752 (11th Cir. 1988) (noting "that other lawyers may have employed another strategy" and acknowledging that "it is a close question" whether the attorney was ineffective for failing to present mitigating evidence). Other decisions have vaguely indicated that the defendant's preference for death affects the scope of the attorney's responsibility without explaining what this concretely means. See *Langford v. Day*, 110 F.3d 1380, 1386 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 208 (1997) ("Langford's insistence on pleading guilty and seeking the death penalty is not utterly without effect on the determination of what MacKay as a competent attorney was required to do."); *Jeffries*, 5 F.3d at 1197 (reasonableness inquiry is affected by defendant's acts and statements); *Mitchell*, 762 F.2d at 889-90 (same); *Thomas v. Kemp*, 796 F.2d 1322, 1324 (11th Cir. 1986) ("[A] capital defendant's stated desire not to use character witnesses and refusal to testify limits the scope of required investigation"); *Gray v. Lucas*, 677 F.2d 1086, 1093-94 (5th Cir. 1982). See also, *Felde v. Butler*, 817 F.2d 281, 282 (5th Cir. 1987) (court need not reach question of whether attorney who requested jury return death sentence based on client wishes was ineffective).

⁴⁶ This differs from cases involving insanity pleas, where imposition of pleas upon unwilling defendants has prompted numerous appeals.

⁴⁷ Such a defense challenges the prosecution's proof of the intent element of the crime by arguing that the defendant was incapable of forming the intent required to commit the offense. A successful mental health defense, often called a diminished capacity defense, results in either acquittal (if the mental state was an essential element of the crime) or reduction in the degree of the crime of conviction (when the defense negates specific intent but a lesser included or related offense requires only

ity prompted the United States Attorney in the Kaczynski case to state, in its brief, "The government has found no case addressing the question whether counsel may rely on a mental defect defense over the objection of a competent defendant."⁴⁸ If a mental health defense is treated as analogous to other affirmative defenses, then the decision would appear to belong to the attorney rather than to the defendant.⁴⁹ This analogy may not be the appropriate one, however; the prosecutors in the *Kaczynski* case suggested that the court instead follow cases addressing a defendant's waiver of an insanity plea, and thereby allocate the decision to the defendant. Similarities in the two contexts support such an analogy: both implicate important dignitary concerns and both may require a defendant to waive his Fifth

general intent). See Jennifer Kunk Compton, *Expert Witness Testimony and the Diminished Capacity Defense*, 20 AM. J. TRIAL ADVOC. 381, 382-84 (1996-97).

⁴⁸ Government's Motion for a Hearing, *United States v. Theodore John Kaczynski*, No. CR-S-96-259GEB, 1998 WL 15074, at *3 (E.D. Cal. Jan. 15, 1998).

⁴⁹ Outside the mental health context (with which this article is concerned), most courts which have considered situations involving an attorney's refusal to follow a defendant's wishes and present a "merits-based" defense (in other words, a defense that does not rely upon evidence of mental illness) have found that this does not render representation defective. See *United States v. Span*, 75 F.3d 1383, 1389-90 (9th Cir. 1996) (excessive force defense); *United States v. Hansel*, 70 F.3d 6, 8 (2d Cir. 1995) (statute of limitations defense); *Foster v. Lockhart*, 9 F.3d 722, 726-27 (8th Cir. 1993) (impotency defense); *Capps v. Sullivan*, 921 F.2d 260, 262 (10th Cir. 1990) (entrapment defense); *United States v. Cronic*, 839 F.2d 1401, 1403-04 (10th Cir. 1988) (good faith defense); *United States ex rel. Barnard v. Lane*, 819 F.2d 798, 802-05 (7th Cir. 1987) (justification defense); *Maddox v. Lord*, 818 F.2d 1058, 1061-62 (2d Cir. 1987) (extreme emotional disturbance defense); *Meeks v. Bergen*, 749 F.2d 322, 327-28 (6th Cir. 1984) (battered wife defense). When attorneys have acceded to defendant wishes and failed to present meritorious defenses, courts have often expressly or implicitly disapproved of such deference. See, e.g., *Martin v. Maggio*, 711 F.2d 1273, 1280 (5th Cir. 1983) (defendant's instruction to attorneys that they seek either a complete acquittal or the death sentence did not justify failure to investigate intoxication defense); *DeLuca v. Lord*, 77 F.3d 578, 586-87 & n.2 (2d Cir. 1996), cert. denied, 117 S.Ct. 987 (1997) (finding attorneys ineffective for abandoning extreme emotional disturbance defense based on defendant's aversion to psychiatry, when attorney explained defense inadequately); *United States v. Gray*, 878 F.2d 702, 712 (3d Cir. 1989) (attorney should not have failed to subpoena witnesses based on defendant's reluctance). But cf. *Mulligan v. Kemp*, 771 F.2d 1436, 1442 (11th Cir. 1985) ("[I]f he is commanded by his client to present a certain defense, and if he does thoroughly explain the potential problems with the suggested approach, then his ultimate decision to follow the client's will may not be lightly disturbed."); *People v. Frierson*, 705 P.2d 396, 405 (Cal. 1985) ("[W]hen a defendant insists on a course of action despite his counsel's contrary warning and advice, he may not later complain that his counsel provided ineffective assistance by complying with his wishes.").

Amendment right and submit to a government psychiatric exam.⁵⁰ However, one important difference is that a mental health defense will not result in indefinite commitment in a psychiatric institution, eliminating one of the primary rational objections to an insanity plea.⁵¹ Language in reported decisions can be found to support either the position that the decision belongs to the defendant or to defense counsel.⁵²

⁵⁰ Admissions that a defendant makes in a compulsory exam by government psychiatric experts may be used against him in trial, including factual admissions about the crime itself. This is true in cases in which the defendant raises an insanity defense, *see* *Powell v. Texas*, 492 U.S. 680, 684 (1989) (per curiam), or diminished capacity, *see* *Buchanan v. Kentucky*, 483 U.S. 402, 422-24 (1987). *See also* *Soria v. State*, 933 S.W.2d 46, 57-59 (Tex. Crim. App. 1996) (reaching same conclusion when defendant sought to introduce psychiatric testimony on future dangerousness in capital sentencing phase). In contrast, submission to a court-ordered competency examination does not waive the Fifth Amendment right. *See* *Estelle v. Smith*, 451 U.S. 454, 465-66, 469 (1981). *Cf.* *Hendricks v. People*, 10 P. 3d 1231, 1241-42 (Colo. 2000) (en banc) (reasoning that, when court orders psychiatric examination to determine whether insanity defense should be imposed, privileges and right against self-incrimination are not waived).

⁵¹ *See* 18 U.S.C. § 4243 (1999) (governing commitment of individuals adjudicated not guilty by reason of insanity). *See also* Gordon Witkin, *What Does It Take to Be Crazy?*, U.S. NEWS & WORLD REP., Jan. 12, 1998, at 7 (pointing out that those found insane will often spend more time involuntarily institutionalized than they would have been imprisoned for following conviction of the crime); David R. Katner, *Raising the Insanity Plea*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER*, 1995 A.B.A. SECTION. CRIMINAL. J. 55 (concluding that courts allow defendants exclusive control over whether to raise an insanity defense because it results in indefinite commitment in a mental institution, distinguishing it from all other affirmative defenses).

⁵² *Compare* *Dean v. Superintendent*, 93 F.3d 58, 61 (2d Cir. 1996) ("It clearly is preferable for counsel to leave the decision whether . . . to reject a legal defense to the client") with *United States v. Layton*, 666 F. Supp. 1369, 1377 (N.D. Cal. 1987) (characterizing attorneys as having taken defendant's opposition to mental health defense into account, "although they recognized that the decision was ultimately theirs and not his"). *See also* *Wainwright v. Sykes*, 433 U.S. 72, 93 (1977) (Burger, J., concurring) (the lawyer, "not the client, has the immediate-and-ultimate responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop."). Two state supreme courts have explicitly ruled on the issue. One held that a defendant had the right to waive a diminished capacity defense based on his desire to avoid the accompanying stigma, even though it characterized the decision as "legally imprudent." *See* *State v. Woodland*, 945 P.2d 665, 670 (Utah 1997). The other expressly approved an attorney's decision to override the defendant's desire to deny any involvement in the crime and present a mental health defense. *See* *People v. Jones*, 811 P.2d 757 (Cal. 1991). *See also* *People v. Anderson*, 641 N.E.2d 591, 599-600 (Ill. App. Ct. 1994) (whether to raise mental health defense is attorney's decision because it does not require entry of formal plea and is therefore a matter of trial strategy).

2. Ethical Canons

The ethical canons, in attempting to defer to a client's autonomy but at the same time hold an attorney responsible for pursuing her client's best interests, provide little guidance to attorneys facing this dilemma. It is conventionally stated that clients decide the objectives of representation and attorneys, in consultation with clients, make strategic and tactical decisions designed to facilitate the objectives of their clients.⁵³ Decisions clearly reserved for a client include the "plea to be entered, whether to waive jury trial and whether the client will testify."⁵⁴ Decisions traditionally allocated to the authority of defense counsel include "what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced."⁵⁵

The distinction between objectives and means, however, is not as coherent as it might initially appear, and many decisions can be easily characterized both as strategic ones regarding means and as fundamental ones regarding objectives.⁵⁶ The decisions addressed by this article offer a perfect example of the difficulty of such a method of categorization: the decision whether to present evidence of mental illness and/or assert a

⁵³ See MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2(a) (1996). See also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.6(a), at 557 (2d ed. 1992).

⁵⁴ MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.2(a) (1996); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1983). See also *Jones v. Barnes*, 463 U.S. 745, 751, 753 n.6 (1983) (affirming that the Constitution requires that decisions whether to plead guilty, waive a jury trial, testify, and appeal belong to individual defendants).

⁵⁵ ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2(b) (3d ed. 1993). See also JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS: LAW & LIABILITY § 6.3(a)(2), at 6-25, 26 (1997); LaFave & Israel, *supra* note 53, at § 11.6(a), at 559.

⁵⁶ See LaFave & Israel, *supra* note 53, at § 11.6(b), at 560 (2d ed. 1992); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 14-15 (1998). Of course, "[a] clear distinction between objectives and means sometimes cannot be drawn." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (2000). The Model Code's Ethical Considerations make a similar distinction between ends and means: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 (1980).

mental health defense can be characterized as a strategic decision regarding the optimal means to defend a case, but in most cases such a decision also fundamentally implicates the client's objectives and personal dignity.

Given this close relation between (attorney) strategy and (client) objectives, the ethical authorities are not definitive. While the Model Code's Ethical Considerations suggest that a decision to *waive* an affirmative defense or to *forego* presentation of relevant evidence must be made by the client,⁵⁷ the Model Rules contrarily instruct that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so."⁵⁸ Moreover, the ethical authorities fail to locate the authority to decide to *assert* a defense or *present* relevant evidence when the client objects to the lawyer doing so.⁵⁹ Perhaps the strongest support for locating this decision with the defendant is found in the language of Ethical Consideration 7-8: "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for [the lawyer]."⁶⁰ Under these guidelines, it would appear that a defendant who seeks to preserve her dignity by refusing to present evidence of mental illness, who prefers a prison sentence to indefinite psychiatric institutionalization, or who would rather die than spend life in prison, has the right to instruct her attorney to respect her wishes.

The Ethical Considerations, however, also instruct an attorney to "act in a manner consistent with the best interests of his client."⁶¹ Furthermore, most ethical authorities grant attorneys additional decision-making authority when a client's competency is in question, although the scope of this authority is far

⁵⁷ See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-26. *But see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(B)(1) (1980) ("Where permissible, [a lawyer may] exercise his professional judgment to waive or fail to assert a right or position of his client").

⁵⁸ MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cml. (1989).

⁵⁹ For discussion of the gap in the rules, see Uphoff & Wood, *supra* note 56, at 12-13. Similarly, the ethical rules place more emphasis on the requirement of consultation with a client when a lawyer is waiving a right that belongs to the client; the need for such consultation when a lawyer asserts a right or defense, on the other hand, is far less clearly articulated. See Bonnie et al., *supra* note 22, at 59-60.

⁶⁰ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1980).

⁶¹ MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1980).

from clear and an attorney must, "as far as reasonably possible, maintain a normal client-lawyer relationship with the client."⁶² No specific guidance is provided as to whether an attorney may raise a mental health defense or insanity plea over a client's objection when the attorney believes that the client's objection is the product of his mental illness.⁶³ Similarly, when a defendant in a capital case decides that he would prefer a death sentence to life in prison, and accordingly instructs his attorney not to present any mitigating evidence, it is not clear what an attorney's ethical responsibility requires.⁶⁴ Whether or not to present mitigating evidence is not primarily a question of what strategies to employ, but whether the objective should be to obtain or avoid a death sentence: "to introduce evidence supportive of life imprisonment when the defendant's objective is death is not a tactical decision. Mitigation evidence is in direct abrogation of the defendant's objective in the case."⁶⁵ Ultimate objectives are supposed to be determined by the defendant.⁶⁶

⁶² MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14(a) (1996). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-12 (1983); MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.14 cmt. (1996).

⁶³ But see Katner, *supra* note 51, at 50 (concluding that the consensus of ethical authorities is that an attorney may not raise an insanity plea over a client's objection).

⁶⁴ Defendants often express such a desire for the death sentence after they have been found guilty and before the penalty phase, at a point when defendants often view an early death as more attractive than the alternative immediately ahead. See Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1380 (1988). Many defendants make similar decisions after spending some time on death row, and ask their attorneys to drop all appeals. Approximately 10% of executions involve defendants who have made such decisions. See Matthew T. Norman, *Standards and Procedures for Determining Whether a Defendant Is Competent to Make the Ultimate Choice - Death; Ohio's New Precedent for Death Row "Volunteers,"* 13 J.L. & HEALTH 103, 106 (1998-99); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. Rev. 299 (1983). While an in-depth discussion of the issue of whether individuals facing execution should be allowed to waive their right to appeal is beyond the scope of this article, it certainly raises some analogous concerns. Courts have generally allowed defendants to waive appeals unless a state statute makes the appeal mandatory. See *Gilmore v. Utah*, 429 U.S. 1012, 1014-15 (1976) (Burger, C.J., concurring).

⁶⁵ Linda E. Carter, *Maintaining Systemic Integrity in Capital Cases: The Use of Court-Appointed Counsel to Present Mitigating Evidence When the Defendant Advocates Death*, 55 TENN. L. REV. 95, 146 (1987).

⁶⁶ See *supra* notes 53-55 and accompanying text.

Thus, the ethical authorities leave defense counsel with little guidance when representing a defendant who insists that counsel present no evidence of mental health problems, when such problems are highly relevant to the guilt or sentencing determination: "No ethical code or rule dictates which course a criminal defense attorney must take when a client, her judgment apparently clouded by mental illness, resists following counsel's advice."⁶⁷

D. THE POTENTIAL FOR CONFLICT BETWEEN MENTALLY ILL DEFENDANTS AND COUNSEL

The attorney-client relationship in a criminal case is inherently problematic. Most often, the relationship is established under the emotionally intense circumstances following an arrest and arraignment (which includes advising the defendant of the maximum sentence contemplated by the law). Much more often than not, counsel must bring bad news—the weight of the evidence or the possible sentence, for example—that clients and their families are loathe to hear. Court-appointed counsel, in particular, must perform these functions not having been chosen by the client and, therefore, facing a trust barrier often compounded by socio-economic and racial factors.⁶⁸ These tensions create the potential for conflict over control of the defense and, as discussed above, the existence of the *Faretta* right endows clients with the power to veto or appropriate important decisions, including the decision to present evidence of their mental illness.

A growing number of criminal defendants suffer from some form of mental illness.⁶⁹ The fact of mental illness complicates

⁶⁷ Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1345 (1998). See also Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients With Mental Disability*, 68 FORDHAM L. REV. 1581, 1610-14 (2000) (discussing failure of ABA ethical authorities to provide clarity).

⁶⁸ See Robert Miller & Leonard Kaplan, *Representation by Counsel: Right or Obligation?*, 10 BEHAVIORAL SCI. & LAW, 401-403 (1992) (reporting widespread dissatisfaction with counsel among sample of indigent defendants).

⁶⁹ A recent study by the United States Department of Justice concluded that in 1998 there were 283,800 individuals suffering from some form of mental illness in prison or jail and 547,800 such people had been placed on probation. Michael J. Sniffen, *Many Mentally Ill Americans Jailed*, AP ONLINE, Jul. 12, 1999. This represented 16% of state prison inmates, local jail inmates and probationers, and 7% of federal

the attorney-client negotiation over control of the defense and, in the context of representation of mentally ill persons, the post-*Faretta* negotiation becomes particularly fragile for two reasons. First, mental illness often creates difficulties in communication. Second, mental illness often affects a client's valuation of objectives and evaluation of strategy. Frequently, the attorney-client negotiation in this context takes on great urgency over counsel's recommendation of a defense based on mental illness and, often, insistence on such a defense results in a breakdown of the attorney-client relationship.⁷⁰

Mental health defenses, to add to the paradox, are often opposed by mentally ill clients precisely as a consequence of their mental illness.⁷¹ In this connection, it is important to recognize that a mentally ill person might rationally fear the consequences of an insanity plea and wisely choose to risk a criminal conviction with a statutory maximum term of incarceration over indefinite "civil" commitment.⁷² Quite often,

prisoners. *See id.* The same study estimated that four out of ten received no treatment while incarcerated. *See id.* *See also* Clarke Thomas, *Editorial*, PITT. POST-GAZETTE, Oct. 13, 1999, at A19 (reporting that American Jail Association estimates that 600,000 to 700,000 mentally ill individuals are booked into jails in the United States every year).

⁷⁰ Many mentally disabled criminal defendants have dual diagnoses: that is, they suffer from both a mental illness and a substance addiction. The frequency of substance addiction further complicates the attorney-client relationship because that relationship often commences just as the client begins the painful process of withdrawal.

⁷¹ According to the National Alliance for the Mentally Ill, approximately half of individuals afflicted with schizophrenia do not believe in their own mental disability or need for treatment. Laurie M. Flynn, *No Death Penalty for Persons with Severe Mental Illnesses*, PR NEWSWIRE WASH. DATELINE, Jan. 12, 1998. One study of criminal defendants diagnosed with serious major mental disabilities reported that 10% opposed entering an insanity plea and an additional 15% "were unreceptive to the attribution of mental illness." *See* Bonnie et al., *supra* note 22, at 54. Of course, an aversion to being portrayed as insane is of course also consistent with mental health, as many sane individuals would not welcome the stigma of being designated schizophrenic. Telephone Interview with Ron Kuby (Apr. 23, 1998). A survey of twenty-five defendants who had refused insanity defenses found that ten did not believe they were mentally ill, six asserted their innocence, eight feared hospitalization or longer incarceration, and one wanted to "get it over with." Miller et al., *supra* note 33, at 501-02. The evaluators noted that "the majority of those claiming they were innocent did so in a way that contradicted significant physical evidence, often in bizarre way," but that the remainder appeared to be competent decisions. *Id.*

⁷² For a discussion of some of these rational reasons, *see infra* notes 86-90 and accompanying text.

however, mentally ill criminal defendants reject mental health defenses for reasons directly related to their disability: for example, a mentally ill person might not perceive the illness itself or its legal significance (the potential for non-responsibility due to lack of criminal intent). She might also elect self representation in order to "make a more glorious kind of defense"⁷³ such as self defense or simply not having committed the acts charged, or she might insist that she is innocent out of honest belief, despite overwhelming evidence to the contrary.⁷⁴ In choosing the path of glory, mentally ill defendants often forego the presentation of existing (or readily available) relevant evidence of mental illness. In such cases, the trier-of-fact will determine guilt and/or set punishment deprived of essential evidence relating to intent. The right to self representation, then, effectively excludes relevant evidence of mental illness from the fact-finding process.

In practice, the phenomena described above confuse the operation of the criminal justice process, inject a destructive element of gamesmanship into the attorney-client relationship, erode the integrity of the criminal process, and, ultimately, undermine public respect for the criminal justice system. The ultimate reality—the potential for self representation by an unstable person—is also unfair, in a profound sense, to an individual whose mental illness may have contributed not only to her actions, but may also contribute to her self immolation through self representation in the criminal process. In these cases, the jury never learns of her mental illness and therefore convicts and/or selects a sentence ignorant of her basic human qualities.

The result of this combination—uncertainty in legal and ethical norms and the grant of an absolute right to represent oneself—was disastrous in the Ferguson and Kaczynski murder cases and leads to similarly troubling results in many other cases involving mentally ill defendants. First, these norms operate, like Malthusian scissors, to create a significant class of "competent" but mentally ill individuals who elect to represent themselves at trial. This effect occurs because the low competency

⁷³ *United States v. Farhad*, 190 F.3d 1097, 1102 (9th Cir. 1999) (Reinhardt, J., concurring) (quoting defendant's statement in transcript of pretrial hearing), *cert. denied*, 120 S. Ct. 1428 (2000).

⁷⁴ See Miller et al., *supra* note 33, at 501-02; Ross, *supra* note 67, at 1348-49.

standard often confuses a mentally-disturbed criminal defendant with her mentally stable counterparts and the *Faretta* right gives her the same right to represent herself as it would a stable defendant.⁷⁵ Second, and equally as important, a defendant's ultimate recourse to the *right* of self representation—even that of a mentally unstable defendant—curbs counsel's decision-making authority by creating the potential, in each important attorney-client disagreement, that the client will terminate the relationship.⁷⁶ Mentally ill defendants, in fact, often threaten self representation in the face of counsel's recommendation to present mental health evidence. Paradoxically, then, the *Faretta* right becomes, in the hands of mentally ill defendants, an instrument for preventing the presentation of relevant evidence of mental illness and a defense (often the best defense) based upon such evidence whether or not the right is formally asserted. *Faretta*, then, distorts the truth-finding function of the criminal justice by empowering mentally ill criminal defendants to foreclose presentation of evidence highly relevant to criminal intent and culpability.

II. THE TRADITIONAL APPROACH TO ALLOCATING AUTHORITY WITHIN THE ATTORNEY-CLIENT RELATIONSHIP: BALANCING AUTONOMY AND BEST INTERESTS

As discussed above, case law and ethical canons provide more confusion than guidance to attorneys, courts, and clients facing conflicts over allocation of authority between client and counsel. This confusion results from the narrow focus that courts and scholars have adopted in analyzing the allocation of authority within the attorney-client relationship. Traditionally, courts and scholars have approached the conflict as pitting a defendant's personal autonomy (including "dignity" interests) against the client's best interests. Such an approach neglects the commitment that we as a society have pledged to justice.

⁷⁵ See *supra* notes 20-25 and accompanying text.

⁷⁶ In theory, a similar effect may follow from a client's right to fire her counsel, which also exerts pressure on an attorney to respect a client's wishes. In reality, the right of self representation undermines the attorney-client relationship much more directly because a *pro se* criminal defendant has direct control over all defense decisions. In contrast, a criminal defendant who seeks new counsel (particularly appointed counsel) is by no means assured that (1) she will be appointed new counsel or (2) the decisions by new counsel will coincide with her preferences.

This section of the paper assesses the values underlying the traditional approach to allocating authority within the attorney-client relationship. This discussion is intended to emphasize the philosophical limitations of the autonomy/best interests dichotomy. We suggest that a commitment to individual rights should not obscure the importance of societal interests that often serve to protect us all from erosion of important commitments. It is from this perspective that we now turn to the two values that have thus far dominated the allocation of authority within the attorney-client relationship: autonomy and best interests.

A. THE AUTONOMY ARGUMENT

The autonomy viewpoint treats questions involving the presentation of a defense as implicating the objectives of representation and therefore properly belonging to the criminal defendant.⁷⁷ Underlying the autonomy viewpoint is the notion that attorneys will not make better decisions than clients because they often do not fully understand a client's interests and needs, especially when there are major social, economic, or cultural differences between the two.⁷⁸ The autonomy viewpoint suggests that allowing a client control of decisions will produce decisions that better meet client needs and affirm a client's sense of personhood and individuality.⁷⁹

⁷⁷ See *Faretta v. California*, 422 U.S. 806, 834 (1975) ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. . . . And although he may conduct his own defense ultimately to his own detriment, his choice must be honored.").

⁷⁸ See Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 328-29 (1987).

⁷⁹ See *id.* at 336-38. A variant of the autonomy point has been expressed in philosophical terms as "the right to be punished." This theory proposes that the right to be treated as a person, which is enjoyed by all individuals, carries with it the right to have one's choices respected and to choose punishment as the consequence of committing criminal offenses. See Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION 40 (Jeffrie G. Murphy ed. 1973); Martin R. Gardner, *The Right to Be Punished-A Suggested Constitutional Theory*, 33 RUTGERS L. REV. 838 (1981). For recent debates over the significance of this right for theories of punishment, see R.A. Duff, *In Defence of One Type of Retributivism*, 24 MELB. U. L. REV. 411, 417-18 (2000); Mirko Bagaric & Kumar Amarasekara, *The Errors of Retributivism*, 24 MELB. U. L. REV. 124, 174-175 (2000); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1349-53 (2000); Robert D. Miller, *Forced Administration of Sex-Drive Reducing Medications to Sex Offenders: Treatment or Punishment?* 4 PSYCHOL. PUB. POLY & L. 175,

The strongest expression of the autonomy interest in modern jurisprudence, and the expression of greatest (im)practical import, is *Faretta v. California*, which recognized a nearly absolute right of self representation, formally based in the Sixth Amendment right to the effective assistance of counsel but effectively rooted in the principle of individual autonomy: "that respect for the individual which is the lifeblood of the law."⁸⁰ In an opinion authored by Justice Brennan, the Court reasoned that "[t]he 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."⁸¹ The *Faretta* majority recognized that self representation would injure the interests of most criminal defendants, and expressly held that defendants who opt to represent themselves waive any right to bring ineffective assistance of counsel claims based on their own trial per-

187-88 (1998). It has been suggested that recognition of such a right precludes the involuntary imposition of the insanity defense. See Gardner, *supra*, at 861. However, proponents of this theory have recognized that this right may be limited or postponed in cases in which mental illness inhibits the ability to make rational choices. See, e.g., *id.* at 839 & n.13, 856 nn.92-93. Gardner also proposes that the right to be punished does not encompass the right to choose a particular punishment (especially one that itself denies an individual's personhood), and therefore does not give individuals the right to be put to death or forego capital appeals. See *id.* at 862-63.

⁸⁰ *Faretta*, 422 U.S. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). According to a later opinion by Justice Brennan, the rationale of *Faretta* rested on "the view that the . . . Sixth Amendment is to protect the dignity and autonomy of a person on trial by *assisting* him in making choices that are his to make, not to make choices for him." *Jones v. Barnes*, 463 U.S. 745, 759 (1983) (Brennan, J., dissenting). Justice Brennan argued that *Faretta*'s recognition of an interest in autonomy required that defendants have the right to insist on certain arguments in trial; only those decisions that had to be made quickly in the course of a trial were exclusively the province of the attorney. See *id.* at 759-60.

The *Faretta* decision was also based on an analysis of the historical recognition of a right of self representation. The Supreme Court's recent decision rejecting a right to self representation on appeal dismissed such evidence as unreliable because of the historical absence of a corresponding right to assistance of counsel:

Thus, a government's recognition of an indigent defendant's right to represent himself was comparable to bestowing upon the homeless beggar a "right" to take shelter in the sewers of Paris. Not surprisingly, early precedent demonstrates that this "right" was not always used to the defendant's advantage as a shield, but rather was often employed by the prosecution as a sword.

Martinez v. Court of Appeals of Cal., 528 U.S. 152, 157 (2000).

⁸¹ *Faretta*, 422 U.S. at 819.

formance.⁸² Thus, under *Faretta*, autonomy is the favored value regardless of whether it is exercised in a manner that actually serves the defendant's best interests.

An approach to representation that places maximization of a client's autonomy at the forefront of the lawyer's objectives is popular among legal academics who believe in radical lawyering or lawyering for social change.⁸³ Most of these individuals primarily discuss legal representation in the civil context. However, their ideas about the power dynamics inherent in an attorney-client relationship and the importance of self-determination in the context of this relationship extend to the criminal defense realm. Practitioners and commentators who favored the autonomy viewpoint were extremely active in the debate accompanying Kaczynski's trial. In a widely reprinted article that argued that Kaczynski's lawyers had improperly dictated the objectives of representation, legal ethics professor Richard Zitrin asked, "[w]ho in the courtroom spoke for what Ted Kaczynski wanted? . . . [I]t was Kaczynski's life at stake, and his call to make. As members of the criminal law community often say, 'We don't do the time.'"⁸⁴ Tony Serra, who entered the fray by offering to represent Kaczynski on his own terms, justified his position on the ground that "[a] person has the right to

⁸² See *id.* at 834 & n.46 (acknowledging that defendant "may conduct his own defense ultimately to his own detriment").

⁸³ See generally DAVID A. BINDER & SUSAN C. PRICE, PH.D, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH (1977); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501 (1990); Stephen Ellmann, *Lawyers and Clients*, 34 UCLA L. REV. 717 (1987); Mark Spiegel, *Lawyering and Client Decision Making: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979); Strauss, *supra* note 78, at 321-22. In the civil context, values such as self-determination and empowerment play an even more central role, since many lawyers view their roles as assisting or facilitating community organization and mobilization. See generally GERALD P. LOPEZ, REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE (1992); Daniel S. Shah, *Lawyering for Empowerment: Community Development and Social Change*, 6 CLINICAL L. REV. 217 (1999). For discussion of the use of the client-centered model in the criminal defense context, see Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L.J. 2419, 2440 (1996); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841 (1998).

⁸⁴ Richard A. Zitrin, *The Kaczynski Dilemma*, N.J. L.J., Feb. 9, 1998, at 24.

defend himself in the manner he chooses, even if it means death, as long as he appreciates the risk."⁸⁵

Advocates of the autonomy viewpoint emphasize that a decision to forego an insanity plea, mental health defense, or presentation of mitigating circumstances may be an entirely rational course of action based on practical, dignitary, or even political concerns. An insanity plea or mental health defense may undermine the legitimacy of the defendant's motives,⁸⁶ admit guilt of the offense charged,⁸⁷ result in indefinite commitment in a mental institution and unwanted psychiatric treatment,⁸⁸ carry

⁸⁵ Finnegan, *supra* note 2, at 56 (quoting Tony Serra). For a recent article proposing that Kaczynski should have been allowed to control his own defense, see Joel S. Newman, *Doctors, Lawyers and the Unabomber*, 60 MONT. L. REV. 67 (1999). After reviewing the legal and ethical authorities, Newman concludes that the decision at issue concerned ultimate objectives rather than tactics or means and therefore belonged to a competent defendant. *See id.* at 90, 96-100.

Another recent article reaches the similar conclusion that attorneys should control the tactical and strategic decisions that arise in criminal defense except that a defendant should control the basic theory of the defense including the decision whether to plead insanity or raise a mental health defense. *See* H. Richard Ulviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719 (2000). Ulviller makes an exception to his grant of authority to the defendant when the lawyer is ethically unable to advance the theory of defense that the client prefers. *See id.* at 771. The authors of the instant article, however, focus not on cases in which the attorney has ethical difficulties taking a position, but with cases in which we believe it unethical to fail to present important evidence or argument.

⁸⁶ *See* United States v. Robertson, 507 F.2d 1148, 1158 (D.C. Cir. 1974), *overruled by* United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991); *Frendak v. United States*, 408 A.2d 364, 377 (D.C. 1979); *State v. Jones*, 664 P.2d 1216, 1221 (Wash. 1983). This was, of course, of particular concern to Kaczynski, whose journals expressed a strong fear that he would be portrayed as a "sickie" in order to undermine and invalidate his political views. *See* Evelyn Cruz, *Kaczynski Journal Entry: I'm No "Sickie,"* S.F. EXAM., Nov. 20, 1997, at A1; Dr. Sally Johnson, *supra* note 2.

⁸⁷ *See* *Frendak*, 408 A.2d at 377.

⁸⁸ *See* United States v. Wright, 627 F.2d 1300, 1308 (D.C. Cir. 1980) (discussing the defendant's rational preference for a fixed jail sentence rather than indefinite commitment in a mental institution known for its poor conditions), *overruled by* United States v. Marble, 940 F.2d 1543 (D.C. Cir. 1991); *People v. Redmond*, 94 Cal. Rptr. 543, 545-46 (Cal. Ct. App. 1971) (defendant preferred sentence of at most six months in jail to indefinite commitment in mental hospital); *Frendak*, 408 A.2d at 376 (noting that defendants might "object to the quality of treatment or the type of confinement" available in a mental institution as well as to the possibility of longer confinement); *State v. Johnston*, 527 P.2d 1310, 1313 (Wash. 1974) (defendant may prefer incarceration to institutionalization).

tremendous societal stigma,⁸⁹ and in some cases be strategically unwise.⁹⁰ Thus, it is clear that there are important dignitary interests, as well as practical interests, offended by the argument that one's actions were the product of one's insanity.⁹¹ Courts have recognized a similar interest in autonomy in death penalty cases.⁹² Reasons other than a preference for death, such as a desire to spare one's family members the agony of testifying, might cause a defendant to want to thwart presentation of mitigating evidence.⁹³ Furthermore, some courts have even recognized as valid interests the dignitary justifications for seeking a death sentence:

The decision to ask for the death sentence . . . was based on his rational and understandable decision that he would rather die than spend the rest of his life in jail as a crippled and badly injured man. . . . This

⁸⁹ See *Freundak*, 408 A.2d at 377. In fact, the stigma of being a former mental patient may be worse than that which results from an adjudication of guilt of a crime. See *Miller et al.*, *supra* note 33, at 488-89 (citing H.J. STEADMAN & J. COCOZZA, *CAREERS OF THE CRIMINALLY INSANE* (1974)).

⁹⁰ See generally *Right and Responsibility*, *supra* note 26, at 945-46; *Katner*, *supra* note 51, at 55.

⁹¹ For this reason, one defendant preferred to rely on an alibi rather than an insanity defense despite the likelihood of a life sentence, because "at least that leaves a man, if there is any peace of mind in a case like this, with that little bit left." *People v. Gauze*, 542 P.2d 1365, 1370 (Cal. 1975) (quoting defendant). See also *People v. Deere*, 710 P.2d 925, 929 (*Deere I*) (Cal. 1985). The intensely personal nature of the decision to plead insanity may accentuate the importance of this interest in personal autonomy. In *Treece v. State*, the court explained that choices with "important personal consequences" are generally reserved for the individual defendant to make, and concluded that the results of a successful insanity defense are sufficiently "grave and personal" to give this decision to the defendant. *Treece v. State*, 547 A.2d 1054, 1058-60 (Md. 1988).

⁹² See *Bonnie*, *supra* note 64, at 1390 ("[T]he prevailing view seems to be that the decision of a competent defendant to forgo a (presumably meritorious) insanity defense should be honored. The defendant's dignity supersedes the dignity of the law in this [death sentence] context as well."). See also *Deere I*, 710 P.2d at 936 (Lucas, J. concurring and dissenting) (characterizing the majority decision to overturn a death sentence when the defendant blocked presentation of mitigating evidence as "patronizing" and intruding on the privacy and dignity rights of the defendant). For a decision explicitly comparing the insanity defense and death penalty decisions, see *People v. Bloom*, 774 P.2d 698, 714-15 (Cal. 1989).

⁹³ See *Knight v. Dugger*, 863 F.2d 705, 749-50 (11th Cir. 1988) (defendant did not want mother to testify on personal information about father's sexual abuse of siblings); *LaRette v. State*, 703 S.W.2d 37, 39 (Mo. Ct. App. 1985) (defendant did not want father to testify because of concerns about father's health).

court does not credit the expert witnesses who testified that Felde made his decision to seek the death penalty out of a self-destructiveness brought about by his post-traumatic stress disorder. . . . Far from the choice of a suicidal incompetent, Felde showed the depth of his feelings and cognition in putting up such a defense.⁹⁴

Even when a defendant's desire to block consideration of evidence of mental illness appears to be motivated by entirely irrational concerns, many autonomy proponents would object that respect for autonomy demands deference to such a choice.⁹⁵ For there is another concern that underlies the arguments of those who favor the defendant's autonomy interests: autonomy proponents, many of whom built their reputations representing defendants who chose to present political defenses to criminal offenses, object that determining whether a viewpoint amounts to mental illness or to a fringe political ideology is a value judgment that is inappropriate for defense counsel or the court to make. In autonomy proponents' view, an individual who chooses to martyr himself on behalf a cause should

⁹⁴ Felde v. Butler, 817 F.2d 281, 282-83 (5th Cir. 1987) (quoting trial court decision). See also Bloom, 774 P.2d at 715 n.7 (arguing that life imprisonment can be as bad as a death sentence). Defense attorneys have often justified their complicity with a defendant's quest for a death sentence on dignitary grounds. The defense attorney whose actions were at issue in *Deere* expressed this concern eloquently: "[I]f I were to follow the Court's order and present mitigating evidence . . . [my client] would object to the very depth of his soul," and it would violate the client's "true and sincere and honest beliefs about what is right for him." *People v. Deere (Deere II)*, 808 P.2d 1181, 1187 (Cal. 1991). See also Felde, 817 F.2d 281, at 284 ("I can't tell anyone to take someone else's life but I think . . . only the person whose life is to be taken has that right."); *Deere I*, 710 P.2d at 929 ("I have no right whatsoever to infringe upon his decisions about his own life.") (alteration in original).

Assertions that a desire to die can be rational can also be found in cases regarding death penalty appeals:

The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed. . . .

Lenhard v. Wolff, 443 U.S. 1306, 1312-13 (1979).

⁹⁵ See David S. Cohn, *Offensive Use of the Insanity Defense: Imposing the Insanity Defense over the Defendant's Objection*, 15 HASTINGS CONST. L.Q. 295, 313-14 (1988) ("[T]he search for truth, though primary, does not subordinate all other interests. . . . [T]he larger interest in an individual's autonomy and freedom of choice must take precedence over the purported interest in refusing to punish the mentally ill.").

have the right "to lose to make a point."⁹⁶ These individuals frame the right to refuse to assert "the best defense" as an important element in the tradition of civil disobedience and political dissent:

A defendant has, and should have, the right to reject a defense that runs contrary to a deeply held ethical, religious, or political viewpoints. From the narrow perspective of the criminal defense lawyer, Dr. Martin Luther King, Jr. would have had a stronger legal argument pleading insanity rather than arguing that his civil disobedience was justified. Similarly, the "best" defense was not forwarded by the young people who burned the American flag atop of the Times Square recruiting station to protest the Gulf War. . . . Even Jesus would have been better off to have pleaded diminished capacity based on excessive exposure to the desert sun than to remark "thou hast said it" when asked if he was the Son of God.⁹⁷

In an article that appeared a few months after Kaczynski's guilty plea, *The New Yorker* columnist William Finnegan argued that it is difficult to distinguish political dissent from mental illness and objected to the imposition of "the ideology of the psy-

⁹⁶ Professor Richard Bourne, University of Baltimore, *quoted in* Sandy Banisky, *Kaczynski: A Fool for a Client?*, BALTIMORE SUN, Jan. 8, 1998, at A2.

⁹⁷ Kuby and Kunstler, *supra* note 1, at 23. One defense attorney responded to Kuby's analogy: "if I was representing Jesus Christ, don't you know that I woulda tried to win that case? And that's what we do as criminal defense lawyers." Rivera Live (CNBC News Transcript, Jan. 20, 1998) (statement of David Dratman, criminal defense attorney).

Kuby has also compared the imposition of insanity defenses upon defendants who preferred to assert a political defense for their actions to practices in the former Soviet Union that labeled all political dissidents mentally ill. *Rivera Live, supra* (statement of Ronald Kuby); All Things Considered (NPR radio broadcast transcript, Jan. 6, 1998) (statement of Ronald Kuby). *See also* Sandy Banisky, *Kaczynski: A Fool for a Client?*, BALTIMORE SUN, Jan. 8, 1998, at A2 (quoting Richard Bourne, law professor, University of Baltimore) (arguing that individuals who choose to martyr themselves on behalf of a cause they believe in should be allowed "to lose to make a point.").

In fact, it may sometimes be difficult to distinguish political dissent from mental disability, and "the ideology of the psychiatrist" may come into play to classify legitimate political ideas as mental disability. Finnegan, *supra* note 2, at 54. Tony Serra, the attorney chosen by Kaczynski to replace Clarke and Denvir, planned to argue an imperfect necessity defense based on Kaczynski's perception of the threat of technology—and maintained about this perception, "It's not crazy, and it's not difficult to understand. And if the hole in the ozone opens and kills us all, he'll be proved right!" *Id.* at 56. Another case in which mental illness appeared to interact with genuine political ideology was that of John Salvi, who was found competent to stand trial and convicted of murdering two individuals who worked in abortion clinics. Salvi ultimately committed suicide in prison. Ross, *supra* note 67, at 1347 n.18.

chiatrist" to classify legitimate political ideas as mental illness.⁹⁸ More recently, longtime capital defense attorney Michael Mello, who now distinguishes himself from what he characterizes as a paternalistic capital defense bar, has published a book comparing Kaczynski to abolitionist John Brown. He proposes that the psychiatrists and lawyers who interpreted Kaczynski's radical political ideology as symptomatic of mental illness stifled Kaczynski's right to use his criminal trial to make a statement about the dangers of technology.⁹⁹ For these reasons, autonomy proponents argue that decisions regarding presentation of an insanity plea or other mental health defense may only be made by a defendant.

While we share many of the views of this school of thought in cases involving criminal defendants that are not mentally impaired, the autonomy viewpoint fails to account for the fact that mental illness itself may render an individual's decisions unfree. This is one of the primary critiques that the "best interests" school of thought, to which we now turn, has of the autonomy theorists.

B. THE BEST INTERESTS ARGUMENT

Those who reject the proposition that a defendant has the absolute right to control his defense rely upon the notion that an attorney's obligation is not to assist a client's articulation of her desires and objectives, but rather to act in her client's best interests. In particular, the stakes in capital cases have motivated attorneys to conclude that their sense of morality and responsibility prevents them from uniformly respecting client wishes. Welsh S. White, who spoke to a number of capital defense attorneys in researching this issue, reported that while many acknowledged the importance of client autonomy to make decisions,

⁹⁸ Finnegan, *supra* note 2, at 54. James Q. Wilson maintained that Kaczynski's Manifesto was well argued and rational, claiming, "If it is the work of a madman, then the writings of many political philosophers—Jean Jacques Rousseau, Tom Paine, Karl Marx—are scarcely more sane." *Id.* at 61 (quoting James Q. Wilson). For another example of a defendant who felt this way, see *United States v. Robertson*, 507 F.2d 1148, 1158 (D.C. Cir. 1974) (insanity defense "would impugn the credibility of his racial and political views."), *overruled by* *United States v. Marble*, 940 F.2d 1543 (D.C. Cir. 1991).

⁹⁹ MELLO, *supra* note 2.

[N]ot one indicated that he could imagine a case in which he would voluntarily allow a capital defendant to submit to execution. Thus, for these attorneys, the bottom line is that the goal of preventing the government from killing a human being outweighs a defense attorney's normal obligation to respect his client's autonomy.¹⁰⁰

Many legal commentators and practitioners who advocate a paternalistic approach to client representation do so in part based on the view that most criminal defendants do not fully understand the legal process, even if they have had multiple experiences in the criminal justice system.¹⁰¹

The best interests argument is particularly compelling in cases involving mentally ill defendants, whose "autonomy" may be illusory if mental illness prevents them from making free, rational decisions. In the case of a mentally ill defendant, best interests advocates argue, "the free will presupposed by our criminal justice system cannot be presumed."¹⁰² Instead, a recognition of the unique vulnerability of a mentally ill defendant may require attorneys to play a paternalistic role and override the preferences expressed by the defendant.¹⁰³ The low standard of mental health required by the competency determination supports the argument that mentally ill defendants are often not making free and voluntary decisions.¹⁰⁴ In fact, the de-

¹⁰⁰ Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 861 (1987).

¹⁰¹ See Strauss, *supra* note 78, at 321-22 (1987). The argument that an attorney will make better decisions than a client generally rests on the attorney's "superior technical and tactical knowledge." Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 GEO. L. J. 2419, 2440 (1996).

¹⁰² *United States v. Wright*, 627 F.2d 1300, 1310 (D.C. Cir. 1980).

¹⁰³ See *Shull v. South Carolina*, 1989 WL 106842 at *8 (4th Cir. Sept. 5, 1989) (Ervin, J., dissenting) (pointing to decisions allowing imposition of a psychiatric examination on possibly incompetent clients as demonstrating the uniqueness of the attorney relationship with mentally ill clients).

¹⁰⁴ Examples from reported cases make this point, as well. See *State v. Smith*, 564 P.2d 1154, 1156 (Wash. 1977) (defendant wanted to present self defense claim that fellow train passenger invaded his privacy through the use of ESP and attempted to kidnap him by turning the train around); *State v. Khan*, 417 A.2d 585, 591 (N.J. Super. Ct. App. Div. 1980) (defendant insisted on self defense claim although it was based on "paranoiac delusion"). For another example of such twisted reasoning, but one where the defendant successfully resisted his attorney's advice to plead insanity and did argue self defense, see *People v. Morton* 570 N.Y.S.2d 846, 847 (N.Y. App. Div. 1991) (defendant argued that frail elderly mother tried to drown him in toilet bowl and attacked him with oriental dance).

defendant's refusal to accept his own mental illness may derive from the mental illness itself. In this connection, the Kaczynski defense team argued that Kaczynski's inability to tolerate psychiatric examination and presentation of evidence of mental illness was a direct result of his illness.¹⁰⁵

To address this concern, Richard Bonnie has proposed a system in which judges may declare a defendant competent to stand trial but decisionally incompetent; in other words, the defendant would be deemed competent to assist but not to direct or guide defense counsel.¹⁰⁶ Josephine Ross, who wrote an article grappling with her own decision to impose a defense of "nonresponsibility" upon a mentally ill client, characterizes her approach as an "ethic of care" that emphasizes human interconnectedness and considers not only what is at stake in a given criminal case but takes responsibility for a defendant's life as a whole.¹⁰⁷

The concerns of best interests proponents extend to cases in which a defendant's mental illness is not so severe as to cause him to lose touch with reality, but nonetheless motivates a defendant to invite a death sentence.¹⁰⁸ Depression may be at its height following arrest for a capital crime and prior to trial.¹⁰⁹ Some individuals decide that death is the preferential option in the midst of the depression that follows announcement of the guilty verdict.¹¹⁰ In other cases, mental illness or a client's dissat-

¹⁰⁵ See note 4 *supra*. Kaczynski viewed psychiatrists as "agents of a science of the brain given to mind control and personality alteration" who sought "to eliminate free will and personal autonomy by creating a population that is wholly compliant with the needs of an omnipotent system." *Id.* at 10 (Exhibit A, Declaration by Dr. David Vernon Foster, M.D.).

¹⁰⁶ See note 211, 213 *infra*.

¹⁰⁷ See Ross, *supra* note 67, at 1373-80.

¹⁰⁸ See Note, *Due Process—Mental Competency to Waive Counsel and to Plead Guilty*, 107 HARV. L. REV. 144, 155, 163 (1993). Bruce Ledewitz, who has represented many capital defendants, states that almost every client he has represented "at some point indicated a desire not to oppose the death penalty." White, *supra* note 100, at 859. For a discussion of why so many capital defendants express a preference for death, discussing the frequent combination of "macho" self image and a strong pull toward self destruction, see *id.* at 871-75.

¹⁰⁹ See *id.* at 859.

¹¹⁰ See, e.g., *Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991) (arguing that this "irrational" and "morose" state of mind created additional obligations for his attorneys to advise him). Depression among death row inmates appears to be rather

isfaction with his attorney's performance during the guilt phase appear to provide strong emotional influences upon a defendant's decision.¹¹¹ The dangers inherent in allowing depressed defendants to forego presentation of a case for mitigation are particularly powerful in the death penalty context. This is because, while individuals on death row frequently change their mind about whether or not they want to die,¹¹² a defendant who has instructed her attorney to offer no evidence of mitigation may subsequently find few legal avenues to appeal his death sentence and present the case for allowing him to live.¹¹³

This point of view—that counsel must act in her client's best interests—is unquestionably at the core of counsel's ethical obligations and the structure of the adversarial system,¹¹⁴ and nothing in this paper is intended to undermine this view of counsel's duty of zealous advocacy. By framing the conflict as one of best

widespread. A study of Florida death row inmates found that 35% attempted suicide and 42% had seriously considered it. G. Richard Strafer, *Volunteering for Execution: Competency, Voluntariness and the Propriety of Third Party Intervention*, 74 J. CRIM. L. & CRIMINOLOGY 860, 872 n.44 (1983).

¹¹¹ See, e.g., *Thompson v. Wainwright*, 787 F.2d 1447, 1451, 1452 n.3 (11th Cir. 1986) (discussing effect of defendant's mental problems upon his decision-making and citing MODEL CODE OF PROF'L RESPONSIBILITY EC 7-12); *White*, *supra* note 100, at 860 (discussing Ledewitz's contention that the reasoning of many defendants who want the death penalty is affected by mental disability); *Emerson v. Gramley*, 91 F.3d 898, 906 (7th Cir. 1996) (Ripple, J., concurring and dissenting) (discussing defendant's "disgust" with attorney heading into sentencing).

¹¹² See Richard C. Dieter, *Ethical Choices for Attorneys Whose Clients Elect Execution*, 3 GEO. J. LEGAL ETHICS 799, 801 (1990) (defendants often decide they want to die and ask attorney to suspend all appeals, then change their minds and want appeals to resume). Bonnie acknowledges this problem but contends that it can be addressed if attorneys "emphasize to the recalcitrant client how difficult it will be, after he has been sentenced to death, to undo the consequences . . ." If, after such advice, a defendant still insists on foregoing a mitigation presentation, he recommends the attorney should request an inquiry into the defendant's competence but then abide by the preferences of an individual found competent. *Bonnie*, *supra* note 64, at 1388-89.

¹¹³ As one commentator points out, "choosing execution at the initial penalty trial is likely to make the chance of successfully attacking the death penalty at a subsequent stage very slim." *White*, *supra* note 100, at 867.

¹¹⁴ Of course, counsel are not only representatives of parties but also officers of the court. For this reason, there are limitations to counsel's freedom to act in her client's best interests, as well as obligations on counsel which may be in tension with her client's best interests. For example, counsel cannot participate in a fraud on the court and, therefore, may not put a client on the stand and question her if counsel believes that the witness is committing perjury. MODEL RULES OF PROF'L CONDUCT R. 3.3 (1995).

interests versus autonomy, however, advocates of attorney control of the defense make themselves vulnerable to the charge of paternalism; that is, the criticism that, if the lawyer's only concern is the defendant's best interests, the lawyer should accept the best interests as articulated by that defendant.¹¹⁵

In an article describing her decision to impose a mental illness defense over a client's wishes, Josephine Ross acknowledges, "[w]hen I weighed my client's best interests against her right to autonomy, undoubtedly my definition of best interests was a product of my own values, as was the weight I gave to my client's autonomy."¹¹⁶ She describes the difficulty inherent in substituting one's judgment for a client's and the impossibility of ascertaining the value that a client would place on various objectives were it not for that client's mental illness.¹¹⁷ For this reason, Ross concludes that her justification for imposition of an unwanted mental health defense cannot be supported when a defendant's insistence on a different strategy is arguably motivated by political objectives.¹¹⁸

The best interests point-of-view is thus an inadequate answer to the autonomy viewpoint. It cannot fully address a case such as Kaczynski's—whose illness is expressed through the vehicle of a political philosophy—in that it fails to articulate a fundamental rationale for authorizing attorney control over the decision to present evidence of mental illness. The best interests point-of-view fails to give adequate weight to society's interest in a full, fair and final resolution of a criminal case: that is, society's interest in the securing the integrity of the criminal process by ensuring the presentation of important exculpatory evidence. Possibly in recognition of the limitations of the best interests philosophy, Ross, who characterizes her decision to impose a

¹¹⁵ For just such an argument, see Slobogin & Mashburn, *supra*, note 67, at 1638-39.

¹¹⁶ Ross, *supra* note 67, at 1346.

¹¹⁷ *Id.* at 1371. Ross notes that she still argues that lawyers should have discretion to take decisions away from mentally ill clients because the alternative—"mentally ill clients who are adjudicated competent to stand trial will make these decisions"—is worse and would sometimes "require the lawyer to engage in ineffective assistance of counsel." *Id.* at 1371 n.109.

¹¹⁸ *Id.* at 1363-4. Ross cites as examples the cases of Kaczynski and John Salvi, who murdered two women who worked in abortion clinics; both Kaczynski and Salvi favored a political defense over an insanity plea, and both defendants' lawyers overrode their clients' wishes.

mental health defense as motivated solely by her assessment of her client's best interests, nonetheless acknowledges an overriding fairness concern: "What made me decide that it was important to follow up on the client's mental health was my own sense that it was *wrong* to allow Ms. Teplinski to be convicted for something that was really a product of her mental illness."¹¹⁹

III. VALUING THE JUSTICE INTEREST

By framing the issue as a conflict between the autonomy of the individual defendant, on the one hand, and her best interests, on the other, current jurisprudence has overlooked the overriding importance of the societal interest in a fair trial. Accordingly, our joint interest in due process of law, effective representation, and the integrity of the criminal process has been significantly undervalued, if not entirely subordinated, within the current system. In this section, we discuss the nature of the societal interest in relation to the contexts that are relevant here, namely the determination of intent during the guilt phase of a criminal trial and the consideration of evidence of mental illness during the penalty phase of a capital trial. We then propose the recognition of a broader Justice Interest that would prioritize vindication of the right to a fair trial in such circumstances.

A. THE NATURE OF THIS INTEREST WHEN MENTAL ILLNESS IS INVOLVED

1. *Convicting Only the Morally Culpable: Presentation of Evidence of Mental Illness Related to Criminal Intent*

It has long been established in our legal culture that an individual may be convicted of a crime, and bear the associated stigma and punishment, only if she acted with criminal knowledge and intent and, therefore, is responsible for her actions. In moral terms, "our collective conscience does not allow punishment where it cannot impose blame."¹²⁰ This interest finds recognition in the rule that a judge may reject a guilty plea if

¹¹⁹ *Id.* at 1365 (emphasis added). *See id.* at 1375.

¹²⁰ *United States v. Robertson*, 507 F.2d 1148, 1157 (D.C. Cir. 1974) (citations omitted).

convinced that the plea lacks a factual basis—in other words, if there is insufficient proof that the defendant has committed the offense.

One principle embodying this justice interest is the notion that courts should not tolerate the conviction of persons who are not guilty by virtue of lack of criminal knowledge or intent.¹²¹ This principle derives from the philosophical idea that only those who have knowingly and freely embarked upon a course of conduct deserve to be punished for the evil that they have caused.¹²² In his book discussing the relationship between law and psychiatry, Professor Michael Moore traced the insanity plea back to the idea that children under a certain age cannot be held criminally responsible because they “knoweth not of good and evil,” an idea with religious origins, and set forth the moral basis for holding individuals responsible for their acts:

[N]either the legal nor the psychiatric theory of the person departs significantly from the ancient and commonsense idea that persons are beings who are sufficiently rational, “in charge” of their actions, and unified in their purposes, that they may justly be the subjects of praise and blame, justly the holders of rights and of responsibilities.¹²³

This principle has an obvious and important application in cases involving individuals suffering from mental illness because “one whose acts would otherwise be criminal has committed no crime at all if because of incapacity due to . . . mental condition he is not responsible for those acts.”¹²⁴ The courts have recog-

¹²¹ For the tension between this idea and the legal concept of felony murder, which allows conviction of an individual for murder, or even capital murder, despite the absence of intent to kill, see Norman J. Finkel, *Culpability & Commonsense Justice: Lessons Learned Betwixt Murder & Madness*, 10 NOTRE DAME J.L. ETHICS & PUB. POL'Y 11, 18-31 (1996).

¹²² For discussion of the views of moral philosophers on the proper test for insanity, see Michael L. Perlin, *Unpacking the Myths: The Symbolism Mythology of Insanity Defense Jurisprudence*, 40 CASE W. RES. L. REV. 599, 666-69 (1989/1990) (discussing the views of Professors Stephen Morse and Michael Moore).

¹²³ MICHAEL S. MOORE, *LAW & PSYCHIATRY: RETHINKING THE RELATIONSHIP* 5, 64-65 (1984).

¹²⁴ *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965). See also *State v. Smith*, 564 P.2d 1154, 1156 (Wash. 1977) (“It would clearly be unconstitutional to permit the conviction of a defendant who was legally insane at the time of the commission of the crime.”).

nized that this principle is a fundamental one in American criminal law. In a decision discussing the reason why Congress did not abolish the insanity defense in the aftermath of the controversy about would-be presidential assassin John Hinckley's successful use of it, the Third Circuit commented:

Eventually, the abolition approach did not triumph. Congress preserved a limited affirmative insanity defense. It did so, however not because of doubts about the use of evidence to negate *mens rea*, but rather because it felt that concerns about the dangers of an insanity defense were overstated and because abolition "would alter that fundamental basis of Anglo-American criminal law: the existence of moral culpability as a prerequisite for punishment."¹²⁵

As the Ninth Circuit noted in explaining the durability of the M'Naghten test, "The right and wrong test has withstood the onslaught of critics, not because it is scientifically perfect, but because the courts regard it as the best criteria yet articulated for ascertaining criminal responsibility which comports with the moral feelings of the community."¹²⁶ Judge Bazelon has even suggested that it be made explicit that jurors are to "apply the moral standards of the community" in deciding whether insanity negates criminal responsibility; he proposes that jurors be instructed that a defendant is not responsible "if at the time of his unlawful conduct his mental or emotional processes or behavior controls were impaired to such an extent that he cannot justly be held responsible."¹²⁷

2. *Punishing Only the Morally Culpable: Ensuring Presentation of All Mitigating Evidence in the Death Penalty Context*

In the few decisions that have overturned death sentences on the ground that the sentencing body had heard no mitigating evidence, the courts determined that society's interest in a just process overrode a defendant's autonomy interest; thus, while a defendant might have the right to make some decisions surrounding his own defense, he does not have the right to of-

¹²⁵ United States v. Pohlott, 827 F.2d 889, 900 (3d Cir. 1987) (quoting H.R. Rep. No. 98-577, 98th Cong. 1st Sess. 7-8 (1983)).

¹²⁶ Sauer v. United States, 241 F. 2d 640, 649 (9th Cir. 1957), *overruled in part*, Wade v. United States, 426 F. 2d 64 (9th Cir. 1970).

¹²⁷ DAVID L. BAZELON, QUESTIONING AUTHORITY: JUSTICE AND CRIMINAL LAW 50-51 (1988).

fer *no* defense whatsoever in a death penalty case.¹²⁸ Allowing a defendant to forego presentation of mitigating circumstances “violate[s] the fundamental public policy against misusing the judicial system to commit a state-aided suicide.”¹²⁹ To emphasize this point, California Supreme Court Justice Stanley Mosk argued that if a defendant has the right to prevent presentation of a case against death, “he may as well be allowed to irrevocably ‘plead death.’ At least in such a situation, we avoid, both at trial and on appeal, the unseemly spectacle of an empty charade.”¹³⁰ The improbability that courts would ever allow a defendant to choose death without a neutral fact-finder imposing such a sentence demonstrates society’s aversion to such an approach—but if relevant, important arguments are kept from a jury and judge, the result may be the same.¹³¹ Justice Mosk has termed the sentencing hearing that results when no defense to death is offered “a sham and a mockery of justice.”¹³²

In overturning death sentences in this context, courts have emphasized that holding a penalty hearing where the finder of fact hears *only* the argument for death offends society’s interests in a reliable penalty determination and the fair punishment of the individual.¹³³ This societal interest in reliability derives not

¹²⁸ Justice Mosk has compared allowing defendants to decide not to present mitigating evidence to allowing defendants the right to prosecute themselves. *See* *People v. Bloom*, 774 P.2d 698, 727 (Cal. 1989) (Mosk, J., concurring and dissenting) (also arguing that *Faretta* is a “shield for the criminal defendant” but cannot be used as a “sword . . . [to] undermine the adversary process” by agreeing with the prosecutor that death is appropriate).

¹²⁹ *People v. Deere* (Deere I), 710 P.2d 925 (Cal. 1985).

¹³⁰ *People v. Howard*, 824 P.2d 1315 (Cal. 1992) (Mosk, J., concurring and dissenting).

¹³¹ *But see* *People v. Sanders*, 797 P.2d 561, 594 (Cal. 1990) (concluding that defendant’s refusal to present mitigating evidence was “not tantamount to a guilty plea,” in part because it “did not necessarily make it any more likely that the jury would find death was the appropriate penalty.”).

¹³² *People v. Bloom*, 774 P.2d 698, 726-27 (Cal. 1989) (Mosk, J., concurring and dissenting).

¹³³ *See* *People v. Deere* (Deere I), 710 P.2d at 934-35; *State v. Koedatich*, 548 A.2d 939 (N.J. 1988). *See also* Defendant Kaczynski’s Response to Government’s Motion for a Hearing on Issues Concerning the Defendant’s Representation, *United States v. Theodore John Kaczynski*, No. CR-S-96-259GEB, 1998 WL 27878, at *4 (E.D. Cal. Jan. 21, 1998). *But cf.* *People v. Sanders*, 797 P.2d 561, 51 Cal.3d 471, 525-26 (Cal. 1990) (acknowledging but rejecting such a concern); *People v. Lang*, 782 P.2d 627, 652-56 (Cal. 1989) (same).

only from the need for appropriate sentences generally, but from Supreme Court rulings that the imposition of a death sentence demands a higher degree of reliability than other punishments.¹³⁴ In this connection, the Court has determined that the Eighth Amendment requires that state death penalty statutory schemes provide for such an individualized inquiry, including consideration of appropriate mitigating circumstances.¹³⁵ Presentation of only one side, the case for death, defeats this societal interest in an individually tailored penalty determination.¹³⁶ When there is no attempt to build a record of mitigating evidence, neither the sentencer nor the appellate court can exercise its responsibility to insure that the imposition of death is reliable and based on the available evidence.¹³⁷ “[P]ossession of the fullest information possible concerning the defendant’s life and characteristics is [h]ighly relevant—*if not essential*—[to the] selection of an appropriate sentence.”¹³⁸

For this reason, some courts have found that not only must state law provide for such an individualized sentencing proce-

¹³⁴ See, e.g., *California v. Ramos*, 463 U.S. 992, 998-99 (1983) (citations omitted) (“[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.”); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976) (finality of death mandates higher degree of reliability in imposing death sentence).

¹³⁵ See *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (citations omitted) (state sentencing procedures must provide “meaningful basis for distinguishing” when death is appropriate sentence, to avoid “arbitrary and capricious infliction of the death penalty.”); *Woodson*, 428 U.S. at 303-05 (imposition of death sentence requires consideration of individual defendant’s character and circumstances); *Gregg v. Georgia*, 428 U.S. 153, 189-90 (1976) (to avoid arbitrariness, all circumstances of offense and offender must be taken into account).

¹³⁶ As Justice Mosk has explained, “Manifestly, the penalty phase of a capital trial . . . is an adversary process. . . . ‘The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.’ . . . When such testing is absent, the process breaks down and hence its result must be deemed unreliable as a matter of law.” *People v. Bloom*, 774 P.2d 698, 724 (Cal. 1989) (Mosk, J., concurring and dissenting) (citation omitted).

¹³⁷ See, e.g., *Deere I*, 710 P.2d 929-30; *State v. Koedatich*, 548 A.2d 939, 993-95 (N.J. 1988). Because of concerns over reliability, courts in seven states will not allow defendants to waive appellate review of their death sentence, and other states have established a statutorily mandated appeal. See Laura A. Rosenwald, *Death Wish: What Washington Courts Should Do When a Capital Defendant Wants to Die*, 68 WASH. L. REV. 735, 741 (1993).

¹³⁸ *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (internal quotation marks and citations omitted) (emphasis in original).

dure, but this inquiry must take place in *each* individual case.¹³⁹ This extension of Supreme Court doctrine seems logical, for when defendants block presentation of mitigating circumstances a court clearly cannot deliver a reliable verdict.¹⁴⁰ The only difference between such cases and the instances in which the Supreme Court has overturned death sentences because state procedures prevented presentation of mitigating circumstances is the *source* of the barrier: the individual defendant instead of the state. If one believes that the state interest in reliable imposition of death sentences is independent of the individual defendant's right to a reliable sentence, then there is no logical basis for allowing *anyone* to thwart an individualized penalty determination. Regardless of whether the individual defendant or the state procedures are the cause, the result is the same: it "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind."¹⁴¹ Thus allowing the defendant to waive presentation of a case against death is impermissible because it is not solely the defendant's decision to make.¹⁴²

In a series of dissents, Justice Thurgood Marshall¹⁴³ objected to allowing defendants to waive appeals of their death sentences for precisely the same reasoning:

¹³⁹ See *State v. Koedatich*, 548 A.2d 939, 994 (N.J. 1988) (citing *Furman v. Georgia*, 408 U.S. 238, 310 (1972)). See also *Gregg*, 428 U.S. at 188-95.

¹⁴⁰ The Kaczynski defense team relied on this line of reasoning in arguing that federal law provides for presentation of all mitigating factors and requires the jury to weigh all aggravating and mitigating circumstances. "Where available mitigating evidence is withheld from the jury's consideration, the jury cannot effectively discharge its statutory duty of determining whether a life or death sentence is appropriate under all the circumstances of the case." Defendant Kaczynski's Response, *supra* note 133, at *3.

¹⁴¹ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

¹⁴² See *Rosenwald*, *supra* note 137, at 750 (arguing that when no mitigating evidence is presented, the death sentence becomes automatic, violating Supreme Court jurisprudence striking down automatic death penalty statutes); *Carter*, *supra* note 65, at 128 (arguing that there is no "right to choose a penalty" and that the societal interest in imposing a fair sentence therefore outweighs the defendant's waiver of the right to present mitigating evidence).

¹⁴³ The irony of the Kaczynski breakdown again presents itself: the members of the Court who are traditionally the most pro-defendant, Justices Marshall and Brennan, end up arguing for overriding the wishes of the defendant, while the pro-prosecution Justices argue for respect for and deference to defendant wishes.

A defendant's voluntary submission to a barbaric punishment does not ameliorate the harm that imposing such a punishment causes to our basic societal values and to the integrity of our system of justice. . . . When a capital defendant seeks to circumvent procedures necessary to ensure the propriety of his conviction and sentence, he does not ask the State to permit him to take his own life. Rather, he invites the State to violate two of the most basic norms of a civilized society—that the State's penal authority be invoked only where necessary to serve the ends of justice, not the ends of a particular individual, and that punishment be imposed only where the State has adequate assurance that the punishment is justified.¹⁴⁴

One criticism of this line of argument suggests that there is no real societal interest in making sure that an argument against death is made in *every* case. Rather, the decision of whether to vindicate or waive the right to individualized sentencing belongs to each individual defendant. Richard Bonnie points out that this societal interest in "individualization," which focuses on the defendant's individual interests, differs from the "legality" interest that has become the focus of many cases demanding a coherent statutory scheme for imposing sentence. He concludes, "the value being protected in the 'individualization' decisions is not a societal interest in promoting leniency in reducing the number of death sentences, but rather the defendant's interest in having an opportunity to seek leniency in his own case."¹⁴⁵ And although the Supreme Court has not explicitly ruled on this question, the Court's treatment of cases in which defendants have blocked any presentation of a case for mitigation suggest that the absence of such evidence does not pose a major concern for members of the Supreme Court.¹⁴⁶

¹⁴⁴ *Whitmore v. Arkansas*, 495 U.S. 149, 173 (1990) (Marshall, J., dissenting). See also *Hammett v. Texas*, 448 U.S. 725, 726 (1980) (Marshall, J., dissenting) ("I do not believe that a defendant may by his consent permit a State to impose a punishment forbidden by the Constitution."); *Lenhard v. Wolff*, 444 U.S. 807, 811 (Marshall, J., dissenting) ("Society's independent stake in enforcement of the Eight Amendment's prohibition against cruel and unusual punishment cannot be overridden by a defendant's purported waiver."). See also *Gilmore v. Utah*, 429 U.S. 1012, 1018 (1976) (White, J., dissenting) ("[T]he consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eight Amendment.").

¹⁴⁵ Bonnie, *supra* note 64, at 1383-84.

¹⁴⁶ See *supra* note 39 and accompanying text.

B. FAIRNESS, INTEGRITY AND THE CLEARLY DEFINED PURPOSE OF THE CRIMINAL PROCESS

In a recent special concurrence affirming the conviction of a defendant who had represented himself at trial, Judge Reinhardt of the Ninth Circuit explicitly raised the question whether the right to self representation overrides a defendant's right to a fair trial. His opinion reasons that, while the Due Process Clause's guarantee of a fair trial is absolute and is central to the protections provided under the Constitution that secure liberty and freedom, the right of self representation is *not* absolute and is rooted in the Sixth Amendment, the purpose of which is to ensure the fairness of a criminal trial.¹⁴⁷ However, "the right to self representation has now been extended to the point that it frequently, though not always, conflicts squarely and inherently with the right to a fair trial."¹⁴⁸ Thus, "elevating a Sixth Amendment procedural right over the fundamental right to a fair trial, as *Faretta* implicitly does, impermissibly elevates form over substance."¹⁴⁹ Judge Reinhardt's concurrence therefore proposes that the Supreme Court address the question whether a defendant may waive his right to a fair trial; he suggests that the State's "compelling interest, related to its own political legitimacy, in ensuring both fair procedures and reliable outcomes in criminal trials" require that this question be answered in the negative.¹⁵⁰

The Due Process Clause establishes an individual guarantee to the "fundamental elements of fairness in a criminal trial."¹⁵¹ This guarantee is absolute¹⁵² and is essential to the preservation of all other rights.¹⁵³ Two centuries of constitutional interpretation have firmly established this right in the form of numerous

¹⁴⁷ See *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999) (Reinhardt, J., concurring).

¹⁴⁸ *Id.* at 1107.

¹⁴⁹ *Id.* at 1105.

¹⁵⁰ *Id.* at 1107.

¹⁵¹ *Spencer v. Texas*, 385 U.S. 554, 562 (1967); see also *Strickland v. Washington*, 466 U.S. 668, 683 (1984).

¹⁵² *In re Murchison*, 349 U.S. 133, 136 (1955).

¹⁵³ *Estes v. Texas*, 381 U.S. 532, 540 (1965).

procedural and substantive protections for an individual accused of a crime.

The fairness of the criminal process, however, also has societal value—a value beyond the interest of an individual criminal defendant. All persons associated with the criminal justice process, directly or indirectly, share an interest in the fairness of the process. All of us suffer a harm if the criminal process is unjust; we may fear that similar injustice will be visited upon us directly or we may be offended knowing that we support (through jury service, electing judges or district attorneys, or taxation) a process that fails to treat human beings in a just manner. The criminal justice system speaks in our name and, therefore, each of us is implicated when that voice offends shared notions of “decency and fairness.”¹⁵⁴ The communicative role that trials play demonstrate the centrality of the value of a fair trial in our system of rights:

Trials can bring “community catharsis,” but to do so they must serve not only the substance but also “the appearance of justice.” This language brings to the surface the *communicative* purposes of criminal trials. As Thurman Arnold, among others, has argued, the trial is an important occasion for dramatic enactment, the symbolic representation of the community’s most deeply held values. On the one hand, we desire the reassurance of safety and the satisfaction of revenge On the other hand, we require the reaffirmation of our individualist values, of the separateness and sanctity of every individual; these are the values expressed in the rights and restrictions, even the “technicalities,” embedded in our criminal procedure. The criminal trial, as the most vivid and visible intersection of state and individual, simultaneously affirms the needs of both our collective and separate selves.¹⁵⁵

For this reason, the “clearly defined purpose” of the criminal justice process is “to provide a fair and reliable determina-

¹⁵⁴ According to Justice Frankfurter:

The exact question is whether the criminal proceedings that resulted in [the] conviction deprived [the defendant] of the due process of law by which he was constitutionally entitled to have his guilt determined. Judicial review of that guaranty . . . inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.

Malinski v. New York, 324 U.S. 401, 416-17 (1945) (Frankfurter, J., concurring).

¹⁵⁵ Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1140 (1982).

tion of guilt.”¹⁵⁶ In this sense, the right to a fair trial not only benefits an individual criminal defendant, but also underlies the structure of our criminal justice process.¹⁵⁷ Fairness, then, is both an individual right and the purpose for which the criminal justice process exists. As such, fairness is a shared, societal value deserving greater priority than autonomy.

This valuation of fairness strongly suggests that evidence of mental illness, and the corresponding defense, must be presented to the trier of fact. If the clearly defined purpose of the criminal justice process is a fair and reliable determination of guilt, then evidence relevant to criminal intent should be presented at trial. The choice to exclude such evidence, even if it is the autonomous choice of the criminal defendant, undermines the factual basis of a verdict or sentence, thereby rendering it unjust and unreliable. For this reason, in making determinations of culpability and punishment, triers of fact should be afforded the opportunity to consider important relevant evidence, including evidence of mental illness, whether or not an individual criminal defendant would elect to allow this evidence to be presented. Justice, in other words, presupposes a category of exculpatory evidence—evidence of mental disability—that must be presented to a trier of fact in order to guarantee the integrity of the criminal justice process. This concept of justice flows not from the individual rights established in the Sixth Amendment but from the societal interests reflected in the a “fundamental, absolute right to a fair trial in a fair tribunal”¹⁵⁸ and in the Eighth Amendment.

In this sense, we propose that the right to a fair trial be viewed as a right that cannot be waived by an individual, like other rights that vindicate societal values. For example, it would not be controversial to propose that a defendant who wishes to be tortured, or does not object to being tortured, would not be allowed to waive the Eighth Amendment proscription against cruel and unusual punishment. Although the wording of the Eighth and Sixth Amendments differs, we propose that the val-

¹⁵⁶ *Estes v. Texas*, 381 U.S. at 557 (Warren, C.J., concurring). See also *United States v. Farhad*, 190 F.3d 1097, 1105 (9th Cir. 1999) (Reinhardt, J., concurring) (“In short, a fair trial is a proceeding that is designed to maximize the likelihood of a fair and reliable determination of guilt or innocence.”).

¹⁵⁷ See *Duncan v. Louisiana*, 391 U.S. 145, 155-56 n.23 (1968).

¹⁵⁸ *Farhad*, 190 F.3d at 1105 (Reinhardt, J., concurring).

ues protected by these constitutional protections are similar and that the right to a fair trial should not be waivable by a criminal defendant who seeks to represent herself (and block the presentation of critical evidence).¹⁵⁹

In a broad sense, we seek to apply a philosophical notion of justice related to John Rawls' concept of a "well ordered society," which focuses on the well-being of the less privileged members of society and measures society's legitimacy by examining the extent to which it can justify its norms and institutions to all of its members.¹⁶⁰

C. INCLUDING JUSTICE IN THE BALANCE

With the exceptions previously discussed, courts at all levels have failed to recognize that this societal interest in justice must sometimes override a defendant's individual autonomy interest. In the few cases in which defendants have advocated for a recognition of such a fair trial or justice interest, and argued on appeal that the trial court should have intervened *sua sponte* to declare a mistrial or otherwise act to protect the defendants' rights despite assertion of the *Faretta* right, the courts have treated this "fair trial" argument as a disguised claim of ineffective assistance and, therefore, considered only whether the court or the prosecution acted affirmatively to deny the right to a fair trial. In *United States v. McDowell*, for example, the Sixth Circuit rejected a "fair trial" claim asserted by a *pro se* defendant, reasoning that "[t]he only thing that was 'unfair' about McDowell's trial was that he did not represent himself very well" and

¹⁵⁹ Judge Reinhardt's concurrence in *Farhad* relies upon this institutional interest in the appearance of fairness to suggest that the right to a fair trial might not be subject to waiver. See *id.* at 1107-08 (Reinhardt, J., concurring).

¹⁶⁰ JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls developed the notion of a well-ordered society as a grand theory of distributive justice in the social and economic arena. Rawls developed this notion largely in reaction to the hegemony of utilitarian notions that measure justice in terms of wealth maximization: that is, that the proper social and economic order is one which society is doing well *in the aggregate*. Rather than focusing on the aggregate, Rawls focused on the least privileged individuals and asked whether or not a privileged person could justify a particular economic arrangement to the less privileged person. This perspective explicitly rejected prevailing utilitarian notions of distributive justice and implicitly rejected their civil libertarian counterparts. This perspective also rejects individualistic notions of rights that fail to consider the relatedness among individual rights as well as between individual rights and social interests.

that *Faretta* precluded such objections.¹⁶¹ The court's conclusory reasoning failed to even address the basis for the defendant's claim that his trial had been unfair. In *United States v. Pavich*, the Seventh Circuit addressed the issue more directly and held that a trial judge has no obligation to intervene to protect a pro se defendant's right to a fair trial:

Given the absolute right of self representation of *Faretta*, a residual right to insist upon a certain quality of that representation would result in unbearable appellate burdens, if not chaos. It would encourage every defendant to undertake his own defense for the manifold advantages it would give him: first, by appearing before the jury relatively undefended he would tend to gain the jury's sympathy; failing in that he could deliberately introduce confusion and hope that chance would work its way in his favor; and finally, if all else failed, he could seek review on the basis of his inept representation. He would have three different days in court at a minimum.¹⁶²

State courts that have addressed this issue have reached similar conclusions.¹⁶³

1. *Limited, Implicit Recognition that Fairness May Override an Interest in Autonomy*

However, in two contexts, courts have acknowledged that a defendant does not have an unfettered right to assert or waive all constitutional rights and that concerns about fairness may at times override the defendant's individual autonomy interest.

¹⁶¹ *United States v. McDowell*, 814 F.2d 245, 251 (6th Cir. 1987). See also *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988) (relying upon *McDowell* to reach the same conclusion).

¹⁶² *United States v. Pavich*, 568 F.2d 33, 39 (7th Cir. 1978). When sitting by designation in the First Circuit, Judge Reinhardt wrote another concurring opinion foreshadowing the concern about the fairness of trials in which defendants represent themselves that he later expressed forcefully in *Farhad*. In *United States v. Nivica*, 887 F.2d 1110 (1st Cir. 1989), Judge Reinhardt suggested that a trial judge should have intervened *sua sponte* to suggest that an attorney take over questioning of the defendant when the defendant's ineptness in questioning himself was causing a denial of his fundamental right to testify on his own behalf. *Id.* at 1128 (Reinhardt, J., concurring).

¹⁶³ See, e.g., *Bowen v. State*, 677 So.2d 863 (Fla. Ct. App. 1996) (error to deny self representation to a defendant on the basis that trial would be unfair); *Commonwealth v. Jackson*, 647 N.E.2d 401, 404-05 (Mass. 1995) (errors by *pro se* defendant were "inherent in the risk he assumed" and "[n]either the trial judge nor the prosecutor impaired the defendant's right to represent himself in a fair proceeding.").

Although upholding the entry of a guilty plea by a defendant who continued to insist that he was innocent, in *Alford* the Supreme Court did acknowledge that “[a] criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court.”¹⁶⁴ The authority recognized in *Alford*—judicial discretion to reject guilty pleas—assumes an *independent* judicial duty to “make certain that the innocent go free as it is that the guilty be punished.”¹⁶⁵ A defendant also does not have the absolute right to waive the right to a jury trial (because the government’s interest in justice is also implicated by the choice of fact finder).¹⁶⁶ In limited circumstances, the Supreme Court has thus recognized—without fully articulating—a societal interest in justice that outweighs other constitutional protections which vindicate an autonomy interest. Nonetheless, the balancing of rights that courts have conducted in some other contexts suggests that such balancing may be viable here.

Particular support for our argument that the societal interest in justice outweighs the procedural individual guarantees of the Sixth Amendment can be found in the analogous context of waivers of attorney-client conflicts of interest. The Supreme Court has held that an individual’s right to choose her own counsel is not absolute but is circumscribed by the “institutional interest in the rendition of just verdicts in criminal cases.”¹⁶⁷ This “institutional interest” follows from a court’s “independent interest in ensuring that . . . legal proceedings appear fair to all

¹⁶⁴ *North Carolina v. Alford* 400 U.S. 25, 38 n.11 (1970) (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)).

¹⁶⁵ *Lynch*, 369 U.S. at 732 (Clark, J., dissenting).

¹⁶⁶ See *Singer v. United States*, 380 U.S. 24, 36 (1965).

¹⁶⁷ *Wheat v. United States*, 486 U.S. 153, 160 (1988). In an important predecessor to *Wheat*, the District of Columbia Circuit discussed how a court should handle a situation in which the right to counsel of one’s choice conflicts with the right to effective assistance of counsel. In *Lewis v. United States*, 430 A.2d 528 (D.C. Cir. 1981), the majority held that the court had no obligation to accept the defendant’s waiver, and that *Faretta* did not imply a right to waive effective assistance of counsel. *Id.* at 531 & n.7. Judge Newman dissented, commenting that the defendant was “waiving one constitutional prerogative while at the same time attempting to fully exercise another, i.e., the right to counsel of his own choice. Where defendant has chosen to exercise one constitutional guarantee over another and has done so knowingly and intelligently, and where neither of the two rights is a ‘preferred’ right, I would conclude that it is reversible error for the court to refuse to honor his decision.” *Id.* at 532-33 (Newman, J., dissenting).

who observe them.”¹⁶⁸ Because of this independent interest and the dangers posed by multiple representation, a court need not accept a defendant’s waiver of conflict-free counsel:

[N]o such flat rule can be deduced from the Sixth Amendment presumption in favor of counsel of choice. Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them. . . . Not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.¹⁶⁹

Thus, in the context of deciding whether a defendant may choose conflicted counsel, “[t]he Supreme Court has previously recognized that individual Sixth Amendment rights are subordinate to society’s interest in assuring fair trials.”¹⁷⁰ Justice Marshall has cited such cases as demonstrating that “[t]his Court has recognized in other contexts that societal interests may justify limiting a competent person’s ability to waive a constitutional protection.”¹⁷¹

2. *Explicit Recognition that Other Values—Namely, Order and Decorum—Override the Autonomy Interest*

Although *Faretta* and its jurisprudence places an individual’s autonomy interest above her right to effective assistance of counsel and therefore, implicitly, over the right to a fair trial, other societal interests *have* been held sufficient to override the defendant’s autonomy.¹⁷² The right of self representation may

¹⁶⁸ *Wheat*, 486 U.S. at 159.

¹⁶⁹ *Id.* at 160. As in *Faretta*, the liberals on the Court were on the side of autonomy in *Wheat*. Justice Marshall filed a vigorous dissent, agreeing that the Sixth Amendment provides a non-absolute right to choose one’s attorney and that this may be overridden by concern about the fairness of a trial, but “because of the importance of the right at stake” disagreeing with the deference shown to the trial court. Justices Brennan, Stevens, and Blackmun also dissented.

¹⁷⁰ *United States v. Farhad*, 190 F.3d 1097, 1106 (9th Cir. 1999) (Reinhardt, J., concurring) (citing *Wheat*, 486 U.S. at 160).

¹⁷¹ *Whitmore v. Arkansas*, 495 U.S. 149, 175 (1990) (Marshall, J., dissenting).

¹⁷² In fact, some of the earlier decisions allowing imposition of an insanity plea over a defendant’s objection, while framing the justification as serving the defendant’s best interests, may have actually rested upon concern over the threat to societal order posed by mentally ill individuals. See *Overholser v. Lynch*, 288 F.2d 388, 393-94

be limited when it intrudes upon decorum or order in the courtroom:

[T]he trial judge may terminate self representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . The right of self representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.¹⁷³

Therefore, a defendant who seeks to represent herself must be "able and willing to abide by rules of procedure and courtroom protocol."¹⁷⁴ As one commentator pointed out, "even in the context of the hallowed right to self representation, the systemic interest in just proceedings prevails over the individual right" and allows some limitations on *Faretta* rights.¹⁷⁵ Other decisions have allowed the appointment of standby counsel over a defendant's objection or limited the right of self representation in response to witnesses' concerns.¹⁷⁶

(D.C. Cir. 1961), *rev'd on other grounds*, 369 U.S. 705 (1962). This interest can also be characterized much less favorably, as resting upon society's fear of the mentally ill and the state's effort to control them. *See, e.g.*, Goldstein & Katz, *Abolish the "Insanity Defense"—Why Not?*, 72 YALE L.J. 853, 864-68 (1963). Language used by courts suggests that this rationale often lies behind assertions of concern about the defendant's own welfare; for example, the Colorado Supreme Court cited the state's interest in "public safety and welfare" as its justification for overriding the defendant's traditional trial rights. *Les v. Meredith*, 561 P.2d 1256, 1258 (Colo. 1977). For even if "the defendant . . . does not want such protection," the state may have the right to insist on "protection of the welfare of its citizenry." *Id.*, at 1258. It is often not clear in these cases whether the court seeks to protect the mentally ill members of society, or the rest of society from the mentally ill. The concern that mentally ill individuals may make irrational choices that ultimately prove harmful to their own well-being provides an argument that someone else should step in to take the decision away from the disabled defendant.

¹⁷³ *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

¹⁷⁴ *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984).

¹⁷⁵ *See Carter*, *supra* note 65, at 109. These limits include the requirements of a knowing and intelligent waiver, appointment of standby counsel over the defendant's objections, denial of self representation when the request is untimely or for purposes of delay, and revocation of the right of self representation in the case of disruption. *See id.*

¹⁷⁶ *See Faretta*, 422 U.S. at 834 n.46 (court may appoint standby counsel over defendant's objection); *McKaskle v. Wiggins*, 465 U.S. 168, 187 (1984) (standby counsel may participate in trial, without defendant's consent, as long as it still appears that the defendant is representing himself); *Fields v. Murray*, 49 F.3d 1024, 1035 (4th Cir. 1995) (holding that right to self representation can be properly restricted by disallow-

In a 1991 decision, *Savage v. Estelle*, the Ninth Circuit appeared to extend the notion that a defendant's *Faretta* right could be limited based on the need for order or decorum in the courtroom to a case implicating fundamental fairness concerns. The court upheld the effective denial of self representation to a defendant with a severe stutter, reasoning that "[c]ommunicating with the fact finder (here, a jury) is the essence of a trial" and that the defendant's inability to formulate questions due to his stutter "rendered him unable to abide by the rules of courtroom procedure."¹⁷⁷ The court essentially couched its concern about the defendant's ability to present his defense as resting on the defendant's inability to comply with courtroom procedure. However, the Ninth Circuit subsequently made it clear that *Savage's* import was very narrow in a decision rejecting denial of the right of self representation on the ground that a defendant's inadequate education would render him unable to abide by the rules of procedure. The court held:

In *Savage*, the defendant suffered from a physical disability which rendered him incapable of exercising his right to self representation. No physical bars were identified that might have prevented Peters from abiding by the rules of procedure or courtroom protocol. The trial court's denial of Peters' motion was based on incompetence. According to appellants, Peters' intellectual barriers to mounting a capable self-defense are analogous to *Savage's* physical barriers.¹⁷⁸

For these reasons, we propose that the recognition of the overriding import of the value of fairness, in combination with the acknowledgment that the right of self representation is not absolute, compels the conclusion that fairness must trump autonomy in the set of cases with which this article is concerned.

IV. PROPOSED SOLUTIONS

In those cases in which a defendant's mental illness undermines the functioning of the adversary system, the duty of en-

ing defendant from personally cross examining children who he had allegedly molested).

¹⁷⁷ *Savage v. Estelle*, 924 F.2d 1459, 1464 (9th Cir. 1991).

¹⁷⁸ *Peters v. Gunn*, 33 F.3d 1190, 1192 (9th Cir. 1994). In *Peters*, the defendant had not even finished high school. The court declined to consider the question whether a defendant who was illiterate could be denied self representation on that ground.

sure the basic fairness of the trial or sentencing procedure must fall to the defendant's lawyer or to the court itself. We propose that major reforms to the functioning of the criminal justice system are necessary in order to vindicate society's interest in justice while continuing to afford some recognition of the importance of the defendant's dignity and autonomy. First, the ethical rules must be modified to clearly allocate the authority to present evidence of mental illness to defense counsel, regardless of the defendant's wishes. Second, in order to avoid a result that would further undermine the fairness of trials of mentally ill defendants, *Faretta's* grant of an absolute right to self representation must be overruled. Finally, in recognition of a defendant's legitimate desire to present the defense of her choosing, we advocate a legislative recognition of a right to a bifurcated trial, in which a defendant could first present her chosen defense and then defense counsel could present a defense based on mental illness.

The proposed bifurcation would balance a defendant's interest in autonomy against society's interest in ensuring the legitimacy and integrity of the process. Defendants should not be forced to sacrifice the right to fairness in order to protect an interest in autonomy. An "undeniable tension" arises when a defendant is forced to relinquish the protection of one constitutional right in order to enjoy another.¹⁷⁹ In order to resolve such tension in a different context, the Supreme Court has held that a defendant may testify in support of a motion to suppress without waiving his Fifth Amendment right at trial; that is, she may testify regarding the suppression issue without being confronted by that testimony at trial.¹⁸⁰ We propose an analogous reconciliation of rights here.

A. GRANTING AUTHORITY TO DEFENSE COUNSEL

The current ethical rules and legal jurisprudence fail to provide authoritative guidance regarding the allocation of authority over the decision whether to present evidence of mental illness. As discussed above, the only point on which there appears to be a relative consensus among the authorities is that the decision whether to enter an insanity plea belongs to a de-

¹⁷⁹ *Simmons v. United States*, 390 U.S. 377, 394 (1968).

¹⁸⁰ *Ibid.*

fendant. No such clear guidance is available to a lawyer whose client objects to presentation of evidence of mental illness that will mitigate guilt or punishment.

The problem with this state of affairs is twofold. First, a conscientious attorney who strives to respect the ethical guidelines that govern the profession is left with little advice as to how to handle a dispute with his client.¹⁸¹ Second, when an attorney concludes that she is required to forego presentation of relevant evidence of mental illness—whether that decision is motivated by sincere adherence to her reading of the ethical rules or by relief that the ethical rules provide an excuse to avoid the foreboding prospect of preparing a mental health defense—the court is deprived of essential evidence relevant to both guilt and punishment, defeating society's interest in justice in the individual case.

For these reasons, we advocate that the ethical rules be reformed to clarify that, when defense counsel concludes that a defendant's decision-making capacity is undermined by mental illness, counsel has the authority to decide to present a mental health defense, enter an insanity plea, or present mitigating evidence of mental illness, regardless of the defendant's wishes.¹⁸² The Colorado Supreme Court, interpreting a state

¹⁸¹ In a case such as *Kaczynski's*, when the court itself is required to step in to mediate a lawyer-client dispute, the lack of clarity in the law leaves the court with little guidance in reaching its decision. See note 48 *supra* and accompanying text. Whether Judge Burrell's decision that defense counsel could impose a diminished capacity defense over the defendant's objection would survive an appeal was therefore highly uncertain, and he acknowledged the uncertainty in the law at the time that he ruled that defense counsel could assert the mental health defense. See Pre-Trial Transcript, *supra* note 3, at *3 ("I think counsel for the defense controls the mental status defense. . . Well, I understand there's a lot of authority on the issue. I don't believe all cases are consistent in deciding the issue, and I have decided as I've stated."). After *Kaczynski* asserted his right to self representation in response, and the government warned of the prospect of "grave appellate error," Judge Burrell appeared to reconsider his decision, commenting, "[K]nowing that he only wants to represent himself because of his dispute with trial counsel over the assertion of the mental status defense . . . [k]nowing that he would prefer to be represented by present trial counsel without assertion of that defense, it seems that the Government's position is persuasive. . . it seems to me that if I find he is competent . . . given the scenario I just related, it would seem to me that his present trial counsel should represent him, if that is his desire, without assertion of the defense." Official Trial Transcript, *supra* note 3, at *14.

¹⁸² The justice principle that we conclude requires the presentation of relevant evidence that negates guilt or diminishes criminal responsibility is subject to impor-

statute that gives such authority to defense counsel (subject to court approval), proposes that the defendant's choice to forego an insanity-based defense be given "substantial weight" and mandates that it be respected unless "founded in the defendant's delusions or is otherwise devoid of a rational basis."¹⁸³ These rules should require an attorney who doubts his client's mental state to take all possible steps to fully inform himself about this subject, including arranging for a psychiatric examination if the defendant is willing to submit to one, before deciding to override his client's decision. Nonetheless, the final decision will be left to the judgment of defense counsel, with two limitations on this discretion: first, defendants would be able, on post-conviction review, to challenge counsel's imposition of a mental health defense on the grounds of ineffective assistance of counsel;¹⁸⁴ and second, to protect the client's autonomy interest, we propose that bifurcation be authorized only upon an *in camera* showing by counsel (to a judicial officer) that the mental health evidence is necessary for a fair trial and the client would not consent to presentation of such evidence unless the trial were to be bifurcated.

Our proposal does not defer to the careful distinction currently drawn between entry of an insanity plea and presentation of evidence of diminished capacity. Those who assert that the law should treat these decisions differently rely primarily upon two arguments: first, that the rule that a defendant controls which plea to enter requires a defendant's consent before entry of a not-guilty-by-reason-of-insanity plea can be made; and second, that while a successful mental health defense will result in acquittal or conviction of a lesser offense, a successful insanity

tant limitations within the criminal justice process. It is, for example, subject to procedural limitations designed to ensure the workings of the adversarial process. For example, a successful alibi or necessity defense would, like an insanity defense, fully absolve an accused person of criminal responsibility; nevertheless, few would suggest that a court has the power to require that a defendant present either of these defenses. This question, of course, would not often present itself given that a court would not have an opportunity to discover these defenses for a defendant. *See State v. Jones*, 664 P.2d 1216, 1220 (Wash. 1983) (declining to impose insanity defense in part based on analogizing to defenses of alibi or self defense).

¹⁸³ *Hendricks v. People*, 10 P.3d 1231, 1242 (Colo. 2000).

¹⁸⁴ For a discussion of why such decisions are better left to defense counsel than to a trial judge, *see Ross, supra* note 67, at 1382-83.

plea will result in indefinite involuntary commitment in a mental institution.

The first distinction strikes the authors as extremely formalistic given that both defenses (insanity and diminished capacity) require acknowledgment by the defendant or her counsel that the defendant has committed the acts that constitute the offense. Such a formalistic distinction, moreover, is increasingly untenable given that nationwide reforms have rendered the insanity plea increasingly similar to a diminished capacity defense.¹⁸⁵

The second distinction does pose a more serious concern, for a defendant's personal interest in rejecting such indefinite commitment is strong.¹⁸⁶ In reality, however, indefinite commitment may be imposed under state and federal statutes whether or not an insanity defense is raised.¹⁸⁷ Therefore, a mentally ill person might face the risk of indefinite commitment

¹⁸⁵ Twelve states have replaced a not-guilty-by-reason-of-insanity verdict with a "guilty but mentally ill" verdict, which allows a finding of guilt and imposition of a sentence of imprisonment. See Richard Carelli, *DuPont Appeal Rejected by Court*, AP ONLINE, available at 2000 WL 22885671 (June 12, 2000); Lisa Levitt Ryckman, *Family Seeks to Change State Law in Memory of Murdered Daughter*, DENVER ROCKY MOUNTAIN NEWS, Nov. 14, 1999, at D24. Prisons are supposed to provide mental health treatment for defendants adjudicated mentally ill, but some contend that this requirement often goes unmet. Seven states have narrowed their substantive insanity tests, sixteen shifted the burden of proof to the defense, and twenty-five made it more difficult to release individuals from mental hospitals after being adjudicated insane. See Michael L. Purlin, *"The Borderline Which Separated You From Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and The Culture of Punishment*, 82 IOWA L. REV. 1375, 1376-77 (1997).

¹⁸⁶ This is especially true in cases in which a defendant is accused of a crime that carries a light sentence and an adjudication of insanity may therefore result in longer incarceration than a guilty verdict. See generally Ross, *supra* note 67 (discussing propriety of imposing mental health defense in case in which mentally ill client could likely have received probationary sentence in return for guilty plea). David Katner's analysis of the ethical rules governing defense attorneys concludes that courts allow defendants exclusive control over whether to claim insanity because of the prospect of involuntary commitment in a mental institution, which distinguishes it from all other affirmative defenses. See Katner, *supra* note 51.

¹⁸⁷ 18 U.S.C. § 4244 authorizes the district court to require a defendant to submit to a post-conviction, pre-sentencing psychiatric examination to determine whether or not in-custody treatment is warranted. Civil commitment statutes, both state and federal, provide authority for detention after a defendant has served a criminal sentence. See, e.g., *Jackson v. Indiana*, 406 U.S. 715, 738 & n.25 (1972) (discussing standards for civil commitment proceedings); Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1431 & n.6 (2001) (discussing state statutes which authorize civil detention of certain sex offenders).

whether she raises an insanity defense or not. A successful insanity defense does not, in sum, represent the only danger of indefinite commitment; that risk also exists after a conviction that results from the failure to raise an insanity defense.

The strongest philosophical objection to this proposal is that, especially in cases in which a defendant's mental health is subject to debate, it allows an attorney to override the legitimate preferences of an individual whose interests are at stake. A recent article on this subject concludes that the subjective nature of diagnoses of mental illness, in combination with the rational reasons for foregoing presentation of evidence of mental illness, require attorneys to defer to client preferences in all but the most rare of cases.¹⁸⁸ We propose that these matters are appropriately left to defense counsel who must conscientiously evaluate the strength of the evidence of mental illness, carefully consider the defendant's articulated reasons for resisting such evidence, and attempt to separate the preferences that are rationally based from those derive from the mental illness itself.

The major practical obstacle to implementation of a system in which a lawyer has the authority to impose presentation of evidence of mental illness is that a determined defendant will often resist any efforts to portray him as mentally ill. Because an insanity plea or mental health defense is only rarely successful even in the best of circumstances,¹⁸⁹ an attorney who relies on a theory of mental health impairment will need to present all available evidence of mental illness, including expert testimony.¹⁹⁰ However, in order to present expert testimony on this

¹⁸⁸ See generally, Slobogin & Mashburn, *supra*, note 67.

¹⁸⁹ A 1991 study of the use of the insanity plea in eight states found that defendants raised an insanity defense in under 1% of all criminal cases, and that those who raised the defense succeeded about 25% of the time. See Gordon Witkin, *What Does It Take to Be Crazy?*, U.S. NEWS & WORLD REP., Jan. 12, 1998, at 7; George L. Blau & Richard A. Pasewark, *Statutory Changes and the Insanity Defense: Seeking the Perfect Insane Person*, 18 LAW & PSYCHOL. REV. 69, 72 (1994) (citing study by McGinley & Pasewark).

¹⁹⁰ For a discussion of the importance of expert testimony in presenting a mental health defense, see generally, R.D. MACKAY, *MENTAL CONDITION DEFENCES IN THE CRIMINAL LAW* 186 (1995); Erica Beecher-Monas & Edgar Garcia-Rill, *The Law and the Brain: Judging Scientific Evidence of Intent*, 1 J. APP. PRAC. & PROCESS 243, 259-60 (1999); Kerrin Maureen McCormick, *The Constitutional Right to Psychiatric Assistance: Cause for Reexamination of Ake*, 30 AM. CRIM. L. REV. 1329, 1338-42 (1993); A. Michelle Willis, *Nonpsychiatric Expert Assistance and the Requisite Showing of Need: A Catch-22 in the Post-Ake Criminal Justice System*, 37 EMORY L.J. 995 (1988). In *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that when a defendant makes a showing that his san-

subject, the defendant must agree to submit to a psychiatric examination by experts chosen by the prosecution.¹⁹¹ Because submission to a psychiatric examination requires waiver of one's Fifth Amendment right and implicates fundamental privacy interests, courts have been unwilling to impose such examinations against a defendant's will, unless necessary to evaluate a defendant's competency. As a practical matter, of course, even if courts were willing to order defendants to talk to a psychiatrist, such an order would accomplish little if a defendant were determined to resist all efforts at evaluation. Thus, an attorney's ability to present evidence of mental illness may be extremely limited in the face of a determined defendant's opposition.¹⁹²

We propose that there are two ways to address this problem. First, as Kaczynski's lawyers sought to do before their negotiations broke down, an attorney can present other evidence of mental illness for the jury's consideration: testimony of friends and family about the defendant's behavior, records from past encounters with the mental health system, the defendant's own

ity may be a significant issue at trial, due process requires the state to provide access to a psychiatrist's assistance. For ineffective assistance of counsel cases on this subject, see *Lloyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992) (failure to obtain independent psychological analysis of defendant was ineffective); *Maddox v. Lord*, 818 F.2d 1058 (2d Cir. 1987) (attorney ineffective for raising extreme emotional disturbance defense without calling doctor to testify); *Anderson v. Butler*, 858 F.2d 16 (1st Cir. 1988) (ineffective assistance not to call available psychiatric witness).

¹⁹¹ Of course, the defendant may be unwilling to submit even to examination by defense-chosen psychiatric experts, although both Ferguson and Kaczynski were willing to undergo such examinations. Ferguson later refused to meet with defense psychiatrists. Kuby & Kunstler, *supra* note 1, at 20.

¹⁹² See *Shull v. South Carolina*, No. CA-87-69-16K, 1989 WL 106842 at *4 (4th Cir. Sept. 5, 1989) (Wilkins, J., concurring) (psychiatric exam serves no purpose if defendant does not cooperate); *Lowenfield v. Phelps*, 817 F.2d 285, 291 (5th Cir. 1987) (defendant's refusal to submit to psychiatric interviews or tests prevented further investigation of the possibility); *Alvord v. Wainwright*, 725 F.2d 1282, 1287, 1289 (11th Cir. 1984) (client's refusal to meet with psychiatrists made mental health defense virtually impossible). See also Kuby & Kunstler, *supra* note 1 at 21 (arguing that "as a practical matter, it is impossible to force a psychiatric defense on an unwilling defendant" because the defendant can refuse to cooperate with mental health experts and insist on contradicting the defense during testimony). A defendant who wishes to thwart the presentation of evidence of mental illness may also threaten to disrupt proceedings. See *Bonnie*, *supra* note 64, at 1386-87 (describing how a defendant might sabotage presentation of mitigating evidence). For examples of cases where attorneys chose not to present mitigating circumstances in part because of threats that the defendant would disrupt the proceedings, see *Knight v. Dugger*, 863 F.2d 705, 751-52 (11th Cir. 1988); *People v. Howard*, 824 P.2d 1315, (Cal. 1992).

testimony, and other, non-expert evidence.¹⁹³ Second, and more important, we propose implementing a system of bifurcation of criminal trials that will allow criminal defense attorneys to negotiate mutually acceptable—or at least less objectionable—solutions with their clients.

B. BIFURCATION OF TRIALS

The deal that was struck between Kaczynski and his defense attorneys at one point during their struggle over control of the defense suggests a possible way to accommodate a defendant's interest in autonomy while vindicating society's interest in justice. Kaczynski agreed to allow his attorneys to present evidence of his mental illness as part of a case for mitigation as long as they refrained from questioning his mental health during the guilt phase of the trial.¹⁹⁴ In non-capital trials, however, there are usually not two stages about which to negotiate—and as long as a single jury evaluates a defendant's guilt in a unitary proceeding, there is little room to accommodate the conflicting interests and desires of defendant and defense counsel. For this reason, we propose that when defense counsel wants to present evidence of mental illness and a defendant favors a merits-based defense, bifurcation of the trial be an available option.

Bifurcated trials, in which the jury hears the evidence regarding whether the defendant committed the acts that com-

¹⁹³ In the Kaczynski case, defense attorneys planned to show the jury the tiny cabin in which he had lived for years as part of their demonstration that he was mentally ill. See MELLO, *supra* note 2, at 34-35. In a recent well-publicized case involving an insanity defense, the defense closed its case by showing the jury a videotape of the defendant's confession to pushing a woman in front of a moving subway train, on the theory that the jury would see signs of his mental illness in his manner of speaking and discussion of the crime. See David Rohde, *Defense Rests Murder Case with a Video Confession*, N.Y. TIMES, Oct. 22, 1999, at B3. Cf. *Babbitt v. Calderon*, 151 F.3d 1170, 1173-74 (9th Cir. 1998) (rejecting argument that defense counsel was ineffective for failing to present testimony by Vietnam veterans to bolster expert testimony about defendant's post-traumatic stress disorder). For a study suggesting that expert testimony may not be as important as most lawyers consider it, see Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 VA. L. REV. 1109 (1997).

¹⁹⁴ See Dr. Sally Johnson, *supra* note 2, at *2, *United States v. Kaczynski*, No. CRS-96-259GEB, 1998 WL 611123 (E.D. Cal. Sep. 11, 1998); Order, *United States v. Kaczynski*, No. CR-96-259GEB, 1998 WL 226796, at *1 (E.D. Cal. May 4, 1998); Order, *United States v. Kaczynski*, No. CR-96-259GEB, 1998 WL 27836, at *2 (E.D. Cal. Jan. 20, 1998).

prise the offense and renders a verdict on this aspect of the guilt determination *before* hearing evidence on the question whether the defendant was legally insane at the time that he did so, have already been utilized in some types of cases in a number of jurisdictions.¹⁹⁵ In these bifurcated proceedings, during the first phase of the trial the defendant is presumed sane and the jury determines whether the prosecution has demonstrated beyond a reasonable doubt that the defendant committed the acts at issue. During the second phase, the jury evaluates the defendant's mental culpability.¹⁹⁶

In *United States v. Duran*,¹⁹⁷ the District of Columbia Circuit articulated the primary justification for bifurcated trials: when a merits-based defense and an insanity defense are both substantial and incompatible, and the jury could not hear evidence without seriously undermining one of the two defenses, a bifurcated proceeding is only fair way to allow the presentation of both theories of the case. Bifurcated trials are also utilized to address the problem that arises when psychiatric testimony relevant to the sanity of the defendant may also establish the defendant's guilt of the crime.¹⁹⁸

¹⁹⁵ See *Houston v. State*, 602 P.2d 784 (Alaska 1979); *Post v. State*, 580 P.2d 304 (Alaska 1978); *People v. Villarreal*, 213 Cal.Rptr. 179 (Cal. Ct. App. 1985); *People v. Worthy*, 167 Cal.Rptr. 402 (Cal. Ct. App. 1980); *People v. Morgan*, 637 P.2d 338 (Colo. 1981); *People v. Deason*, 670 P.2d 792 (Colo. 1983); *Goudy v. United States*, 495 A.2d 744 (D.C. 1985), *as amended by* 505 A.2d 461 (D.C. 1986); *State v. Glenner*, 513 A.2d 1361 (Me. 1986); *Treece v. State*, 547 A.2d 1054 (Md. 1988); *Commonwealth v. Siegfriedt*, 522 N.E.2d 970 (Mass.1988); *State v. Khan*, 417 A.2d 585 (N.J. 1980); *State v. Leach*, 370 N.W.2d 240 (Wis. 1985); *State v. Repp*, 362 N.W.2d 415 (Wis. 1985). See also *People v. Deason*, 670 P.2d 792 (Colo. 1983) (sanity determination precedes guilt phase). *But cf.* *Dutton v. State*, 434 So.2d 853 (Ala. Crim. App. 1983); *Gruzen v. State*, 634 S.W.2d 92 (Ark. 1982); *Edison v. State*, 256 Ga. 67 (Ga. 1986); *People v. Alerte*, 458 N.E.2d 1106 (Ill. App. Ct. 1983); *State v. Gray*, 351 S.2d 448 (La. 1977); *McKenzie v. Osborne*, 640 P.2d 368 (Mont. 1981); *State v. Haseen*, 468 A.2d 448 (N.J. Super. Ct. App. Div. 1983); *State v. Smith*, 512 A.2d 818 (R.I. 1986).

¹⁹⁶ See *People v. Villarreal*, 213 Cal.Rptr. 179; *State v. Brink*, 500 N.W.2d 799 (Minn. Ct. App. 1993); 21 AM.JUR.2D CRIMINAL LAW § 70 (1998).

¹⁹⁷ 96 F.3d 1495, 1499 (D.C. Cir. 1996).

¹⁹⁸ See *DeVine v. Solem*, 815 F.2d 1205, 1207 (8th Cir. 1987) (bifurcating sanity and guilt phases of trial is better practice because it avoids the problem of determining whether evidence offered on sanity issue is actually presented to establish guilt); *United States v. Bennett*, 460 F.2d 872, 878-79 (D.C. Cir. 1972) (bifurcated trial should be granted based on government psychiatrist's testimony about admissions of defendant during examination); *State ex rel. LaFollette v. Raskin*, 150 N.W.2d 318

Thus, the mechanism to bifurcate trials already exists in most jurisdictions. We propose an additional justification for bifurcation: when the accused wants to raise a merits-based defense and/or deny having committed the acts that comprise the offense, and the attorney instead plans to raise an insanity defense, the court should bifurcate the trial to allow presentation of both defenses.¹⁹⁹ In order for this proposal to effectively address the problem discussed in this article, a change in the standard by which courts judge the appropriateness of bifurcation would be required. Currently, courts generally authorize a bifurcated proceeding only when the evidence supporting the merits-based defense is substantial.²⁰⁰ However, in cases involving a conflict between a defendant and defense counsel over which theory of the defense should be presented, a defendant's insistence on pursuing a merits-based defense is often irrational.

(Wis. 1967) (defendant who made inculpatory statements to examining doctor was entitled to "sequential" trial on guilt and sanity). Similarly, bifurcation has been upheld as a means to allow a co-defendant to testify as to the defendant's sanity without undergoing cross-examination on the merits. *See United States v. Greene*, 489 F.2d 1145, 1156-57 (D.C. Cir. 1973).

¹⁹⁹ In at least one case, a court has accepted such a justification for bifurcation. *See United States v. Ashe*, 427 F.2d 626, 630 (D.C. Cir. 1970) (court should have bifurcated trial when it imposed insanity defense over objection of defendant, who preferred defense based on merits).

²⁰⁰ Most jurisdictions impose the requirement that both the insanity defense and the merits-based defense be supported by substantial evidence, and have concluded that challenges to the sufficiency of the prosecution's proof do not justify bifurcation. *See Duran*, 96 F.3d at 1499-1500 (bifurcation appropriate only when defense on merits is substantial and not when defendant "merely 'puts the government to its proof.'") (citation omitted); *Garrett v. State*, 320 A.2d 745 (Del. 1974) (refusal of bifurcation upheld when defense on merits was insubstantial); *People v. Robinson*, 429 N.E.2d 1356 (Ill. 1981) (denial of bifurcation was proper when no evidence supported claim of self defense); *People v. Glenn*, 599 N.E.2d 1220 (Ill. App. Ct. 1992) (affirming denial of bifurcation when defendant lacked merits-based defense but merely sought to challenge sufficiency of evidence); *State v. Jenkins*, 412 N.W.2d 174 (Iowa 1987) (bifurcation properly refused when alibi defense was insubstantial); *State v. Monk*, 305 S.E.2d 755 (N.C. 1983) (challenge to circumstantial evidence did not justify bifurcation when no defense on merits was raised); *Commonwealth v. Murphy*, 425 A.2d 352 (Pa. 1981) (appropriateness of bifurcation depends on "substantiality" of insanity defense); *State v. Jeppeson*, 776 P.2d 1372 (Wa. Ct. App. 1989) (upholding denial of bifurcation when self defense claim was unreasonable and insubstantial); *State v. Lusk*, 354 S.E.2d 613 (W. Va. 1987) (defendant not entitled to bifurcated trial unless unitary trial would result in prejudice and defendant has substantial evidence supporting insanity and other defense); *State v. Boyd*, 280 S.E.2d 669 (W. Va. 1981) (motion for bifurcation should be granted if both defenses are substantial and presentation of both at unitary trial would be prejudicial).

In such cases, the purpose of the bifurcation is to vindicate the defendant's autonomy interest, rather than to avoid prejudice to a potential merits-based defense. Therefore, a defendant's desire to challenge the prosecution's proof or to raise a merits-based defense that is not supported by substantial evidence should also justify bifurcation. Furthermore, because the need for bifurcation will rest on defense counsel's assessment of the sanity of the defendant and the nature of the conflict over control of the defense, a court's discretion to deny a motion for bifurcation should be severely constrained. An *in camera* proffer by defense counsel that he believes the defendant to have a strong mental health defense and that the defendant insists upon presenting a merits-based defense should be sufficient to require bifurcation.

We propose allowing a single jury to hear both phases of the bifurcated trial. While courts should have the discretion to empanel a separate jury for the sanity phase, a rule requiring this practice may not be necessary. It is possible, however, that a jury that hears the first phase (including an irrational denial of guilt) may be less favorably disposed toward a defendant's later assertion of a mental health defense. This may be a risk in some cases, but it is more probable that the irrationality of the defense in the first phase of the bifurcated trial may in some sense support the defense asserted in the second phase.

C. FARETTA

Even a system of bifurcation will not adequately address cases in which a defendant seeks to avoid the presentation of evidence of mental illness at all costs; nor will it solve the problem facing an attorney who seeks to present mitigation evidence that a defendant wishes to suppress. Under current law, a defendant who refuses to acquiesce to losing control of the defense may thwart defense counsel entirely by invoking his *Faretta* right to self representation and firing his attorney. To observers of or participants in the criminal justice system, the distortion of justice that results when a mentally ill defendant represents himself is all too apparent. We therefore advocate that vindication of the justice interest requires severely constraining a defendant's right to represent himself at trial or at sentencing.

For these reasons, we propose reconsideration of *Faretta v. California*.²⁰¹ Justice Brennan, who authored *Faretta*, focused on the notion of individual autonomy and self expression. *Faretta* was decided, of course, in an era in which political trials were more common and liberals found themselves on the side of defendants who sought to use their trials to make political statements rather than to gain acquittal.²⁰² Those opposed to the right to self representation, largely conservative jurists, articulated a concern for the potential for “abuse” of the criminal process by politically radicalized criminal defendants. Decades later, it is apparent that the *Faretta* right has appealed to mentally ill criminal defendants more often than it has to their politically motivated counterparts. Justice Brennan’s autonomy-oriented jurisprudence seems to serve primarily to empower self-immolation via litigation rather than to protect political dissent. *Faretta*, we argue, has overstayed its ambiguous welcome.

Similar concerns regarding the meaninglessness of trials involving self representation have caused other participants in the legal system to question the legitimacy and wisdom of *Faretta*.²⁰³

²⁰¹ 422 U.S. 806 (1975). The Sixth Amendment, the constitutional textual basis of the *Faretta* opinion, does not expressly establish a right to self representation. The *Faretta* majority found the right to self representation to be implied by the structure of the Sixth Amendment, the history of Anglo-American criminal jurisprudence, and the notion of individual autonomy. With respect to the structural basis for the right, the *Faretta* majority concluded that the right to self representation is implied by the individual rights enumerated in the Amendment. In the dissenting words of Justice Blackmun, the majority “reason[ed] that because the accused has a personal right to ‘a defense as we know it,’ he necessarily has a right to make that defense personally.” *Id.* at 848 (Blackmun, J., dissenting).

²⁰² Two prominent examples were the 1968 trial of two Catholic Priests, the Berrigan brothers, and the 1969 trial of the Chicago Eight. The Berrigan brothers defended themselves based on their opposition to the Vietnam War. The Chicago Eight also offered a political defense and one of their number, Bobby Seale, was bound and gagged after repeatedly asserting his right to self representation and was subsequently removed from the trial. Laurie Levenson, *Cases of the Century*, 33 LOY. L.A. L. REV. 585, 594-95 & nn.26-27 (2000).

²⁰³ Some have suggested hybrid representation, in which a criminal defendant and her attorney serve as co-counsel, as a means to protect *pro se* defendants’ right to a fair trial without overruling *Faretta*. See, e.g., Kenneth Sogabe, *Exercising the Right to Self Representation in United States v. Farhad: Issues in Waiving a Criminal Defendant’s Sixth Amendment Right to Counsel*, 30 GOLDEN GATE U. L. REV. 129 (2000); Marie Williams, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789 (2000). This proposal would generally not address the cases with which this paper is concerned: those in which the defendant is seeking to

In a recent opinion, the Supreme Court rejected a proposed extension of the right of self representation to the appellate context, and gave indications that reconsideration of *Faretta's* underpinnings may be on the horizon.²⁰⁴ Even at the trial stage *Faretta* has been challenged in light of mounting evidence that it empowers criminal defendants to subvert, intentionally or unintentionally, the process.²⁰⁵

We believe that in almost no case can a defendant obtain a fair trial when representing himself. As discussed earlier, in an analogous area, the courts have determined that the impossibility of obtaining a fair trial when counsel has a conflict of interest justifies overriding the defendant's right to choose her own attorney. Judge Reinhardt characterizes this jurisprudence as "recogniz[ing] that individual Sixth Amendment rights are sub-

block presentation of crucial evidence and control the theory of the defense. We also believe it to be an ineffective measure that in many cases requires defense counsel to participate in grossly unfair trials and thereby violate their ethical responsibilities.

²⁰⁴ See *Martinez v. Court of Appeals of California*, 528 U.S. 152 (2000). In *Faretta*, the Court had identified three bases for the right to self representation at the trial stage: the structure of the Sixth Amendment, the history of Anglo-American criminal jurisprudence, and the notion of individual autonomy. In *Martinez*, the Court concluded that the Sixth Amendment refers solely to trial rights and therefore does not apply on appeal, that the historical evidence relied upon in *Faretta* does not apply to the appellate stage, and that any individual right to self representation on appeal based upon autonomy principles must be grounded in the Due Process Clause. The *Martinez* Court concluded that self representation on appeal is not a necessary component of fairness, given the practices prevailing today. Concretely, the Court reasoned that the risk of disloyalty (or appearance of disloyalty) by court-appointed counsel does not justify recognition of such a right. *Id.* at 156-63. In reaching this conclusion, the *Martinez* Court balanced the limitation on autonomy against the "government's interest in ensuring the integrity and efficiency." *Id.* at 162.

This reasoning carries two significant implications: First, the Court's analysis suggests that autonomy is not an abstract principle but a concept defined by reference to the real or perceived threat of disloyalty. Second, the Court's conclusion that autonomy alone does not justify a right to self representation on appeal implies a philosophical willingness to balance autonomy against other values implicated in the criminal justice process. Finally, the Court's analysis suggests that the other values implicated in the appellate process have constitutional significance.

²⁰⁵ In *Martinez*, Justice Breyer noted that judges have raised concerns about the lack of fairness which results from *Faretta* but that empirical evidence has yet to be collected. *Martinez*, 528 U.S. at 164 (Breyer, J., concurring). Two other concurring justices appeared to read the majority opinion as calling *Faretta* itself into question. Justice Kennedy made it a point to note that he does not believe it necessary to reconsider *Faretta*. *Id.* Justice Scalia opined that he "do[es] not share the apparent skepticism of today's opinion regarding *Faretta*." *Id.* at 165.

ordinate to society's interest in assuring fair trials."²⁰⁶ We reach the similar conclusion that the impossibility of obtaining a fair trial also justifies overriding the defendant's right to represent herself. We note, in this respect, that the Supreme Court has never directly addressed this inevitable conflict and held that autonomy overrides due process in cases of self representation; rather, the Court has maintained an indefensible practice of silence in the face of the fundamental violation of due process that inevitably ensues when a defendant stands trial without the protection of counsel. We propose an end to this silence and an admission that the experiment with *Faretta* has been a dismal failure.

Our proposal does not mean that self representation will be banished henceforth never to travel our legal landscape again. We propose eliminating the right, not the opportunity, and we do so in order to limit self representation to individuals who can competently represent themselves. Under our proposal, criminal defendants would have the opportunity to apply to the trial court for the opportunity to represent themselves just as they currently apply for substitution of counsel when they are not satisfied with their attorney. This application process would, of course, allow the trial court great discretion in ruling on a self representation application, and some might object that this discretion would pose an obstacle to radical or innovative legal defense strategies. This criticism ignores the reality of the courtroom. In practice, the obstacle to such radicalism and innovation is the trial court's determination of the legality of a radical or innovative defense (that is, the relevance of the proffered argument to the charge) and the establishment of a factual basis at trial for such a defense. These inquiries by the trial court—not the denial of self representation—pose the most important obstacles to radical lawyering, and, in fact, trained and experienced lawyers have succeeded much more often than *pro se* defendants in expanding the frontiers of the law.

D. REFORM OF THE COMPETENCY STANDARD

One final proposal for preventing defendants from sabotaging their own defense due to mental illness is worth addressing:

²⁰⁶ United States v. Farhad, 190 F.3d 1097, 1106 (9th Cir. 1999) (Reinhardt, J., concurring).

reform of the competency standard so that it tests not only the defendant's comprehension of the procedures but also the defendant's ability to make reasoned decisions. The current competency standard, which evaluates whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him,"²⁰⁷ has been criticized as woefully inadequate.²⁰⁸ Certainly, the examples of clearly delusional defendants who have been found competent to stand trial demonstrate the inadequacy of this inquiry in protecting a defendant's right to due process.²⁰⁹ The result of the minimal nature of the competency standard is that attorneys often seriously doubt the ability of clients who have been found competent to stand trial to participate in their own defense.²¹⁰ While evaluation of specific proposals is beyond the scope of this undertaking, we do note that experts in the field have proposed competency examinations that would test "decisional competence" rather than mere comprehension,²¹¹ measure ability to understand the implications of information rather

²⁰⁷ *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam) (quoting Solicitor General). See also *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (expanding inquiry to require examination of whether defendant can understand the proceedings, consult with his lawyer, and assist in preparing a defense).

²⁰⁸ See *Kuby & Kunstler*, *supra* note 1, at 24-25; see also *supra* notes 22-23 and accompanying text.

²⁰⁹ The *Ferguson* case was of course the most notable example. See also *supra* note 104.

²¹⁰ See *supra* note 22.

²¹¹ See *Richard Bonnie*, *supra* note 23, at 548. Bonnie proposes that the decisional competence inquiry would test client ability to communicate a decision or preference, understand relevant information, appreciate the importance of this information as it relates to his own case, and use the information to make a reasoned decision. The test for decisional competence would be based on the MacArthur Treatment Competence Study's proposed test, which examines competency to make decisions about medical treatment. *Id.* at 570-76. See also *Lafferty v. Cook*, 949 F.2d 1546, 1549-51 (10th Cir. 1991) (concluding that defendant's delusional state required finding of incompetence, since competence requires not only a factual understanding of courtroom proceedings, but a rational one). In *Lafferty*, the court found that the defendant's delusional beliefs affected his ability to make decisions that would further his best interests; for example, the defendant had rejected a mental health defense. *Id.* at 1555-56.

than merely "who sits where' in a courtroom,"²¹² and adjust the nature of the inquiry based on the context in which the question regarding the defendant's competence has arisen.²¹³

Raising the standard does, however, have potentially adverse consequences for mentally ill criminal defendants. An adjudication of incompetence does not result in obtaining freedom from criminal responsibility, but instead in involuntary psychiatric treatment and confinement, at least until a court is satisfied that a defendant has regained her competency.²¹⁴ An adjudica-

²¹² Fox Butterfield, *Unabom Trial Highlighting Ambiguity of Mental Illness*, N.Y. TIMES, Jan. 11, 1998, at A1 (discussing five-year MacArthur Treatment Competency Study's proposed model to test ability to communicate choices, understand relevant information, appreciate the nature and likely consequences of a situation, and make reasoned choices among legal alternatives).

²¹³ Ronald Roesch, et. al., *Conceptualizing and Assessing Competency to Stand Trial: Implications and Applications of the MacArthur Treatment Competence Model*, 2 PSYCHOL. PUB. POL'Y & L. 96, 96, 100 (1996). Richard Bonnie has proposed that "the legal test for competence should differ according to whether the defendant follows or rejects counsel's advice." Bonnie, *supra* note 23, at 576. He urges that defendants who pass the *Dusky* standard but fail to demonstrate decisional competence (ability to make a reasoned choice) should be allowed to proceed to trial with the attorney as a surrogate decision-maker, except that an attorney would not be allowed to make decisions that are constitutionally allocated to a defendant. *Id.* at 546-47, 559, 576-78, 586, 601. See also Winick, *supra* note 21, at 608 (suggesting that attorney disagreement with client over important decisions such as what plea to enter should shift the presumption of incompetence). This distinction parallels that made in the context of medical treatment, "where patients who assent to their clinicians' recommendations are treated as requiring less in the way of competence than those who refuse to do so." Bruce J. Winick, *Foreword: A Summary of the MacArthur Treatment Competence Study and an Introduction to the Special Theme*, 2 PSYCHOL. PUB. POL'Y & L. 3, 14 (1996); see also Bruce J. Winick, *Restructuring Competency to Stand Trial*, 32 UCLA L. REV. 921, 963-64 (1985).

²¹⁴ The Supreme Court has held that due process limits the length of confinement that an incompetent individual can be subjected to "the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972). However, if it is improbable that a defendant will attain competency, he may then face indefinite institutionalization under civil commitment proceedings. See *id.* at 738. See also 18 U.S.C. § 4141(d); 21 AM. JUR. 2D CRIMINAL LAW § 116 (1998). But see Winick, *supra* note 21, at 580 (discussing lengthy confinement of incompetent defendants facing misdemeanor charges and noting that, "[a]lthough *Jackson* marked an end to the most egregious cases of indefinite incompetency commitment, many states have responded insufficiently to the Court's decision, and abuses persist."); Norma Schrock, *Defense Counsel's Role in Determining Competency to Stand Trial*, 9 GEO. J. LEGAL ETHICS 639 n.1 (1996) (citing cases in which defendants have been institutionalized for periods longer than the maximum sentence available for the underlying crime because they were found incompetent and then civilly committed).

tion of incompetency can, therefore, result in lengthy confinement without any adjudication of guilt, especially in cases in which a defendant's mental illness is resistant to treatment.²¹⁵

We also do not believe that increasing the competency standard for individuals who want to represent themselves is a practical avenue, unless *Faretta* is reconsidered. While *Godinez* did not explicitly foreclose statutory efforts to bifurcate the competency standard,²¹⁶ as long as *Faretta* remains the law of the land, these efforts will encounter the objection that they intrude upon defendants' right to self representation and are therefore unconstitutional. Furthermore, we do not believe that such proposals go far enough in addressing the problems posed when defendants elect to represent themselves. The justification underlying an enhanced competency standard is that the current standard for competency measures a defendant's ability to assist an attorney but fails to assess a defendant's capability to go at it alone, without the assistance of counsel. In the words of Justice Blackmun, "[a] person who is 'competent' to play bas-

²¹⁵ One commentator has suggested that the potential for long term commitment can be circumvented by allowing criminal defendants to waive incompetency; that is, to elect to proceed to trial despite being deemed incompetent. Winick, *supra* note 21. The concept of "waiver," however, implies a knowing, voluntary and intelligent choice—a contradiction given that the individual who is making the "choice" has been deemed incompetent to participate in her defense. The only situation of this type that would seem fair is one in which a competent defendant elects to become incompetent during trial for a strategic purpose: e.g., allowing the jury to observe her conduct when she is not medicated or improperly medicated. This strategy was pursued in another case that attracted substantial public attention: the second murder trial of Andrew Goldstein, charged with murder for pushing a young woman to her death in front of a New York City subway. The strategy unraveled after Goldstein punched a social worker and was ordered to resume taking his medication. See Julian Barnes, *Second Murder Trial Opens in Subway Shoving Case*, N.Y. TIMES, Mar. 4, 2000 at B3; Julian Barnes, *Insanity Defense Fails for Man Who Threw Woman Onto Track*, N.Y. TIMES, Mar. 23, 2000 at A1.

²¹⁶ See *Godinez*, 509 U.S. at 402 ("While psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements."). See also Alan Felthous, *The Right to Represent Oneself Incompetently: Competency to Waive Counsel and Conduct One's Own Defense Before and After Godinez*, 18 MENTAL & PHYSICAL DISABILITY L. REP. 105, 109 (1994) (concluding that *Godinez* does not limit state legislative efforts to design more stringent tests of voluntariness and competence for defendants who seek to represent themselves).

ketball is not thereby 'competent' to play the violin."²¹⁷ While imposition of a higher standard of competency would potentially eliminate a category of the most egregious cases—those in which a defendant's mental illness or impairment renders him clearly unable to present a defense at trial—it would leave broad discretion in individual judges' hands, render the denial or grant of self representation an appealable issue in almost every case in which it is at issue, and fail to address those cases that are less obviously egregious but just as fundamentally unfair.

V. CONCLUSION

Those who are critical of our proposal may argue that we are attempting to find a way to appease a defendant's autonomy interest while refusing to accord it the respect it deserves. We do not, however, advocate a uniform approach to all cases. In most cases, defendants are clear on their interests and values and, when disagreement arises between counsel and client, the client's wishes should be respected.²¹⁸ Rather, we are concerned with a specific category of cases: those in which a defendant's ability to articulate, and decide upon, his or her interests is fundamentally tainted by mental illness.²¹⁹ In these cases, we believe that the autonomy interest is significantly weakened as a consequence of illness.

Of course, identifying and distinguishing the cases in which a defendant's mental illness justifies overriding his autonomy is not always easy. Cases in which a defendant's depression causes him to object to presentation of any case for mitigation will be more difficult to evaluate than those in which a defendant is clearly delusional. And cases such as the Unabomber will push the limits of the difference between an unpopular political philosophy and mental illness itself.

We believe, however, that the difficulty of making such a distinction does not justify inaction in the face of the funda-

²¹⁷ *Godinez*, 509 U.S. at 413 (Blackmun, J., dissenting).

²¹⁸ Of course, the rationale behind our proposals may have implications beyond the context of mental illness. For example, a defendant who elects to take responsibility for a crime that someone else has committed, in order to obtain financial remuneration or avoid violence, is utilizing the criminal justice system to reach an unfair result. In these cases, an attorney would legitimately object to being used to thwart a defendant's right to a fair trial.

²¹⁹ This category is far from a narrow one. *See supra* note 69.

mental unfairness that results when a mentally ill defendant's wishes are followed uncritically. Rather, we believe that the defendant's lawyer is in the best position to judge whether a defendant's objections to presentation of evidence are rooted in legitimate concerns or in interests or desires that the judicial system should not place above all other interests. Defense counsel is most familiar with both the circumstances of the criminal case and with the defendant, and is therefore best able to judge whether the defendant's objection is responsive to legitimate, rational concerns or is rooted in mental illness or some other invalid factor. For this reason, a court should be extremely reluctant to intrude upon the attorney-client relationship other than to clarify, when necessary, that defense counsel is acting responsibly in controlling the decision whether to present relevant evidence of diminished capacity or mitigating circumstances.

While we propose a departure from the current legal rules for cases in which a defendant engages in open conflict with his attorney over presentation of evidence of mental illness, this may not be such a dramatic departure from current norms of attorney-client relations in the majority of cases involving mentally ill defendants. When defendants are less able or determined to fight their attorneys for control of the defense than in a case such as *Kaczynski's*, attorneys often thwart client wishes by simply declining to consult their clients about the decision. An empirical study of attorney behavior conducted by Richard Bonnie found that in over one-third of the cases in which attorneys raised an insanity defense, the lawyers "pre-empted their clients participation" and "made the decision to pursue the insanity defense on their own, without meaningful client participation."²²⁰ Rather than require defense attorneys to subvert their ethical obligations in cases involving this type of client, and accede to their stronger-willed clients' wishes in order to avoid an invocation of *Faretta*, legal authorities should recognize

²²⁰ Bonnie et al., *supra* note 22, at 56-57. When the attorneys did consult their clients, the clients' involvement in the decision was fairly minimal. *See id.* at 58. The justifications for this absence of consultation were either that the attorneys had concluded that "the insanity defense was the only real choice and that there was nothing to discuss . . . [or] they doubted their clients' competence to participate meaningfully in the decision-making process." *Id.* at 57, 60. Another survey of insanity defenses in Colorado estimated that in one-third of the cases the defense was imposed over the defendant's wishes. *See* Miller et al, *supra*, note 33, at 501.

the primacy of society's interest in justice and acknowledge that this interest trumps the limited autonomy of a mentally ill defendant.

