

2009

Self-Representation in the International Arena: Removing a False Right of Spectacle

Eugene Cerruti

New York Law School, eugene.cerruti@nyls.edu

Follow this and additional works at: http://digitalcommons.nyls.edu/fac_articles_chapters

Recommended Citation

40 *Geo. J. Int'l L.* 919 (2008-2009)

This Article is brought to you for free and open access by the Faculty Scholarship at DigitalCommons@NYLS. It has been accepted for inclusion in Articles & Chapters by an authorized administrator of DigitalCommons@NYLS.

SELF-REPRESENTATION IN THE INTERNATIONAL ARENA: REMOVING A FALSE RIGHT OF SPECTACLE

EUGENE CERRUTI*

*Recent historical scholarship has demonstrated that the practice of self-representation at common law was developed and promoted not to secure a valued right to the accused but rather to compromise the defendant's ability to present an effective defense—by denying him an effective right to be represented by counsel. The Supreme Court in *Faretta v. California* stood this history on its head in order to read into the Sixth Amendment an implied right to self-representation equal to the now preeminent right to counsel. The *Faretta* doctrine was carelessly adopted yet has been resolutely defended by the Supreme Court, to the almost universal chagrin of those most directly affected by its commands. The recent Supreme Court case of *Indiana v. Edwards* is only a modest retreat from the pointless imposition on the lower courts of a structurally and normatively incompatible right within the context of the contemporary counsel-driven system of criminal justice.*

A putative right to self-representation silently entered international law via a back door at Nuremberg as a result of that tribunal's near-wholesale adoption of the apparent rights and protocols of the common law adversarial system. It was subsequently adopted in the International Covenant on Civil and Political Rights as one of the standard "rights of the accused" but never actually put into effect in international law until the creation of the various war crimes tribunals of the last two decades. The right to self-representation has almost immediately replicated its experience in American law by creating a shameful series of disreputable prosecutions. It has become another example of a feature of the adversarial system, like that of the lay jury, which does not travel well—or at all—to the international arena. The structural and normative groundings of the international system make the right even more inapposite there than it now is in the common law system. This article calls on the International Criminal Court, the new standard-bearer of international criminal justice, to take advantage of the upcoming seven-year review of its rules and procedures to strike from its Articles a practice that has been reduced to little more than a perverse right of spectacle.

* Eugene Cerruti, Professor of Law, New York Law School. I would like to extend many thanks to Laurie A. Moffat, now of Dewey & LeBoeuf, for her truly exceptional research assistance.
© 2009, Eugene Cerruti.

I. INTRODUCTION

The practice of self-representation in criminal proceedings began not as a right but as a punitive requirement of the early common law jury trial system. For centuries counsel was not permitted to represent the accused precisely because it was anticipated that counsel would make it less likely that the accused would be convicted. The practice gained limited normative status on behalf of the accused largely as a result of facetious rationalization by the common law courts in defense of the practice. There have been only several historical moments in both England and America where the practice has been genuinely regarded as a positive feature, allowing for popular resistance to politically inspired prosecutions. The contemporary recognition of a right of self-representation therefore has very limited historical grounding, which is at best limited to the unique circumstances of the common law jury system. It enjoys virtually no recognition as a right within the criminal justice systems of civil law countries.¹ It has even less of a foundation, either normative or systemic, in the contemporary "mixed," or "hybrid,"² systems of international criminal justice, which present to the accused neither a political sovereign to resist nor a fellow-citizen jury to appeal to. This article therefore argues for withdrawing any recognition of the right (as opposed to the mere privilege) within the realm of international criminal justice and, particularly, within the rules governing legal practice before the much-heralded International Criminal Court (ICC).

The proponents of a *sui generis* international criminal procedural law have gradually come to recognize that the adversarial criminal procedure of the common law system does not travel well to the international arena. The structural and normative differences between the national and international systems are formidable. But the procedural template for war crimes prosecutions established at Nuremberg did at least recognize at the outset that one of the pillars of the common law system, the lay jury, was untenable in the international setting.³ This

1. Michael P. Scharf, *Self-Representation versus Assignments of Defence Counsel Before International Tribunals*, 4 J. INT'L CRIM. JUST. 31, 35 (2006).

2. The term "mixed" is commonly used to describe international tribunals that combine elements of both civil and common law systems while the term "hybrid" is now used to refer to tribunals which combine both national and international law and procedure. See Sarah M.H. Nouwen, *'Hybrid Courts': The Hybrid Category of a New Type of International Crimes Courts*, 2 UTRECHT L.R. 190, 190 (2006).

3. "In international proceedings the adversarial system has basically prevailed, but without a jury. This system has been predominant since 1945, when the procedure for the IMT [the

article aims principally to demonstrate that the practice of self-representation, which has scant legitimacy even in the common law system, is absolutely incompatible with the structural and normative groundings of the emerging international criminal justice system.

A certain unreconstructed mystique has shielded the right of self-representation over the years. The iconic image it presents is one of a simple citizen, typically a social outcast or a proud political dissident, pleading for simple justice before a jury of his peers. It is a portrait of direct democracy at work, a self-represented individual throwing off the formal trappings of the state and its lawyers to present an unmediated narrative in the courtroom. It heralds the simple force of truth against the overly rationalized power of the state, the freedom to say "no" to both the power and the process of the prosecution. It champions a nostalgic sense of the simple liberties due the common man even in an age of highly regulated complexity. Unfortunately, this mystique presents an iconography that is not well grounded in either an historical or a normative truth. It is, as we shall see, a false construct that reverses and subverts the reality of the almost entirely negative historical experience with the practice of self-representation in the adversarial setting of the common law jury trial.

This article argues that the current practice of self-representation is not simply a quaint or benign anachronism of the common law jury trial system. Rather it is, within the context of any mature and professionalized criminal justice system, a deeply cynical and irresponsible condescension to the accused. The best that can be said of the practice is that at the lower borders of any criminal justice system—where the cases typically bear no significant consequence—permitting *pro se* representation may not produce a harmful consequence.⁴ But there are no genuinely redeeming consequences to the practice. More commonly, as will be described below, the practice makes a broad and profoundly negative contribution to the cause of justice—particularly with regard to the accused himself.⁵

Nuremberg Tribunal] was being discussed in London." ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 376 (2003).

4. For a recent account of a typical below-radar trial involving a perfectly obnoxious defendant in a silly case where the defendant self-represented at a bench trial and was acquitted by the court, see Anemona Hartocollis, *A Noisy Train, a Fed-Up Rider and a Day in Court*, N.Y. TIMES, Apr. 9, 2008, at B1.

5. Professor Hashimoto has recently conducted a study of records in both federal and state courts to demonstrate that the choice to self-represent is not necessarily irrational because of the widespread incompetence of assigned defense counsel. See Erica J. Hashimoto, *Defending the Right*

In more serious cases civil law systems generally forbid self-representation. This is a non-controversial position that is premised on the fairness and reliability of the civil law system itself. This article does not advocate such a complete prohibition within the international criminal justice system where the primary template is the common law adversarial (but non-jury) trial system. Rather, I argue in favor of reducing the status of the practice from a right to a privilege. The most obvious analog for this restructuring is the practice of trial by jury in the American criminal system. The American defendant has a near-absolute right to be tried by jury but he has no right to be tried without a jury.⁶ American trial judges have broad discretion to deny the defendant the privilege of being tried by the court itself. The bitter morass of self-representation would be largely resolved if the trial courts had the same discretionary authority to deny the defendant the privilege of being tried without counsel, and to permit it only when, and under what circumstances, it would be appropriate.

Recent scholarship on the history of the common law jury system has indirectly contributed a great deal to our understanding of the actual role of self-representation during that history, revealing not only more of the actual practice of self-representation but also of its very purpose.⁷

of Self-Representation: An Empirical Look at the Pro se Felony Defendant, 85 N.C. L. REV. 423 (2007). The study relies upon the extant literature to demonstrate the “breathtakingly low” competence of counsel and conducts a statistical study of the incidence and outcomes of *pro se* cases to suggest that *pro se* defendants themselves do not appear to be directly harmed by rejecting such counsel. *Id.* at 467. The available data do not support a more controlled study that would have generated direct findings as to cause and effect of self-representation, as very generously conceded by Professor Hashimoto. The study provides no evidence of any positive reason for electing to proceed *pro se*—except perhaps for the questionable desire to present a non-legal “ideological defense”—as opposed to the strictly negative incentive of avoiding incompetent counsel. *Id.* at 473. This study marks a significant contribution to a better understanding of the present posture of self-representation and the various negative incentives that may drive it. It is, however, a serious and ironic misreading of Professor Hashimoto’s study to suggest that it demonstrates that all is basically well in *pro se* land, as Justice Breyer appears to do in the recent case of *Indiana v. Edwards*, 128 S. Ct. 2379, 2388 (2008).

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

7. There have been several excellent accounts of the history of the right to jury trial, *see, e.g.*, WILLIAM FORSYTH, *HISTORY OF TRIAL BY JURY* (1852), and the right to counsel, *see, e.g.*, WILLIAM M. BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* (1955), but there has been virtually no direct study of the actual role and status of self-representation throughout this multi-century history. The most recent contribution to this literature by John Langbein provides the most vivid and well-documented account of the actual role of self-representation as a polar restraint on the development of a right to counsel as well as the full panoply of rights now associated with the modern adversarial criminal proceeding. JOHN H. LANGBEIN, *THE ORIGINS OF ADVERSARY CRIMINAL TRIAL* (2003).

SELF-REPRESENTATION

In the earliest stages of the common law trial system the accused was not permitted to present much in the way of an actual forensic defense to the charges. When the accused did finally gain permission to present such a defense he was not permitted to be represented by counsel, to call witnesses or even to testify under oath in his own behalf. He was permitted only to appear personally at trial and to provide direct responses to the evidence offered against him. "In short, the defendant's position was one of standing alone without counsel, books, the means of procuring evidence or the right to offer evidence which he did possess."⁸ The purpose of self-representation was to promote self-incrimination.⁹ Self-representation began, in other words, as the default position that resulted from the denial of any other rights of fair trial or representation.

As the accused slowly accumulated greater trial rights, most critically the right to be represented by counsel, self-representation continued as the default position only because most defendants could not afford counsel and there was no effective right to assigned counsel. The slow demise of self-representation began among the privileged classes who were not only the first to be afforded the right to counsel but also the first to be able to afford counsel.¹⁰ Progress towards a fair trial for the accused in the common law system has therefore been measured primarily in terms of the slow but steady movement away from self-representation and towards the provision of professional counsel. Recent scholarship has demonstrated that the normative gloss of the common law courts that had long supported the default status of self-representation is therefore best understood as a *post hoc* rationalization for a practice that was always recognized (quite openly in the earliest era¹¹) as one that severely compromised the accused's ability to

8. Joseph Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1191 (1970).

9. "[T]he rationale for the rule against defense counsel was to pressure the accused to serve as an informational resource at trial." LANGBEIN, *supra* note 7, at 48.

10. "Before 1695 one accused of treason or misprision of treason had no right to retain counsel, but in that year Parliament chose to create a preferred position for such defendants Members of Parliament were all 'political' figures, and the reform in 1695 reveals in eloquent terms their ideas of a fair judicial proceeding in a case where they might be involved personally." BEANEY, *supra* note 7, at 9.

11. "[T]he very Speech, Gesture and Countenance, and Manner of Defense of those who are Guilty, when they speak for themselves, may often help to disclose the Truth, which probably would not be so well discovered from the artificial Defense of others speaking for them." 2 WILLIAM HAWKINS, A TREATISE ON THE PLEAS OF THE CROWN (London 1721), *cited in* LANGBEIN, *supra* note 7, at 35.

defend himself.

Ironically, the rather unlikely recognition of this practice as a fundamental right that inured to the interests of the accused did not fully arrive until 1975 in *Faretta v. California*.¹² This was a full decade after the Warren Court had finally completed the long march of the Twentieth Century to securing for all defendants in all criminal cases a guaranteed Sixth Amendment right to be represented by counsel. Prior to *Faretta*, no case had ever held that the Sixth Amendment also provided a guaranteed right to self-representation. The text of the amendment does not refer to such a right. There was also, as of 1975, no real call—either in the lower courts, the academic literature or the public narrative—to recognize such a right. The sudden recognition of a Sixth Amendment right to self-representation therefore was an *ipse dixit* creation of the Supreme Court.

Yet there was, to be sure, a good deal of apparent support for the opinion in *Faretta*. Since no state had adopted a guaranteed right to counsel for all defendants, the widespread practice of self-representation by default had continued until well into the middle of the last century. Although a battle raged over extending the right to counsel, a “right” to self-representation remained a non-issue. Therefore, the colonial-era statutes and constitutional provisions that referred to a right to represent oneself in person remained essentially dormant. This silence could be construed to portray a long-term positive commitment to the practice of self-representation rather than an enduring negative commitment to deny guaranteed counsel. However well intentioned, *Faretta* largely misread the common law history it relied upon and constructed a false ideal for a practice that was utterly at odds with the new constitutionally driven system of defaults being developed for the American practice of criminal jury trial. The result of this self-generated conflict between a guaranteed right both to counsel and to self-representation has been recurrent spectacles of self-represented defendants in serious trials who are either mentally ill, sadistic opportunists, pathetic voyeurs, nihilistic martyrs or just plain fools. This development has created a dismal state of affairs throughout the criminal justice system that is almost exclusively supported and maintained by the Supreme Court.

The right of self-representation entered international law in the immediate post-Nuremberg era as one of the “rights of the accused” recognized in the seminal human rights document, the International

12. 422 U.S. 806 (1975).

Convention on Civil and Political Rights (ICCPR).¹³ This was, of course, law largely without context, for there were no subsequent international criminal tribunals until the early 1990s with the creation of the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).¹⁴ The exercise of the international right to self-representation first occurred before these two tribunals and several subsequent tribunals, where it was quickly exposed as a right without a reason. In particular, it has greatly disrupted and compromised the work of the ICTY, the tribunal with the foremost influence to date on the creation of a viable international criminal justice system. It will almost certainly wreak even greater havoc on the integrity and efficiency of the operations of the ICC, the new standard-bearer for the promotion of international accountability for the most egregious violations of fundamental human rights.¹⁵ The time has already passed to revoke the right from the rules of the various temporary tribunals. But it is both timely and essential to remove the right from the statute of the ICC, the first and only *permanent* court of international criminal justice.

This article will demonstrate the clear vacancy of continuing to recognize the right of self-representation in virtually *any* mature legal system, but most significantly within the apparatus of fundamental rights before the International Criminal Court. Part II presents the essential argument. It will engage the more recent historical scholarship to discredit the broad mystique that has supported the common law claim to an individual right of self-representation. This Part will demonstrate that the practice of self-representation began as an instrument of the state designed to compromise, not serve, the interests of the accused. Whatever derivative interests of the accused the practice may have once served have diminished over time to the point of non-existence. Self-representation is not an inherent guarantee of individual autonomy essential to the philosophy of the adversarial system. It is a practice which was carelessly recognized as a constitutional right in America and is now increasingly in disrepute within the judiciary and the scholarly literature. It is presently a practice which

13. International Covenant on Civil and Political Rights, art. 14(3)(d), G.A. Res. 2200A (XXI) Dec. 16, 1966, T.I.A.S. No. 14668, 99 U.N.T.S. 171 [hereinafter "ICCPR"].

14. The ICTY was established in May 1993. International Criminal Tribunal for Yugoslavia, S.C. Res. 827, U.N.Doc. S/RES/827 (May 25, 1993). The ICTR was established in November 1994. International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N.Doc. S/RES/955 (Nov. 8, 1994).

15. The ICC was established by the Rome Statute of the International Criminal Court. Rome Statute of the International Criminal Court art. 1, July 17, 1998, 37 I.L.M. 999.

stands in fundamental conflict with the legitimate interests of both the accused and the legal system itself. It is a practice that should therefore be severely circumscribed by any system aspiring to a more advanced degree of fundamental fairness and integrity.

Part III will demonstrate how the right, even within the context of modern Anglo-American jury trials, has become an odious impediment to providing a fair and reputable trial to the accused. The Supreme Court has created a right-based doctrine that focuses almost entirely upon a false construct of the putative libertarian interests of the accused. The point advanced in this Part is that it is not only the accused who becomes the aphoristic fool; the entire trial proceeding and all of its primary participants are equally implicated in and compromised by the essential foolishness. This Part will largely let the actual trial stories of some of the more notable cases speak for themselves to demonstrate the pervasive harms generated by the right.

Part IV will explain how the traditional norms associated with the right of self-representation have absolutely no transfer application to the unique structural and normative schemes of the international criminal tribunals. A right of self-representation entered international law as part of a near-wholesale adoption of the common law adversarial trial at Nuremberg and has only recently been vetted within the unique and disparate context of the emerging international system of criminal justice. This Part will demonstrate that even within the short history of the temporary international tribunals, the right has already clearly established its ability to frustrate and compromise the pursuit of a fair and reputable trial for some of the most horrendous crimes of the era.

II. THE ROAD TO *FARETTA*

Self-representation has always served the interests of the state and rarely, if ever, the interests of the accused. The practice of self-representation began as a mere incidental feature of the primitive common law jury system. But the practice was maintained long after the more rudimentary stages of jury trial developments, due to its enormous political utility to the state. As the common law jury practice matured and became increasingly complex, a right of counsel became critical to a fair trial. It also enabled the development of other nascent rights dependent upon the presence of counsel, such as the right to remain silent at trial. The default status of self-representation was not vanquished in America until the emergence of a guaranteed right to counsel in the middle of the last century. Ironically, it was not until after these protracted developments that the Supreme Court decided that virtually every criminal defendant in America had an absolute

SELF-REPRESENTATION

right to surrender these new and fundamental rights and proceed to trial without the benefit of counsel.

A. *The Early Period*

In the early period of the criminal jury trial, beginning in the Thirteenth Century, the accused possessed no right to testify in his own behalf, to confront his actual accusers, to compel witnesses for his defense or to be represented by counsel.¹⁶ He appeared personally before the trial jury, which was often composed of members of the same self-informed panel that had already voted to initiate the charges (the forerunner to today's grand jury),¹⁷ and was subject to questioning by both the judge and jurors.¹⁸ "The accused conducted his own defense, as a running bicker with the accusers. Replying in person to the charges and the evidence against him was the only practical means of defense that the procedure allowed."¹⁹ Modest allowances to this primitive adversarial practice were introduced over time but the common law of England clung to the belief that an individual accused of crime should not be aided by counsel in presenting his case to the jury. Counsel was permitted to assist the defendant with regard to technical matters of law but was strictly prohibited from appearing at trial to argue the factual case to the jury.²⁰ Indeed, it was not until 1836, by statute, that the English criminal defendant was permitted the right to have counsel appear on his behalf with regard to matters of both law and fact.²¹ This restriction on counsel and the obligation of the defendant to appear and answer orally was a well-determined feature of English criminal procedure throughout this period.²² The recent historical scholarship of John Langbein regarding the critical transition of the common law jury trial from a simple accusatorial to a highly adversarial proceeding has demonstrated the overriding purpose of

16. "One accused of a capital offense—and all serious offenses were capital—faced his accusers without witnesses, without counsel, even without assurance of opportunity to question the witnesses against him." J.A. GRANT, *OUR COMMON LAW CONSTITUTION* 1 (1960).

17. LEONARD W. LEVY, *THE PALLADIUM OF JUSTICE: ORIGINS OF THE TRIAL BY JURY* 18–19 (1999).

18. LANGBEIN, *supra* note 7, at 319.

19. *Id.* at 253.

20. *Id.* at 26–28.

21. 6&7 Wil. 4, c. 114 (1836).

22. "English criminal procedure was for centuries organized on the principle that a person accused of having committed a serious crime should not be represented by counsel at trial." LANGBEIN, *supra* note 7, at 10.

the early insistence on an uncounseled defendant: "allowing him counsel would work to his advantage by hampering the trial court's ability to convict him if he were guilty."²³

The common law courts were prone to rationalizing this punitive restriction as a protocol designed to *benefit* the accused. One common rationale for denying counsel was that, as to matters of fact, the accused was better informed than any counsel could be and therefore he would be disadvantaged by counsel.²⁴ A common, related, assertion was that the guiltless defendant who was first confronted directly by his accusers at trial and forced to respond spontaneously was put in a better position to reveal his earnest claims of innocence before the jury.²⁵ The common law courts also asserted that the defendant did not require counsel since the burden was placed upon the Crown to prove its charges and, once proven, it was futile for the defendant to deny them.²⁶ This was claimed despite the fact that, as Langbein has demonstrated, the entire system of trial and pretrial procedures inaugurated during the reign of Queen Mary (1553–58) was stacked heavily and presumptively in favor of the Crown.²⁷ But perhaps the most bold and self-satisfied rationale of the common law courts for denying counsel was that the unrepresented accused was in fact better protected by the court itself acting in its guardian of law capacity. "This rule may appear somewhat strict and severe, as the crown has always the benefit of counsel to marshal its evidence, and state the case to the jury; but is, in some degree, attempted to be explained by the maxim, that the judge is to be counsel for the prisoner."²⁸ It is not difficult to surmise, given the tilt of the early scales of justice, that the court-as-counsel was hardly likely to be effective:

This supposedly neutral position of the judge furnished an excuse, however, for continuing the practice of denying coun-

23. *Id.* at 35.

24. *Id.* at 33.

25. "[T]he Simplicity and Innocence, artless and ingenuous Behavior of one whose conscience acquits him, ha[s] something in it more moving and convincing than the highest Eloquence of Persons speaking in a Cause not their own." HAWKINS, *supra* note 11, at 400.

26. "[T]he proof belongs to [the crown] to make out these intrigues of yours; therefore you need not have counsel, because the proof must be plain upon you, and then it will be in vain to deny the conclusion." *R. v. Edward Coleman*, (1678) 7 St. Tr. 1, 14 (K.B.), *cited in* 1 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 382 (London, MacMillan 1883).

27. LANGBEIN, *supra* note 7, at 40.

28. J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 407 (2d ed., London, A.J. Valpy 1816).

SELF-REPRESENTATION

sel in felonies, and the reason commonly given was that the judge was impartial and looked with equal suspicion on both sides in a criminal action, with the further explanation that a criminal proceeding was so simple that any man could understand what was being done. Another reason, though certainly not stated openly at the time, was the view that the defendant, having been indicted as an enemy of the king, was at least half guilty and that all aids should be furnished to the king, whose security, at any rate during the seventeenth century, was more important than that of the individual accused.²⁹

The restriction on counsel in the early common law era was not based upon a lack of or a general aversion to lawyers.³⁰ Already during this early period a class existed of lawyers who were fully representing clients in civil proceedings. Lawyers were also permitted to fully represent defendants charged with misdemeanors. The oddity of permitting counsel in minor offenses but prohibiting counsel for serious crimes is best explained by the more categorical separation between misdemeanors and felonies at early common law.³¹ Virtually all felonies were capital offenses while virtually all misdemeanors were punished with only a fine. Misdemeanors were viewed more as civil offenses and not, as with felonies, as a breach of the king's peace. When the felony defendant attempted to refute the charges, he was effectively challenging an accusation made in the name of the sovereign, hence the strict limitation imposed on his ability to effectively impugn those charges.

The real designs of the early common law regarding the presence of counsel were broadly, and ironically, revealed during a period when the prohibition of counsel was temporarily replaced with the *requirement* of counsel. This occurred during the era of the notorious Star

29. BEANEY, *supra* note 7, at 11.

30. "During the era between the thirteenth and seventeenth centuries a number of legal institutions underwent changes that paved the way for the adversarial procedure. Lawyers rose to prominence both as advocates and as judicial officers. At around the beginning of the 1300s requirements were established regulating the education and conduct of those who would be allowed to argue cases in the King's courts These men formed the nucleus of a legal profession that would eventually assert exclusive control over the judicial machinery." Stephen Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 724-25 (1983).

31. "Illogically, in the least serious cases, English law had granted recognition of the accused's right to retain counsel and to make a defense with his assistance. In these minor cases . . . the state's interest was apparently deemed so slight that it could afford to be considerate toward defendants." BEANEY, *supra* note 7, at 8.

Chamber, which lasted for almost two hundred years until it was abolished by the Long Parliament in 1641. The Star Chamber was a *sui generis* tribunal that evolved out of the King's Council to become a major instrument of the monarchy to prosecute seditious libel, treason and other forms of religious or political dissidence. It is most commonly recalled in the modern era for its political treachery and its secret, highly inquisitorial means of establishing guilt. What is not commonly recalled, however, is its role in temporarily casting a false glow on the early practice of self-representation. The Star Chamber required every defendant to be represented by counsel who was willing to vouch for the defendant's intended defense. By the Seventeenth Century lawyers had become so deeply implicated in the treachery of Star Chamber that the ability to escape representation by this politically compromised caste of esquires had become a quest in its own right:

[B]y the practice of the Star Chamber defendants were not only allowed counsel, but were required to get their answers signed by counsel. The effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious. If counsel would not sign the defendant's answer he was taken to have confessed the information.³²

The Supreme Court in *Faretta* acknowledged these anomalous practices of the Star Chamber, but then also cited the abolition of that court as an affirmative embrace of the common law for the seemingly liberal individualism of self-representation: "The Star Chamber was swept away in 1641 by the revolutionary fervor of the Long Parliament. The notion of obligatory counsel disappeared with it. By the common law of that time, it was not representation by counsel but self-representation that was the practice in prosecutions for serious crime."³³ However, the Court overstated, if not misstated, the real significance of the abolition of the Star Chamber. The prolonged struggle of the early era of the common law was to gain a new right to be represented by counsel in service to the accused, not to "gain" a right of self-representation. The independent demand for recognition of a right to counsel of the defendant's choosing continued throughout the reign of the Star

32. STEPHEN, *supra* note 26, at 341.

33. *Faretta v. California*, 422 U.S. 806, 823 (1975).

Chamber.³⁴ The abolition of the Star Chamber simply returned that limited segment of the accused population to the punitive no-counsel posture of those prosecuted in the common law courts. The objection to the practice of the Star Chamber was not to the presence of counsel *per se* but rather to the obligation to be represented by counsel effectively in service to the crown. The abolition of the Star Chamber did not represent a resurgence of support for the entitlement of self-representation. It instead represented the rejection of a punishing imposition that was worse than no counsel at all. Self-representation at early common law was always a default stemming from the denial of counsel, not a libertarian aspiration of the accused.

B. *The First Era of Reform*

The breakthrough moment for the advance of a right to counsel occurred near the end of the Seventeenth Century. A notorious series of prosecutions for treason among political and religious dissidents preceded the Glorious Revolution of 1688. The treason trials presented a high-profile scandal of proceedings marked by the repeated spectacle of an innocent and uncounseled defendant with no fair opportunity to defend against a politically interested court and crown counsel. The Treason Trials Act of 1696 was designed to provide relief only to this otherwise privileged class of political defendants by providing them with a right to hire and be represented by counsel.³⁵ Even then, the common law courts maintained a restriction on treason counsel by preventing them from arguing the case directly to the jury. This limitation was designed to maintain the pressure of the common law for the accused to appear personally and vocally before the jury. The Act was nonetheless a small but first crack in the common law wall against trial counsel and it set in motion the long movement towards a general right of counsel in all criminal cases.

Langbein describes this limited introduction of defense counsel as the tipping point that marked the critical transition to the modern adversary trial with its roster of attendant rights—all of which are predicated upon the existence of counsel.³⁶ Beginning in the second

34. See, e.g., LANGBEIN, *supra* note 7, at 11 n.2, for citations to the contemporaneous complaints.

35. "The new mode of proceeding was introduced to serve wealthy grandees accused of treasonable intrigues (mostly offenses touching dynastic succession or religious establishment)." *Id.* at 3.

36. "Adversary criminal trial traces to the 1696 Act." *Id.* at 68.

quarter of the Eighteenth Century, the English courts, without enabling legislation, exercised their supervisory powers to extend the new right of counsel to felonies other than treason. This was a simple yet dramatic paradigm shift in trial practice. The defendant was no longer obliged to appear and answer personally at the outset and throughout the trial.³⁷ Increasingly, the defendant was permitted to defend through counsel and to remain personally silent at trial.³⁸

This provided the template for the emergence of a genuinely two-sided, adversarial trial. The prosecution was required to make its case without the benefit of the participation of the accused, which in turn led to the development of a substantial one-sided burden of proof on the prosecution.³⁹ This in turn promoted the development of a body of evidence law, particularly that of hearsay, which operated to exclude a good deal of prosecution evidence that would have typically emerged during the "bickering" process of the self-represented trial. This is also when evidence law developed its more profound commitment to confrontation and cross-examination as the primary tools of truth in the evidentiary process. This evolution of a highly adversarial, process-driven jury trial practice unfolded slowly over the Eighteenth and into the Nineteenth Century in England. These same developments occurred more rapidly, and formatively, in the colonies.

C. *The Colonial Era*

The colonists immediately set out to forge a revolutionary response to the perceived injustices of Crown prosecutions. It is certainly true that lawyers in the colonies were hardly an exalted cadre of compatriots. The colonists commonly viewed lawyers as having both class and political biases that rendered them obnoxious. But this hardly was evidence of a preference by the colonists for self- as opposed to lawyer-representation. Indeed, although the historical record of the colonial practice is unclear, it is at least evident, as the Supreme Court itself has recognized,⁴⁰ that the colonists took strong exception to the English rule prohibiting counsel in criminal cases and almost immedi-

37. "[S]ecuring the accused as an informational resource was the central pre-occupation of the early modern trial." *Id.* at 61.

38. "Only when defense counsel succeeded in restructuring the criminal trial to make it possible to defend a silent accused did a workable privilege against self-incrimination within common law trial procedure become possible." *Id.* at 278-79.

39. *Id.* at 261.

40. "The [English] rule was rejected by the colonies." *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

ately began to repudiate that practice.⁴¹

The objection in the colonies was not to lawyers *per se* but to lawyers who failed to represent the interests of the accused.⁴² The common practice of self-representation in the colonies was dictated not so much by normative preference as by the fact that there was as yet no readily available alternative.⁴³ As might be expected, the colonial reaction to the ban on defense counsel was, if anything, more fervent than the mounting opposition to the rule in England.⁴⁴ Self-representation in the colonial era was, for most defendants, borne of necessity rather than insistence.

Throughout the colonial era rules regarding representation of the accused typically referred to a right to be represented *either* by self or by counsel.⁴⁵ But the context in which these rules were adopted is critical to understanding their relative status. The transformative initiative represented by this development was clearly the recognition by the colonists of a nascent right to counsel. Although they were typically framed as procedural rights of an alternative character, they were not normative rights of the same order. There is no evidence that colonists insisted upon self-representation where counsel was otherwise available. Indeed, there was no need to champion a right for something that had long existed, both at home and in England, as the default practice of a system that had manifestly disadvantaged the accused.

The Supreme Court in *Farretta* was nonetheless at pains to conclude

41. "We have never admitted that cruel and illiberal principle of the common law of England, that when a man is on trial for his life, he shall be refused counsel, and denied those means of defence, which are allowed when the most trifling pittance of property is in question. The flimsy pretence, that the court are to be counsel for the prisoner will only heighten out indignation at the practice: for it is apparent to the least consideration, that a court can never furnish a person accused of a crime with the advice, and assistance necessary to make his defence . . ." 2 ZEPHANIAH SWIFT, *A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT* 398–99 (Windham, 1796), cited in *Farretta v. California*, 422 U.S. 806, 828 n.35 (1975).

42. "[A]t the time of the War of the Revolution, in each of the American Colonies a Bar had developed, composed of trained and able lawyers. The old antipathies towards the 'attorneys,' against whom so much legislation had been directed, in the earlier years had died away, for the character and talents of the men who undertook the practice of the profession had so distinctly changed." CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 211 (1911).

43. "It is probably true that the English [no-counsel] rule combined with the early shortage of lawyers in the colonies made it inevitable that an accused should defend himself in most cases." BEANEY, *supra* note 7, at 18.

44. "There does seem to have been a greater awareness in American courts that an accused who was undefended was at a serious disadvantage, and this awareness became keener as the number of lawyers increased in colonial America." *Id.* at 25.

45. *Farretta*, 422 U.S. at 828.

that the colonists had in the Sixth Amendment conferred *constitutional* status jointly on both the right to counsel and the right to self-representation. The problem of course was that while the Sixth Amendment expressly includes a provision that "the accused . . . shall have the assistance of counsel," it nowhere refers, either directly or by implication, to a coordinate right of self-representation. To complicate matters further, the Judiciary Act of 1789, which was signed into law by the First Congress just one day prior to the proposal of the Sixth Amendment, provided that "the parties may plead and manage their own causes personally or by the assistance of . . . counsel."⁴⁶ Conventional statutory analysis would suggest that, under these circumstances, the drafters intentionally excluded the right of self-representation from the Sixth Amendment.⁴⁷ The Court therefore resorted to a "structural" analysis of the Amendment which found the dual privileges common to the Judiciary Act and the colonial era rules of representation to be implicit within the Amendment itself.⁴⁸

But there is a more direct and simple explanation for the rather glaring omission of any reference to self-representation in the Sixth Amendment: the drafters recognized the right to counsel as a fundamental and transformative feature of the new constitutional order, while the traditional practice of self-representation simply was not. There was no generally recognized right to government-appointed defense counsel in the colonial era.⁴⁹ Therefore, for the typical colonist who could not afford to hire a lawyer, representing himself was the only alternative. Thus, self-representation remained the default for those who chose, for whatever reason, not to avail themselves of the new right to hire a lawyer. The express reference to self-representation in the Judiciary Act and the glaring omission of any such reference in the

46. Judiciary Act of 1789, Section 35, 1 Stat. 73, 92.

47. "[I]t is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (internal quotations and citations omitted).

48. "Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment." *Faretta*, 422 U.S. at 819.

49. "[W]e have as yet no proof that the actual judicial practice in many of the colonies was more liberal than the English practice. Also, it is evident that no uniform practice existed throughout the colonies at any time before, or soon after, the Revolution. Where provision was made for the appointment of counsel, it was done in most states only for capital offenses." BEANEY, *supra* note 7, at 21.

Amendment, at the same historical moment, underscores the likelihood that the omission was purposeful rather than inadvertent.⁵⁰ The drafters appear to have made a clear distinction between rights deemed to be of a fundamental, constitutional nature and those procedural rights, which were privileges of a lesser order.

D. *The Modern Era: A New Paradigm Emerges*

The remnants of the English rule prohibiting defense counsel did not survive the founding of the Union: The new federal government, and each of the states as they joined the Union, recognized a right to counsel in either a constitution or a statute or both.⁵¹ But apart from capital cases,⁵² the guaranteed right to assigned counsel evolved slowly over the next century and a half.⁵³ And even where provision was made by statute or court rule for the assignment of counsel in non-capital cases, the actual assignment of an attorney was widely neglected in practice.⁵⁴ Thus, until well into the Twentieth Century, it was not uncommon throughout the states for a defendant to answer a criminal charge, including a capital offense, without the assistance of counsel.

But the Twentieth Century marked the gradual emergence of criminal law enforcement at the federal level and with it a national resettling of the essential norms of criminal justice. Central to this was a mounting recognition of the paramount significance of the right to counsel to all the other rights deemed essential to criminal due process. *Powell v. Alabama*,⁵⁵ the infamous "Scottsboro boys" case decided in 1932, was

50. The Supreme Court was indeed tilting against several of the more standard protocols of statutory interpretation with regard to the relationship of the Sixth Amendment and the Judiciary Act. The Court "assumes that Congress is aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Furthermore, "it is a general principle of statutory construction that when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart*, 534 U.S. at 452. Chief Justice Burger made the point in his dissent in *Faretta*: "[U]nder traditional canons of construction, inclusion of the right in the Judiciary Act and its omission from the constitutional amendment drafted at the same time by many of the same men, supports the conclusion that the omission was intentional." *Faretta*, 422 U.S. at 844 (Burger, J., dissenting).

51. BEANEY, *supra* note 7, at 25.

52. *Id.* at 138.

53. *Id.* at 21.

54. *Id.* at 138.

55. 287 U.S. 45 (1932). The facts of *Powell* are as follows: Separate groups of black and white youths were riding a freight train across Alabama. The two groups got into a fight, following which all but one of the white youths were thrown off the train. Two white girls remained on the train.

the seminal and enduring event. On the morning of their trial, two attorneys had appeared before the trial judge and offered to "assist" at the trials but the Supreme Court subsequently found that the defendants "were not accorded the right to counsel in any substantial sense."⁵⁶

The Supreme Court had never before held that the federal constitution required the state appointment of counsel for the accused in any case. But the Court so held in *Powell* and thereby initiated recognition of a new normative paradigm for the role of counsel in the modern practice of criminal jury trial. The Court posed the question as to what the Due Process Clause of the Fourteenth Amendment required as a minimal, fundamental guarantee for any defendant heard to answer in "a case such as this"⁵⁷ and answered in a passage by Justice Sutherland that has resonated in the right to counsel cases ever since:

What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.⁵⁸

Shortly thereafter, the train was met and seven black youths were arrested and charged with the capital offense of rape. An Alabama statute required the appointment of counsel in capital cases. At their arraignment, the judge appointed "all members of the bar" to serve as counsel to the accused, yet no counsel actually appeared on their behalf. One week later, they were put to trial. The seven defendants were tried in three separate groups and all three trials were completed in one day. All seven defendants were convicted and sentenced to death.

56. *Id.* at 58.

57. *Id.* at 72.

58. *Id.* at 68-69.

Powell was quickly followed by another extension of the right to assigned counsel. In *Johnson v. Zerbst*,⁵⁹ the defendants were tried in federal court for a non-capital offense and were denied appointed counsel. The Court reiterated its analysis in *Powell* and concluded that, at least regarding all federal prosecutions, the Sixth Amendment right to counsel guaranteed the assignment of counsel to all defendants, regardless of the nature of the charge.⁶⁰

The Court reversed direction four years later in *Betts v. Brady*.⁶¹ The defendant was tried and convicted for robbery in state court. He had pleaded indigency before the trial court but was denied appointed counsel because in Maryland counsel was appointed only in cases of murder and rape. The issue before the Supreme Court was whether the Sixth Amendment rule of *Johnson* automatically requiring appointed counsel in all federal cases was to be incorporated within the Fourteenth Amendment rule of *Powell* and thereby made applicable to all defendants in state court under the Fourteenth Amendment incorporation doctrine set forth in *Powell*. The Court acknowledged that “[e]xpressions in the opinions of this court lend color to the argument”⁶² but refused to so extend the doctrine of appointed counsel. Nevertheless, the right to counsel continued to expand for the next twenty years, albeit on a case-by-case due process basis.

But the slowly evolving due process era came to an end in the early 1960s with the advent of the Warren Court’s “selective incorporation” doctrine. In a series of cases over less than a decade, the Court constructed a new national template for criminal justice by incorporating virtually every provision of the federal Bill of Rights into the Due Process Clause of the Fourteenth Amendment. One of the first of those incorporation cases was *Gideon v. Wainwright*,⁶³ a Florida state case with

59. 304 U.S. 458 (1938).

60. “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’ It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly, and necessary to the lawyer—to the untrained layman—may appear intricate, complex, and mysterious.” *Id.* at 462–63.

61. 316 U.S. 455 (1942).

62. *Id.* at 462–63.

63. 372 U.S. 335 (1963). James Earl Gideon was charged with a non-capital offense and requested the appointment of counsel. The trial court denied his request and Gideon was forced to represent himself at trial. He was convicted; his state court appeal was denied; and, still representing himself, he filed a writ of certiorari with the Supreme Court. The high court

facts similar to those in *Betts*. The Court held that the Sixth Amendment right to counsel was so incorporated and therefore applicable to all defendants otherwise denied counsel in state court proceedings. American justice would no longer permit an accused to be forced to represent himself against the state's modern prosecutorial arsenal.⁶⁴

Gideon affirmed that the "guiding hand" of professional defense counsel was essential to the fairness of virtually any criminal prosecution, refuting the self-representation mythology of a David taking on a Goliath. The structural significance of counsel to the modern adversarial contest has been repeatedly reinforced:

The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.⁶⁵

Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be "of little avail," as this Court has recognized repeatedly.⁶⁶

This right, guaranteed by the Sixth and Fourteenth Amendments, is indispensable to the fair administration of our adversary system of criminal justice.⁶⁷

appointed counsel to *Gideon* for purposes of his review in that court and subsequently decided that *Betts* had been wrongly decided.

64. "Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." *Gideon*, 372 U.S. at 344.

65. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

66. *United States v. Cronin*, 466 U.S. 648, 653-54 (1984).

67. *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

Without the help of a lawyer, all the other safeguards of a fair trial may be empty.⁶⁸

From humble historical origins in England and relatively modest beginnings in the country, the right to counsel has developed into the most vital of all the protections guaranteed to criminal defendants by the United States Constitution.⁶⁹

The central point cannot be ignored: the deliberately amateurish common law jury trial system has now evolved into a complex constitutional system of interdependent rights. This new paradigm is premised on the assumption that counsel will always be available to the accused to navigate this new constitutional labyrinth. The new system of rights is now constructed as a house of cards that crumbles when counsel is removed. The mere right to have counsel is no longer sufficient; the actual presence of counsel is essential. The set points of default performance have been raised and regularized for all participants in the investigation, prosecution and adjudication of crime. The presence of defense counsel is essential not only to the interests of the accused, but also to the interests and integrity of the criminal justice system. The outcome of *Gideon* underscores the ultimate point: on retrial where he was represented by counsel, James Earl Gideon was found not guilty.⁷⁰

The right to appointed defense counsel now permeates the modern system of constitutional criminal justice in many ways. One example is the creation of the "Miranda rights" by the Warren Court in *Miranda v. Arizona*.⁷¹ Previously, the accused had no constitutional right to an attorney outside the courthouse, most notably at the station house. In *Miranda*, without even relying on the Sixth Amendment, the Supreme Court held that the accused possesses a right to have counsel present at the police station. The Court held that a person in custody at the station house and subject to interrogation by the police had a Fifth Amendment right to be protected against compelled self-incrimination. The only reasonable manner in which that right to remain silent could be protected, the Court reasoned, was by recognizing an integrated right to have counsel appointed to represent the accused at the station house.

It is therefore incongruous that only after the right to counsel had

68. William J. Brennan, Jr., *The Bill of Rights and the States*, 36 N.Y.U. L. REV. 761, 773 (1961).

69. JAMES J. TOMKOVICZ, *THE RIGHT TO THE ASSISTANCE OF COUNSEL* 45 (2002).

70. ANTHONY LEWIS, *GIDEON'S TRUMPET* 237 (1964).

71. 384 U.S. 436 (1966).

been secured did the Supreme Court decide that the accused had an absolute right to reject the assistance of counsel at the courthouse. "It is thus no exaggeration to say that *Faretta* not only 'cut against the grain' of the Court's previous Sixth Amendment jurisprudence, but also undermined foundational principles of modern American criminal procedure."⁷²

E. Faretta

The Supreme Court in *Faretta* held that all defendants have a co-equal Sixth Amendment right either to be represented by counsel or to self-represent. It reversed a California Supreme Court case which ruled that a right of self-representation was inconsistent with the modern, guiding-hand paradigm of criminal justice developed by the Supreme Court. The *Faretta* Court relied primarily upon a misreading of the foregoing history of the practice but also offered additional support grounded in the libertarian concept of individual "free choice" or "autonomy." But neither the historical nor the philosophical rationales proffered by the Court are able to withstand analysis.

It was no accident that the case arose in California. A long series of negative experiences with self-represented defendants in that state had led both the legislature and the state judiciary to review whether California should continue in the post-*Gideon* era to recognize a right of self-representation.⁷³ Both the state constitution and statutes provided for the right.⁷⁴ The judiciary acted first, prior to the enactment of several changes to state constitutional and procedural law. In the 1972 case of *People v. Sharp*,⁷⁵ the trial court prevented the defendant from firing his attorney on the day of trial and appearing *pro se*. The California Supreme Court upheld the conviction. The court held that "there is no express language in any of [the Sixth Amendment's] provisions which reasonably supports a right of *pro se* representation."⁷⁶ After a lengthy and strained review of state law, the court concluded that "neither the federal nor the California Constitution makes specific provision for self-representation as a constitutionally protected right in

72. Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 650 (2005).

73. See generally Mark S. Dodson, *Constitutional Law: The Supreme Court of California 1971-1972*, 61 CAL. L. REV. 377 (1973).

74. Both the California Constitution and the Penal Code provide that a defendant had the right "to appear and defend in person and with counsel." CAL. CONST. art. 1, § 13; CAL. PENAL CODE § 686 (West 2008).

75. 499 P.2d 489 (1972).

76. *Id.* at 494.

SELF-REPRESENTATION

criminal trials.”⁷⁷ The court relied heavily on a policy analysis which further reasoned that “social and judicial changes which have taken place during the almost 200 years require greater rather than lesser limitations on the right of self-representation.”⁷⁸

The California legislature was likewise undertaking broad measures to negate any right to self-representation. In 1971 the California Senate proposed a constitutional amendment to be submitted to the electorate that would remove the reference to a right “to appear and defend in person” and add a provision that would grant the legislature the power to require counsel in a felony case.⁷⁹ The legislature also passed a series of statutory amendments, to go into effect only upon passage of the constitutional amendment, which would require counsel in all capital cases.⁸⁰ The sponsors of the changes argued that the right to self-representation had become an empty and dysfunctional entitlement in contemporary criminal trials:

This change in our Constitution, and the legislation which it authorizes, is necessary in order to ensure the defendant is fairly advised of his rights during the trial, and at the same time reduce the delays, reversals, and courtroom disruptions which occur when an untrained person attempts to be his own lawyer . . . Today’s complex legal system leaves no room for the person unschooled in law and criminal procedure . . . Not only is self-representation harmful to the defendant, but it can work havoc upon the judicial process.⁸¹

The electorate passed the constitutional amendment the following year, making California the first state to reject and remove any reference in state law to a right to self-representation. It was to be a short-lived moment in the vanguard. Shortly after the new laws went into effect, Anthony Faretta was charged with grand theft, a non-capital offense. Faretta requested to proceed *pro se*. The trial court initially granted his request but then reversed itself and ordered him to proceed to trial with counsel. The only reason Faretta provided for wanting to dismiss his attorney was that he believed the public defend-

77. *Id.* at 496.

78. *Id.* at 494.

79. S. Res. ch. 240 Reg. Sess. (Cal. 1971).

80. S. Res. ch. 1800 Reg. Sess. (Cal. 1971).

81. Propositions and Proposed Laws, Together with Arguments, Primary Election, Tuesday, June 6, 1972, at 8, available at http://holmes.uchastings.edu/ballot_pdf/1972p.pdf.

er's office was "very loaded down with . . . a heavy case load."⁸² Faretta was convicted; the intermediate appellate court affirmed in an unreported opinion; the California Supreme Court denied review; and the Supreme Court granted review by certiorari.⁸³

The Supreme Court, in an opinion by Justice Stewart, held that Faretta had been denied his right to self-representation guaranteed by the Sixth and Fourteenth Amendments. *Faretta* took the opposite approach of the California court in *Sharp* to the traditional references in both federal and state law that coupled a right to counsel with a right to represent oneself. The *Sharp* court addressed a state constitution that *expressly* referred to a right to "defend in person," yet the court's interpretation led it to rule that the text did not actually confer an absolute right to self-representation. Conversely, the *Faretta* Court construed the federal Constitution, which makes no express reference to self-representation, to read such a right into the Sixth Amendment. Neither opinion is particularly compelling.

The *Faretta* court had a choice. No prior case had held that the Sixth Amendment guaranteed a right to self-representation. The most straightforward choice for the Court would have been to recognize that the framers had gotten it right: the right to self-representation was a default procedural right protected by federal statute but it was not a fundamental, constitutional right within the text or context of the Sixth Amendment. This approach would have upheld the California initiative as a product of the *Powell-Gideon* right-to-counsel case line. It would have permitted the states to review their own commitment to a right to self-representation in an era when the Supreme Court had already ruled, contrary to both the text and associated practice of the federal constitution and statutes, that the demands of the modern adversarial trial require that the states assign counsel to all defendants in all serious cases.⁸⁴ The same historical analysis of the evolving demands of the adversarial trial system that led to the requirement that the states ensure counsel in all circumstances demonstrates the folly of self-representation in virtually all circumstances.⁸⁵ The Court could have

82. *Faretta v. California*, 422 U.S. 806, 807 (1975).

83. *People v. Faretta*, 415 U.S. 975 (1974).

84. This claim for individual state "autonomy" was directly presented to and rejected by the Supreme Court in an amicus brief. See Brief of Ohio and 18 Other States as *Amici Curiae* in Support of Petitioner, *Indiana v. Edwards*, 128 S.Ct. 2379 (2008) (No. 07-208).

85. "The notion that criminal defense was a suitable do-it-yourself activity developed at a time when the whole of the criminal trial was expected to transpire as a lawyer-free contest of amateurs." LANGBEIN, *supra* note 7, at 11.

used *Faretta* to reinforce the preeminent command of *Gideon* to require all states to provide all defendants with access to a defense bar that is capable of effective representation.

However, the *Faretta* court opted for another choice which appeared to assume that the due process-incorporation movement required strict guardianship by the Supreme Court of any right that might reasonably be attributed to the framers. A right of self-representation, while fundamentally at odds with the *Gideon* court's recognition of the need for a defense counsel's "guiding hand," was such a right. Furthermore, the practice of self-representation had up to that point generated virtually no concern or controversy within the federal system, thereby giving it the appearance of a relatively inconsequential burden to impose upon the states.⁸⁶

The Court relied almost entirely upon the "nearly universal conviction"⁸⁷ for such a right found in the original, and unmodified, statutes and state constitutions which consistently paired a right to counsel with a right to represent oneself. The opinion treated the two rights as being joined as equals and made no attempt to analyze their normative status independently. The Court grounded this co-equal treatment upon an historical analysis that was, as described above, misleading with regard to the purported "fervent insistence" of the colonists upon an independent right to self-representation. Yet the Court relied upon this analysis to conclude that the right, although not included on the express list of rights of the accused in the Sixth Amendment, was nonetheless "necessarily implied"⁸⁸ in that amendment.

It is one thing to find an implied right in the Constitution located either within an expanded reading of the text itself⁸⁹ or within the interstitial penumbras of the various textual provisions.⁹⁰ But it is more troublesome to find an implied right when the opposite counterpart to that putative right is exclusively specified within the text. The Supreme Court had earlier confronted this circumstance with regard to another

86. "Presumably the occasions are rare when a defendant will plead not guilty and then waive counsel. The paucity of cases where a defendant has done so suggests that since the case of *Johnson v. Zerbst* [304 U.S. 458 (1938)] defendants will accept the appointment of counsel." BEANEY, *supra* note 7, at 59.

87. *Faretta*, 422 U.S. at 817.

88. *Id.* at 819.

89. See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel").

90. See *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (recognizing a right of association within the penumbra of the First Amendment, despite that "[t]he association of people is not mentioned in the Constitution nor in the Bill of Rights.").

provision of the Sixth Amendment: the right to be tried "by an impartial jury."⁹¹ In *Singer v. United States*,⁹² the defendant had claimed the right to be tried without a jury following his knowing and voluntary waiver of his right to be tried by jury. The Court denied his claim and recognized that the waiver of a right is not itself a right. It is a privilege that may or may not be granted depending upon particularized criteria.⁹³ The *Faretta* Court dismissed this juxtaposition of right-versus-privilege in a footnote, noting only that the *Singer* Court had recognized "that an implied right must arise independently from the design and history of the constitutional text."⁹⁴

Three justices joined in two vigorous dissents⁹⁵ which appeared to prompt a number of concessions in the opinion for the Court. Justice Stewart acknowledged at the outset that the case presented "not an easy question"⁹⁶ and later confronted the nearly universal conviction in the Court's then-recent case law that the guiding hand of counsel is essential to a fair trial:

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

91. U.S. CONST. amend. VI.

92. 380 U.S. 24 (1965).

93. A similar circumstance developed with regard to the criminal defendant's right to testify under oath at his own trial. Until the latter half of the nineteenth century, the common law rule was that the defendant was incompetent to testify. The defendant was, however, commonly provided with a right to make an unsworn statement. But when the defendant did finally gain the right to testify, he did not retain a residual right to provide an unsworn statement. See *Ferguson v. Georgia*, 365 U.S. 570 (1961).

94. *Faretta v. California*, 422 U.S. 806, 820 n.15 (1975).

95. Justices Burger and Blackmun dissented separately. Each joined the other's dissent and each was joined by Justice Rehnquist. Justice Blackmun's dissent concluded with the memorable observation that "the Court by its opinion today now bestows a constitutional right on one to make a fool of himself." *Id.* at 852 (Blackmun, J., dissenting).

96. *Id.* at 807 (majority opinion).

that a State may constitutionally impose a lawyer upon even an unwilling defendant.⁹⁷

Strong, but apparently not strong enough. The Court then made a modest attempt to support its historically determined analysis with a policy analysis of the right to self-representation. The right was said to be grounded in the “inestimable worth of free choice”⁹⁸ recognized by the Founders. After conceding that the right would actually benefit the accused only “in some rare instances”⁹⁹ which the Court did not identify, the opinion maintained that the inestimable worth of the right required that the typical *pro se* defendant be made to bear the consequences of his foolish choice.¹⁰⁰ In other words, the Court argued that the Constitution guarantees individuals the opportunity to cause probable and unnecessary harm to themselves at trial and then forces them to abide the foolish consequences of their ill-advised decision.

Faretta’s almost complete reliance on its flawed historical analysis to determine the existence of a right to self-representation allowed it to virtually ignore any need to provide a normative account in support of the right. The Court made only passing references to “that respect for the individual which is the lifeblood of the law” and “the inestimable worth of free choice.” These bland rhetorical references would subsequently be interpreted by the Court as explaining that the right to self-representation “exists to affirm the dignity and autonomy of the accused.”¹⁰¹ The philosophical principle of autonomy has become a powerful, if often ill-used, reference to support a broad array of restraints upon the state.¹⁰²

The modern concept of autonomy is a mercurial construct, difficult to isolate or pin down. It has become something of a catch-all reference, sometimes loosely applied, to identify a broad libertarian commitment to permitting individuals to control those decisions that have a recognized (or at least arguable) normative value to the essential conditions of individual self-identity. But it is important to note that it is

97. *Id.* at 832–33.

98. *Id.* at 833–34.

99. *Id.* at 834.

100. *Id.* (“And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’”) (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

101. *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984).

102. “As autonomy has played an increasingly important role in modern moral and political philosophy, so has it become central to the Supreme Court’s constitutional jurisprudence.” Toone, *supra* note 72, at 651.

a normative concept that is itself normatively circumscribed. Autonomy as used in the modern legal context is not a radical libertarian concept that posits an existential freedom to be free from all state regulation or restriction over any choices/decisions thought to have a bearing on self-identity. The choice at issue must itself obtain prior recognition as one that is legitimately inscribed with normative value. Autonomy itself does not inscribe all life choices with such normative value. The Supreme Court itself has acknowledged this limiting provision: "That many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate and personal decisions are so protected."¹⁰³

Examples of state control over intimate life choices are ubiquitous. No one in a modern society could reasonably raise the banner of autonomy to claim, for example, a right to self-operate in a public hospital. This is simply not recognized as a legitimate choice. The same is true in most jurisdictions with regard to the self-installation of an electric service panel by an unlicensed individual in his own home. The fact that it is only the handy homeowner who may be electrocuted in the process does not render it a legitimate choice implicating the norm of autonomy. Perhaps the most telling recent example of the distinction between the general norm of autonomy and the particular normative value of the choice at issue is expressed in the modern recognition of the legitimacy of same-sex intimacy. Broad notions of sexual or bodily autonomy have been used over the years to support a right to various forms of sexual activity.¹⁰⁴ But the principle of autonomous free choice had not been extended to same-sex intimacy until that very sexual activity itself was recently recognized as a legitimate life choice in *Lawrence v. Texas*.¹⁰⁵

The essential question regarding the *Faretta* reliance upon the principle of autonomy is therefore: what are the fundamental, normative values associated with an individual's choice to represent himself at trial? Quite frankly, there are none. One searches in vain, in either the case law or the academic literature, to uncover any identification or

103. *Washington v. Glucksberg*, 521 US 702, 727 (1997) (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973)).

104. The seminal case is *Griswold v. Connecticut*, 381 U.S. 479 (1965).

105. 539 U.S. 558, 578 (2003). For an excellent account of the evolving recognition of autonomy as applied to homosexual intimacy, see NICHOLAS C. BAMFORTH & DAVID A. J. RICHARDS, *PATRIARCHAL RELIGION, SEXUALITY AND GENDER: A CRITIQUE OF NEW NATURAL LAW* 211-27 (Cambridge 2008).

SELF-REPRESENTATION

explication of the positive values associated with an individual having the freedom to pursue such a course. The Supreme Court's Sixth Amendment case law, beginning with the iconic passage by Justice Sutherland in *Powell*,¹⁰⁶ describes in detailed and compelling terms the values inherent in a right to counsel. Similar normative accounts have accompanied the touchstone cases regarding the recognition or expansion of other rights of the accused. But neither *Faretta* nor the subsequent self-representation cases have ever provided a meaningful account of what is to be positively gained or secured by recognizing such a right, apart from vacuous references to the value of "free choice." Indeed, to the contrary, *Faretta* expressly recognizes the almost certain harmfulness and futility of recognizing a freedom to make such a choice.

The concept of autonomy is contextual. It refers only to choices that are deemed legitimate at the time of their making. "The concept of autonomy has come to play a vibrant and resilient role in the Court's greater constitutional jurisprudence, but as used in *Faretta* and its progeny, it is an illusion."¹⁰⁷ And, as we shall see in Part IV, the recognition of such a right of autonomy in the structural context of a modern international court or tribunal is even more illusory. The vacuous, indeed suspect, rationale for recognizing self-representation as libertarian self-infliction is reminiscent of the early common law rationalizations for the no-counsel rule.¹⁰⁸ The irony and inadequacy of the Court's anachronistic analysis of the right was contained in its own pithy summary of its holding: "In short, the Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it."¹⁰⁹ This of course referred to what we knew about the making of a defense at trial as of 1975, forty-three years after *Powell* and thirteen years after *Gideon*.

III. THE MANY HARMFUL ERRORS OF *FARETTA*

There is virtually nothing positive to report regarding the post-*Faretta* experience with self-representation. There have been no redeeming

106. *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

107. Toone, *supra* note 72, at 655.

108. "Thus, from the outset, the Court's announcement of the right of an accused to proceed *pro se* in a criminal proceeding was not free from skepticism about its legal foundation, moral legitimacy and practical consequences." John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years after Faretta*, 6 SETON HALL CONST. L.J. 483, 496 (1996).

109. *Faretta v. California*, 422 U.S. 806, 818 (1975).

stories of the triumph of a simple, old-fashioned justice; no realizations of any strategic benefit or advantage to a particularized set of defendants; no recognition of self-representation providing a check or restraint on the modern machinery of prosecution; no engaging or edifying political encounters between the individual accused and his state accusers; no reassuring expressions of pride in a system so versatile and accommodating that it can ensure just results even when challenged by a diverse cohort of individualistic contrarians; basically, no gains in any quarter.

The Supreme Court callously rationalized the unlikely benefits of recognizing a right of self-representation by positing that it was the defendant himself, the bearer of the right, who would bear the harmful consequences of its invocation. The Court's *caveat emptor* philosophy would excuse the state for the almost certain and substantial costs to be imposed on the defendant.¹¹⁰ But *Faretta* has caused real harm that has been distributed on a broad and indiscriminate basis. It has presented the courts with a constitutional commandment so unforgiving that they have been forced to struggle endlessly, and fruitlessly, to contain the damage. This Part will briefly summarize the already well-documented doctrinal morass of *Faretta* and then focus more directly upon providing a broad portrait of the real and intolerable harms that arise from that legal abyss. It will do this by highlighting for each of the various harms one or two of the more prominent self-representation cases, all of which tend to speak their harm quite well for themselves.

The *Faretta* Court was not unaware of the dangers its decision might cause; the dissenters provided a prescient list.¹¹¹ But the only danger the Court chose to address directly, albeit in a footnote, was the threat to the orderly proceeding of the trial itself. At the conclusion of a paragraph explaining how the principle of the autonomy, or "free choice," of the accused was supported by the fact that it was he who "will bear the personal consequences of a conviction,"¹¹² the Court entered a footnote to explain that certain consequences, *to the court itself*, would not be tolerated. The footnote recognized the possibility of a *pro se* defendant engaging in "deliberate disruption" and authorized trial courts to appoint "standby" counsel who would stand in whenever the

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

111. *Id.* at 838-39 (Burger, J., dissenting) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

112. *Id.* at 834 (majority opinion).

trial proceeding was threatened.¹¹³ The practice of appointing such standby counsel became almost immediately ubiquitous¹¹⁴ as well as an irresolvable morass.¹¹⁵

Nothing better portrays the fundamental conflict between the promise of *Gideon* and the guarantee of *Faretta* than the utter failure of the American experience with standby counsel. The initial concept was abundantly hopeful. The standby attorney was to be "seen but not heard"¹¹⁶; a lawyer-in-waiting precluded from prepping the case but who could nonetheless step in mid-performance and take over the leading role without hitch or conflict; a passive, unassertive assistant to the commands of the defendant who had already refused her as an advocate and who retained the power of refusal over all the attorney's professional advice and services. But the inherent conflicts presented by standby counsel surfaced immediately in the case law. When the trial court appointed standby counsel over the defendant's objection, the defendant would claim a denial of his *Faretta* right to unfettered self-representation.¹¹⁷ When the court did not appoint standby counsel, the defendant would claim an abuse of discretion by the trial court.¹¹⁸ When standby counsel became active in the trial, typically at the request of the defendant, the defendant would later claim that counsel had become too active in violation of his *Faretta* right.¹¹⁹ When standby counsel remained passive throughout the trial, the defendant would claim a denial of his right to standby assistance.¹²⁰ When the defendant permitted some trial involvement of standby counsel, some courts treated this as a waiver of his *Faretta* right,¹²¹ suggesting a

113. *Id.* at 834 n.46.

114. See THE BENCHBOOK FOR UNITED STATES DISTRICT JUDGES, § 1.02 (4th ed. 1996) ("It is probably advisable to appoint standby counsel . . .").

115. See, e.g., Decker, *supra* n. 108; Ann Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676 (2000); Marie Higgins Williams, *The Pro se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789 (2000); Joshua L. Howard, *Hybrid Representation and Standby Counsel: Let's Clear the Air for the Attorneys of South Carolina*, 52 S.C. L. REV. 851 (2001).

116. Wiggins v. Estelle, 681 F.2d 266, 273 (5th Cir. 1982), *rev'd sub nom.* McKaskle v. Wiggins, 465 U.S. 168, 173 (1984).

117. See, e.g., McKaskle, 465 U.S. at 173.

118. See, e.g., United States v. LaChance, 817 F.2d 1491, 1498 (11th Cir. 1987); McQueen v. Blackburn, 755 F.2d 1174, 1176 (5th Cir. 1985); Locks v. Summer, 703 F.2d 403, 404 (9th Cir. 1983).

119. See, e.g., United States v. Dyman, 739 F.2d 762, 771 (2d Cir. 1984); United States v. Heine, 920 F.2d 552, 553 (8th Cir. 1990).

120. See, e.g., Molino v. DuBois, 848 F. Supp. 11, 12 (D. Mass. 1994).

121. See, e.g., Smith v. State, 588 A.2d 305, 306 (Me. 1991).

bait-and-switch cynicism behind the practice. Twenty-five years later one scholar noted that "[t]he role of standby counsel . . . has never been clearly defined. An appointment as standby counsel casts an attorney into an uncomfortable twilight zone of the law."¹²²

The Supreme Court's sole foray into the minefields of standby counsel occurred in the 1984 case of *McKaskle v. Wiggins*.¹²³ The decision failed to provide order, or even direction, for trial courts confronted with the protean disorders of the typical *pro se* proceeding.¹²⁴ In an extended yet remarkably irresolute opinion by Justice O'Connor the Court attempted to both reaffirm the high-mindedness of *Faretta* and likewise acknowledge the utter lack of profit in the cases: "[t]he right to appear *pro se* exists to affirm the dignity and autonomy of the accused and to allow the presentation of what may, *at least occasionally*, be the accused's best possible defense."¹²⁵ The transparent cynicism of *McKaskle* merely reflected, but did not alleviate, the rampant cynicism that had developed around an unmediated right that had produced nothing but wrong.¹²⁶

The most critical, and ultimately most harmful, doctrinal development occurred with the Supreme Court's 1993 ruling in *Godinez v. Moran*.¹²⁷ In *Faretta*, the Court had created a right that assumed that a non-lawyer charged with a crime was competent to assume the role of trial litigator as to matters of both fact and law. This assumption was proven false in the early self-representation cases. The principal question that roiled the lower courts for almost twenty years was what minimal level of functional competence, *if any*, was required of a defendant who elected to proceed *pro se*.¹²⁸ The *Godinez* court declared that a *pro se* defendant need only be sufficiently competent to proceed

122. Poulin, *supra* note 115, at 676.

123. 465 U.S. 168 (1984).

124. "Despite minimal guidance from the Supreme Court, appellate courts still struggle to reconcile the competing interests of the unskilled *pro se* defendant, who seeks to fully exploit his *Faretta* rights, with the interests of the trial court, seeking the orderly and efficient administration of justice." Decker, *supra* note 108, at 524-5.

125. *McKaskle v. Wiggins*, 465 U.S. 168, 176 (1984) (emphasis added).

126. *See, e.g.*, *United States v. McDowell*, 814 F.2d. 245, 251 (6th Cir. 1987) (circuit court disposed of the appellant's fair trial claim with the observation that "[t]he only thing that was 'unfair' about McDowell's trial was that he did not represent himself very well.").

127. 509 U.S. 389 (1993).

128. "Godinez resolved two decades of a considerable disagreement among circuit courts." Decker, *supra* note 108, at 518-19.

to trial.¹²⁹ In other words, defendants who were actually mentally incompetent to represent themselves could be found legally competent to do so. The Court therefore upheld the conviction of a *pro se* defendant who had been indicted on three counts of capital murder. He was examined by several psychiatrists and found competent to stand trial. He then dismissed his assigned counsel in order "to prevent the presentation of mitigating evidence at his sentencing."¹³⁰ He pleaded guilty and was sentenced to death.

The Court's Orwellian holding presented the issue of election in inverse terms: the issue was not the competency to proceed *pro se* but the competency to waive the alternative. The single, all-purpose competency standard the Court relied upon derived from the 1960 two-paragraph opinion in *Dusky v. U.S.*,¹³¹ a notoriously low standard. A defendant may be seriously mentally ill yet still be found competent to proceed to trial. *Dusky's* two-prong, counsel-based standard requires merely that the defendant have a "rational . . . understanding of the proceedings" plus the ability "to consult with his lawyer with a reasonable degree of rational understanding."¹³² *Dusky's* minimalist standard is itself premised upon the presumption that the marginal defendant will be represented by counsel. The *Dusky* standard thus fails of its own accord when a mentally suspect defendant is not represented by counsel.

Godinez created an all-or-nothing conundrum for trial courts confronted by a mentally troubled defendant who insists upon appearing *pro se*. If the trial court believes that the defendant appearing before it is not competent to provide a plausible defense at trial, either the court has to find the defendant not competent to be tried at all or it has to permit him to self-represent. A defendant who self-represents is not required to, and typically does not, present a defense based upon his own mental shortcomings. Therefore a trial court that permits the mentally compromised defendant to self-represent realizes that the jury will not be presented with any exculpatory or mitigating evidence of the defendant's mental state. "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

129. "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Godinez*, 509 U.S. at 399.

130. *Id.* at 392.

131. 362 U.S. 402 (1960).

132. *Id.* at 402.

mental illness.”¹³³

The Supreme Court in *Indiana v. Edwards*¹³⁴ has recently attempted to step back from its unforgiving opinion in *Godinez*, which insisted upon a singular “unified theory” approach to competency. The Court did so in order to “alleviate those fair trial concerns”¹³⁵ of the lower courts. Under *Edwards*, some defendants who suffer from “severe mental illness” yet are still *Dusky*-competent—loosely referred to in the opinion as “gray-area defendants”—may be denied the right to proceed *pro se*.¹³⁶ The State of Indiana had petitioned the Court to overrule *Faretta* in order to enable the “autonomy” of the states to maintain a criminal justice system committed to “actual justice” as well as to end the “romantic illusion that proceeding *pro se* may provide a better chance at a favorable result.”¹³⁷ Despite amicus briefs from eleven other states in support of Indiana’s petition,¹³⁸ the Supreme Court “decline[d] to do so.” The Court also upheld the holding in *Godinez*, meaning that a seriously mentally ill “gray-area” defendant is still deemed competent to waive counsel, plead guilty and be sentenced to death—without ever presenting a defense to the charges. While the opinion in *Edwards* provides the states with some escape from the rigid grasp of *Faretta*, it will also almost necessarily produce another nightmarish struggle for the lower courts to conduct expert-driven “*Edwards* hearings” to determine who qualifies as a “gray-area” defendant and what measures will establish the minimal level of cognitive and performative competency required of such mentally ill individuals in order to proceed *pro se*.

The *Faretta* doctrine has proven costly enough but it is the actual product, the cases themselves, that reveals the real and relentless harms of *pro se* representation.

133. Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self-Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 164 (2000).

134. 128 S. Ct. 2379 (2008).

135. *Id.* at 2388.

136. The defendant in *Edwards* had been diagnosed with a severe mental illness that rendered him *Dusky*-incompetent for approximately six years before being found fit to proceed. *Id.* at 2385.

137. Brief for Petitioner at 60, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208).

138. Brief of Ohio, Alaska, et al. as Amici Curiae Supporting Petitioners, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008) (No. 07-208).

SELF-REPRESENTATION

A. Harm to the Defendant

Colin Ferguson shot and killed six passengers and wounded nineteen others on a Long Island Rail Road commuter train in December of 1993. There was no apparent motive for the shootings. He pulled out a gun and began pacing up and down the aisle of the car, "firing methodically, reloading when he ran out of bullets,"¹³⁹ until he was subdued by several of the other passengers. Ferguson, a black man, claimed "a mysterious 'white Caucasian' gunman committed the massacre."¹⁴⁰ Two lawyers who volunteered to represent him claimed that he was temporarily overcome as the victim of "black rage" in a racist society.¹⁴¹ The trial court held a competency hearing at which psychiatrists testified that Ferguson suffered from a mental illness that rendered him delusional and paranoid and caused him to react violently to his imagined persecutors.¹⁴² The court nonetheless found Ferguson competent to stand trial and therefore competent to represent himself.¹⁴³

Ferguson dismissed the two lawyers who had volunteered to represent him and proceeded to represent himself at trial. He presented a defense of misidentification despite the fact that fifteen witnesses identified him as the shooter on their train. He referred to himself in the third person before the jury and at times appeared in court wearing a bulletproof vest. In his opening statement to the jury he explained that he was charged with 93 counts in the indictment "only because it matches the year 1993."¹⁴⁴ He also claimed that the CIA had planted a computer chip in his brain.¹⁴⁵ Ferguson did not present any evidence of his mental condition. At the close of his rather bizarre trial, he spoke to the jury for several hours detailing the various conspiracies against him, after which the jury convicted him of six counts of murder and

139. Paul Vitiello, *In a Different World*, N.Y. NEWSDAY, Jan. 27, 1995, at A05.

140. 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).

141. Andrew Smith, *DA Seeks Gag Order on Ferguson Lawyers*, N.Y. NEWSDAY, Apr. 2, 1994, at 11.

142. John T. McQuiston, *Ferguson's Insanity Defense Angers Victims and His Lawyers*, N.Y. TIMES, Jan. 8, 1995, § 13, at 1.

143. See *People v. Ferguson*, 670 N.Y.S. 2d 327, 328 (1998) (affirming finding of competency).

144. Stanley S. Arkin & Katherine E. Hargrove, *Justice Mocked When Madman Defends Himself*, L.A. TIMES, Feb. 12, 1995, at M1.

145. Larry McShane, *Ferguson's Trial Antics May Set Stage for Appeal*, CHI. SUN-TIMES, Feb. 19, 1995, at 3.

nineteen counts of attempted murder.¹⁴⁶ The trial court, describing Ferguson as a "selfish, self-righteous coward," sentenced him to six consecutive life sentences.¹⁴⁷

One of the more remarkable American experiences with a *pro se* defendant concerned the case of Zacarias Moussaoui, a French citizen residing in America, who was arrested in August of 2001, on immigration charges and remained in jail at the time of the World Trade Center bombing on September 11. In December of that year he was indicted on capital charges of being a member of the 9/11 conspiracy as the alleged "twentieth hijacker."¹⁴⁸ Moussaoui proclaimed himself to be a member of Al Qaeda and a devoted follower of Osama Bin Laden but he denied that he was an actual member of the 9/11 conspiracy. Whether this was true or not, many believed that it would have been very difficult for the government to have proven its case at trial.¹⁴⁹

Moussaoui was arraigned before District Court Judge Leonie Brinkema in the Eastern District of Virginia. She appointed a team of lawyers from the local Federal Public Defenders Office to represent Moussaoui. He refused to cooperate with these attorneys and in April 2002, filed a motion to dismiss the attorneys and appear *pro se*. Judge Brinkema found him competent and granted his motion. The judge simultaneously also appointed the same attorneys to serve as standby counsel despite the lead attorney's unanswerable query: "He believes I'm trying to kill him. Why would you require him to have anything at

146. *Ferguson*, 670 N.Y.S. 2d at 327.

147. "The result in the Ferguson case illustrates the unfortunate disgrace caused by the Supreme Court's holding in *Faretta*." Decker, *supra* note 108 at 523. See also Richard J. Bonnie, *Ferguson Spectacle Demeaned System*, NAT'L. L.J., Mar. 13, 1995, at A23; George P. Fletcher, *Colin Ferguson's Client is a Fool*, N.Y. NEWSDAY, Dec. 20, 1994, at A32.

148. The 9/11 conspiracy involved four hijacked airplanes, each of which was commandeered by five hijackers except for one of the planes which had only four hijackers.

149. "Moussaoui was certainly connected to Al Qaeda, but his real value to the United States may have been as a witness and not as a stand-in for the dead hijackers, who are beyond punishment Moussaoui's arrest, one former C.I.A. official told me, 'was totally circumstantial. They cast a wide net and the guy happened to be a little fish who got caught up in it. They know it now. And nobody will back off,'" Seymour M. Hersh, *The Twentieth Man: Has the Justice Department Mishandled the Case Against Zacarias Moussaoui?*, THE NEW YORKER, Sept. 30, 2002, at 56. "Some U.S. officials remain doubtful about how much useful information Moussaoui has. One official familiar with the investigation said he doubted Moussaoui was involved in the planning for Sept. 11 because he was 'a late addition' to the plot." Tom Jackman & Walter Pincus, *U.S. Considers Talking to Moussaoui*, WASH. POST, July 20, 2002, at A12. See also Jonathan Turley, *The Case Against Moussaoui is Far From a Lead-Pipe Cinch*, L.A. TIMES, Dec. 30, 2001, at M5.

all to do with me?"¹⁵⁰ Moussaoui then began a long series of vitriolic *pro se* motions¹⁵¹ and courtroom disruptions¹⁵² directed at both his standby counsel and the trial judge. In November 2003, Judge Brinkema revoked his right to self-represent and reappointed the standby counsel but Moussaoui continued to reject their representation and accused the judge and his appointed counsel of engaging in a conspiracy to cause his death. One of the more absurd conflicts this situation produced occurred when the government was required to disclose certain critical classified information to the defense. Since Moussaoui did not have a security clearance, he—the lawyer on the case—was not allowed to view it. Only his counsel, whether appointed or standby, was permitted to view the material, but Moussaoui consistently exercised his right to refuse to collaborate with them.

In April, 2005, after several years of protracted conflict and without any cooperation or consideration, Moussaoui abruptly pleaded guilty to the capital indictment. A jury decided against imposing the death penalty. He was then sentenced to life in prison without the possibility of parole. The government case in this extraordinary prosecution was therefore never challenged or even revealed and Moussaoui himself terminated the proceedings without ever actually conceding that he was indeed the twentieth hijacker. Moussaoui's trial, the only prosecution of an alleged participant in the World Trade Center bombing, produced only an extended high-profile spectacle that made no contribution to either the historical record or individual justice.

To be sure, it is not unheard of for a *pro se* defendant to plead guilty to a capital offense and even to be sentenced to death without interposing a challenge to the prosecution's case.¹⁵³ This extraordinary breakdown of judicial responsibility is supported by the *caveat emptor* principle of *Faretta*: the defendant must bear the full risk and burden of his freedom to choose. The Supreme Court made this clear in a case decided several years after *Faretta*. In *Lenhard v. Wolff* the defendant

150. Eunice Moscoso, *Terror Suspect "Competent," Prosecutor Says*, THE ATLANTA JOURNAL-CONST., June 8, 2002, at 10A.

151. Among the many *pro se* motions were the following: Motion by Moussaoui to Stop Undermining My Constitutional Right to Represent Myself, U.S. v. Moussaoui, No. 01-455-A, Docket No. 211 (E.D. Va. June 24, 2002), available at <http://notablecases.vaed.uscourts.gov/1:01-cr-00455/DocketSheet2.html>; Motion by Moussaoui To Prevent Standby Counsel from Sitting at Defense Table, *id.*; Motion to Stop Leonie Brinkema DJ Playing Game with My Life, *id.*

152. See, e.g., Jerry Markon, *Judge Bars Moussaoui From Jury Selection: Interjections Again Prompt Court Removal*, WASH. POST, Feb. 15, 2006, at A09.

153. Toone, *supra* note 72, at 630 (referring to this as occurring "with surprising frequency"); see also Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (2001).

shot and killed someone who intervened in an attempt to prevent him from robbing a Las Vegas casino.¹⁵⁴ The defendant was charged with capital murder. At his initial arraignment on the charges, he informed the court that he wished to proceed *pro se* and to plead guilty. He did exactly that and, at his penalty hearing, he offered no evidence in mitigation and also prohibited his standby counsel from doing so. He was then sentenced to death. The Nevada Supreme Court upheld the conviction and sentence over a strong dissent that referred to the proceeding as a "state-sanctioned suicide."¹⁵⁵ The Supreme Court subsequently denied without opinion the application for a stay of execution.¹⁵⁶

Ferguson and Moussaoui are examples of the two most common types of *pro se* defendant: the mentally compromised and the egocentric grandee (indeed, perhaps the most common *pro se* defendant is a combination of the two). The experience of these two cases and the many others that they represent raises serious questions about self-representation. How is it possible in a contemporary legal setting to imagine a circumstance in which a *pro se* defendant would *not* be *legally* harmed by his self-representation? Is it truly appropriate for any mature legal system, in the name of an airy concept of "autonomy," to permit someone to self-inflict serious legal harm in return for some self-imagined exogenous benefit? Guilt alone does not establish a just and proper conviction.¹⁵⁷

B. *Harm to Victims and Witnesses*

Dean Schwartzmiller, a 65 year-old plasterer, was charged in California with molesting two eleven-year-old boys over a period of several years. Schwartzmiller had been previously convicted on four occasions of sex offenses with minors in several western states. Upon his arrest, his home was searched and the police discovered an extraordinary 456-page manuscript of log entries that catalogued his sex with young boys

154. 444 U.S. 807 (1979).

155. *Id.* at 808–09 n.1.

156. *Id.* The Supreme Court was later to expressly affirm a conviction under similar circumstances in *Godinez v. Moran*, 509 U.S. 389 (1993).

157. "There are clear detriments when defendants who, by most accounts, should not represent themselves because of their mental or intellectual incapacities, are allowed to proceed *pro se* regardless. The defendants in these cases are often sent to jail for long periods of time or even put to death, while society's faith in the fairness of our judicial system is greatly undermined by a feeling that these sentences are unjust given the circumstances." Sarah Livingston Allen, *Faretta: Self-Representation or Legal-Misrepresentation*, 90 IOWA L. REV. 1553, 1556–57 (2005).

SELF-REPRESENTATION

over four decades.¹⁵⁸ The prosecution alleged that he had sexually abused some 250 boys over the previous 35 years. Schwartzmiller exercised his right to represent himself at trial where the two boys and six former victims, now 20 to 50 years old, testified against him. He cross-examined each of those witnesses at length in “excruciating detail”¹⁵⁹ before the jury. He asked if the witnesses remembered kissing him and if they enjoyed the sex.¹⁶⁰ His encounters with the witnesses appeared to cause agony with both the witnesses and the jurors who were forced to observe.¹⁶¹ In his summation to the jury, he read long accounts of the graphic sex reported by his victims. The jury ultimately convicted him on all counts and he was sentenced to 152 years to life.¹⁶²

Susan Polk, 48, stabbed her seventy-year-old husband 27 times with a paring knife during the middle of a bitter divorce.¹⁶³ She admitted the stabbing but claimed it was performed in self-defense and that her husband died of a heart attack in any event. After firing two sets of private attorneys, she elected to represent herself.¹⁶⁴ Her extraordinary four-month trial seemed drafted for reality TV. Two of her three sons testified against her and the third, who testified on her behalf, was himself tried and convicted during his mother’s trial of beating his ex-girlfriend in the same home where his father was killed.¹⁶⁵ The first witness for the prosecution was her youngest son, who testified that Polk was delusional and manipulative and that she had discussed for years her desire to kill her husband. Polk then cross-examined her son for four days regarding what the judge described as irrelevant family

158. John Cote, *Serial Abuse Suspect Guilty*, S.F. CHRON., Sept. 19, 2006, at A1.

159. Carolyn Marshall, *Serial Child Molester Receives Maximum Term in California*, N.Y. TIMES, Jan. 30, 2007, at A17 (quoting the prosecutor, Steven Fein).

160. Cote, *supra* note 158.

161. “One woman on the jury grimaced as Schwartzmiller continued his sexually explicit questioning while the witness struggled to maintain his composure, frequently sipping water from a paper cup and staring at the back wall of the courtroom.” Rodney Foo, *Pedophile Defends Himself*, SAN JOSE MERCURY NEWS, Aug. 29, 2006, at B1.

162. Marshall, *supra* note 159.

163. The case is unreported but CourtTV has compiled a series of reports. See CourtTV, *Susan Polk Murder Trial: Housewife Stabs Husband*, <http://www.court tv.com/trials/polk> (last visited Feb. 10, 2008).

164. John Springer, *Woman Whose Lawyer’s Wife was Murdered Wants to Defend Herself*, COURT TV, Jan. 17, 2006, http://www.court tv.com/trials/polk/011306_ctv.html (last visited Mar. 7, 2009).

165. Lisa Sweetingham, *After Days of Rare Calm, Murder Defendant Begins to Create Stir Again*, COURT TV, Mar. 25, 2006, http://www.court tv.com/trials/polk/052506_ctv.html (last visited Mar. 7, 2009).

history and “minutiae” which did not concern the actual homicide.¹⁶⁶ As the cross-examination wore on, the judge observed that: “I believe that this cross-examination is bordering on the abusive”¹⁶⁷ and “If you were an attorney, I would have imposed sanctions by now.”¹⁶⁸ The jurors expressed their own discomfort with the defendant’s exhibition.¹⁶⁹ The trial continued in this manner for months.¹⁷⁰ During the prosecutor’s cross-examination of the son who testified in her behalf, she made 30 personalized non-legal objections during the first hour.¹⁷¹ At one point, when the trial audience burst out in laughter at one of the defendant’s performances, the judge was forced to reprimand them: “Ladies and gentlemen, this is not for entertainment.”¹⁷²

Polk had promised the jury during her opening statement that the case would be a “nail-biting edge-of-your-seat thriller”¹⁷³ and she attempted to make good on her promise. She called herself to the stand as a witness and then testified in rambling narrative fashion for more than 17 hours without any questions being posed to her. She took the jury through her life story, complete with childhood photos and

166. Lisa Sweetingham, *Accused Killer Susan Polk Focuses on “Minutiae” in Cross-examination of her son*, COURT TV, Mar. 14, 2006, http://www.court tv.com/trials/polk/031306_ctv.html (last visited Mar. 7, 2009).

167. Lisa Sweetingham, *Defending Herself in Murder Trial, Susan Polk Incurs Judge’s Wrath*, COURT TV, Mar. 21, 2006, http://www.court tv.com/trials/polk/032006_ctv.html (last visited Mar. 7, 2009).

168. Lisa Sweetingham, *Susan Polk Accuses Police Witness of Manipulating Her Husband’s Dead Body*, COURT TV, Mar. 23, 2006, http://www.court tv.com/trials/polk/032206-pm_ctv.html (last visited Mar. 7, 2009).

169. *Id.* (“Several jurors have started openly showing their feelings for the defendant. Eye-rolling, quick glances to one another, and barely concealed smirks increased during Polk’s many confrontations with the witness and the prosecutor.”).

170. Lisa Sweetingham, *After Three Tumultuous Months, Closings Expected in Susan Polk’s Murder Trial*, COURT TV, June 9, 2006, http://www.court tv.com/trials/polk/060806_ctv.html (last visited Mar. 7, 2009) (“The thin, gray-haired defendant is a tireless contrarian. Her defiance of the court’s rulings, her acid-tongue accusations against the judge, prosecutor, court personnel and prosecution witnesses, and her obsessive focus on every mischaracterization or potential slight she perceives have caused frustrating delays.”).

171. Lisa Sweetingham, *Susan Polk’s Outbursts Prompt Judge to Suspend Son’s Testimony*, COURT TV, Apr. 28, 2006, http://www.court tv.com/trials/polk/042706-pm_ctv.html (last visited Mar. 7, 2009). Polk’s objections included “Objection! Sarcastic and nasty” and “Objection! Randomly ambiguous and unintelligible.” *Id.*

172. Lisa Sweetingham, *Accused Killer Susan Polk Goes Off-course While Questioning Detective*, COURT TV, Mar. 30, 2006, http://www.court tv.com/trials/polk/032906_ctv.html (last visited Mar. 7, 2009).

173. Lisa Sweetingham, *Susan Polk Launches Defense with Dramatic Opening*, COURT TV, Apr. 26, 2006, http://www.court tv.com/trials/polk/042406_ctv.html (last visited Mar. 7, 2009).

excerpts from her diaries.¹⁷⁴ She told them she had psychic powers and had foreseen the tragedy of 9/11 but was not able to prevent it from happening because her husband was an Israeli spy.¹⁷⁵ On cross-examination by the prosecutor, she admitted that she had revealed in an interview that she thought Winona Ryder might play her in the movie version of her life and that Anthony Hopkins (aka Hannibal Lecter) might play her dead husband.¹⁷⁶ The jury convicted her of second-degree murder and the court sentenced her to the maximum sentence of 16 years to life.¹⁷⁷

These cases illustrate a common feature of *pro se* trials: the defendant becoming an abuser. The defendant as self-advocate in an adversarial proceeding tends to abuse all of the other participants at trial, particularly his victims and accusers. He also becomes an abuser of the system itself. His lack of professional skills renders him incapable, even if willing, to comply with the rules of evidence and procedure. As a non-professional, he is not subject to the standard controls of the court or the embedded culture of the courtroom. Yet he himself has all the status and privileges of an attorney when directly confronting his accusers. This means that the *pro se* trial in the modern era cannot be viewed as a quaint restoration of the early common law “bickering” trial described earlier. This is no longer a level face-to-face encounter; it is now a one-sided bicker with witnesses forced to endure rude and irrelevant—and often endless—questioning as the price for their testimony.

C. Harm to the Attorneys and Judges

Zacarias Moussaoui, the alleged twentieth hijacker, never made it to trial. Yet over the several years of his court proceedings he maintained a steady stream of personal and professional accusations, in written motions and courtroom proceedings, against both his standby attorneys and the trial judge. He was a non-lawyer in remanded custody and therefore was never subject to direct sanction for his behavior. Mous-

174. Lisa Sweetingham, *Accused Killer Susan Polk Takes the Stand in Her Own Defense*, COURT TV, May 18, 2006, http://www.courtstv.com/trials/polk/051706_ctv.html (last visited Mar. 7, 2009).

175. *Id.*

176. Lisa Sweetingham, *Susan Polk Defends Laughter During Television Interview as She Wraps Up Her Testimony*, COURT TV, June 2, 2006, http://www.courtstv.com/trials/polk/060206_pm_ctv.html (last visited Mar. 7, 2009).

177. Lisa Sweetingham, *Susan Polk, Defiant at Sentencing, Gets Maximum Term for Fatally Stabbing Her Husband*, COURT TV, Feb. 26, 2007, http://www.courtstv.com/trials/polk/022307_sentencing_ctv.html (last visited Mar. 7, 2009).

saoui likened the judge to a Nazi, referring to her as a "furor,"¹⁷⁸ and accused her of being in a conspiracy with his attorneys to have him executed.¹⁷⁹ He constantly ridiculed his standby attorneys and refused to permit them to advise him on any matter,¹⁸⁰ reading aloud from the Koran whenever they tried.¹⁸¹ His lead standby attorney stated that it was "almost an Eighth Amendment violation [cruel and unusual punishment] to require us to stay in this case as standby counsel."¹⁸² But the attorneys and judge had no other choice, given that they were dealing with a capital defendant who had a constitutional right to refuse to permit a serious defense to be made.

The lawyer who served as standby counsel at trial for Colin Ferguson, the commuter gunman, endured a typical, yet particularly grueling, experience. The attorney was himself an immigrant who had attended the same high school as Ferguson in Jamaica. He initially joined the defense as trial counsel and cared deeply to present a mitigating defense for Ferguson based upon his obvious mental deficiencies. But when Ferguson elected to proceed *pro se*, his attorney was relegated to advisor-only status and Ferguson refused to permit him an active role at trial. Forced to sit as a passive hospice at trial, he could "only watch in silence from the defense table, where he often slump[ed], clasp[ing] his head as if trying to prevent it from splitting in frustration."¹⁸³ The attorney described himself as "disgusted" with the experience and threatened to walk away on several occasions during the trial.¹⁸⁴ He likened Ferguson's self-representation to "a patient in a doctor's office trying to perform his own spinal cord operation."¹⁸⁵ The attorney also worried about his professional life-after-Ferguson "as indignities pile on top of embarrassments, as his law practice frays, as his hard-earned reputation is splashed with ridicule."¹⁸⁶

The appointment of standby counsel is a cruel, almost abusive,

178. Tom Jackman, *Terror Suspect Allowed to Seek Foreign Aid*, WASH. POST, July 18, 2002, at B02.

179. Moscoso, *supra* note 150.

180. Motion by Moussaoui: *Dunham Mind Your Own Pig Business: Motion to Keep Mad, Out of Control Herd of Blood Sucker, out of Halal, Pure Pro se Land*.

181. Jackman, *supra* note 178.

182. Siobhan Roth, *Frank Dunham's Odyssey: Strange Twists Come with the Territory When You're a Lawyer for the '20th hijacker*, LEGAL TIMES, July 22, 2002, at 8.

183. Jan Hoffman, *Hapless Lawyer, Thankless Job; Colin Ferguson's Adviser Sees Reputation and Practice Suffer*, N.Y. TIMES, Feb. 14, 1995.

184. Evelyn Nieves, *Our Towns: An Anguished Audience in a Theater of the Absurd*, N.Y. TIMES, Jan. 31, 1995.

185. John T. McQuiston, *L.I.R.R. Trial Has Adviser 'Disgusted'*, N.Y. TIMES, Jan. 31, 1995.

186. Hoffman, *supra* note 183.

assignment to limbo. The role contradicts and demeans everything essential to the professional integrity (let alone the autonomy) of the trial lawyer. The standby attorney is forced to play the fool's fool. No matter how professionally abhorrent the scene becomes, the standby counsel is prohibited from intervening unless and until the *pro se* defendant calls for help, at which point, if it occurs, the standby counsel is expected to step in and perform the miracle of rescuing the defendant from his own malpractice. The concept of such a professional standby is nonsense and it demeans the legal profession to pretend otherwise.¹⁸⁷

For the prosecuting attorneys, the experience is different, but not much better. The prosecutor in the case of Susan Polk, the woman who stabbed her husband, had to contend with an adversary who refused to play by the rules and consistently got away with it. The trial judge tolerated the defendant's repeated breaches of the rules. While the defendant was engaged in prolonged and irrelevant cross-examination of her son regarding various family pathologies, the judge only gently admonished her: "[a] lot of time's being spent on minutiae about events that are extremely important to you—again, I'm not trying to tell you how to try your case—but my concern is that [the jury's] attention will be lost for the important things."¹⁸⁸ The prosecutor, therefore, had to conduct a trial in which his adversary continuously interrupted his questioning of witnesses with non-legal objections and yet was permitted to testify herself without any questions being posed and without any apparent application of the rules of evidence. Perversely, the *pro se* adversary often benefits from preferential treatment from both the trial and appellate judges who attempt to minimize the costs to justice extracted by the *pro se* defendant.¹⁸⁹ The Polk prosecu-

187. There has been some attempt in the recent literature to upgrade the role and the practice of the standby attorney and thereby affirm the right to self-representation. The critical premise of these articles is that nationally the provision of effective defense counsel is woefully inadequate, thereby rendering more reasonable the defendant's choice to forego such suspect counsel. While the inadequacy of defense services is indeed a national concern, it hardly seems to support the conclusions that: replacing inadequate counsel with a less adequate non-counsel will mark an improvement; inadequate trial counsel can somehow be made to perform more, rather than less, effectively as standby counsel; eliminating even the possibility of an appeal on ineffective counsel grounds is cost-effective; and encouraging more self-representation is an appropriate policy initiative for the contemporary American criminal justice system. See, e.g., Hashimoto, *supra* note 4; Poulin, *supra* note 115.

188. Sweetingham, *supra* note 166.

189. See Allen, *supra* note 157, at 1558 (analyzing the "circumstantial evidence that the federal courts, in some cases, may be giving preferential treatment to convicted defendants who

tor characterized the proceedings as “absurd” and a “farce” and pleaded with the court for “guidance.”¹⁹⁰ Later he responded to Polk’s staccato objections by slamming the counsel table in unison with each of them, at which point the jury reportedly “froze” and the judge called a recess.¹⁹¹ Things devolved to the point where later in the trial the defendant again accused the prosecutor of engaging in unethical behavior, referred to him as a “moral creep,” and said that he “ought to be working in a third-world dictatorship.” The beleaguered prosecutor could only respond, “[a]ctually, it might be preferable to being here.”¹⁹²

An adversarial proceeding cannot proceed as such when the adversaries are not capable of behaving as such. The system simply implodes. “[T]he *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.”¹⁹³

D. *Harm to the System Itself*

While serving time in state prison, Kashani Farhad managed to commit a federal offense by fraudulently obtaining a number of federal income tax returns.¹⁹⁴ He informed the District Court upon his arraignment that he elected to represent himself because he believed that he could provide a “more effective defense” than his appointed federal defender. Nonetheless, “Farhad’s performance at trial was—as everyone involved except him surely expected—a complete disaster.”¹⁹⁵ Farhad believed that his standby counsel, while seated at the defense table, was compromising his *pro se* right, so the judge directed the attorney to take a seat in the back of the courtroom for the rest of the trial. “Farhad evinced an utter lack of comprehension of the proceedings . . . He had only the sketchiest understanding of the roles played by various people in the courtroom.”¹⁹⁶ He made no objections during

represent themselves at the trial court level.”). See also *Faretta v. California*, 422 U.S. 806, 846 (Burger, C.J., dissenting) (anticipating the development of appellate nullification following non-affirmable *pro se* convictions).

190. Sweetingham, *supra* note 172.

191. Sweetingham, *supra* note 168.

192. Lisa Sweetingham, *The Murder Defendant Isn’t Laughing, but Some Others Are*, COURT TV, May 12, 2006, http://www.court tv.com/trials/polk/051206_ctv.html (last visited Mar. 7, 2009).

193. Sabelli & Leyton, *supra* note 133, at 169.

194. *U.S. v. Farhad*, 190 F.3d 1097 (9th Cir. 1999).

195. *Id.* at 1102.

196. *Id.* at 1104.

SELF-REPRESENTATION

the prosecution's case. He put himself on the stand during the defense case and tried to conduct the direct by posing questions to himself. He also provided the jury with a handwriting exemplar during his direct but the court subsequently had to instruct the jury not to consider the content of the exemplar. Farhad had written: "Farhad is an innocent man."¹⁹⁷ His closing argument to the jury was a "debacle"¹⁹⁸ which ended with a twist. "Farhad wrapped up his summation in style, asking the jury to find him *guilty* by returning 'a true verdict, a just verdict, that the prosecution has proved its allegation.'"¹⁹⁹ The jury did just that.

Farhad was one of the many *pro se* cases that pass under the public radar. It was not a particularly remarkable case and, under *Faretta*, raised almost no serious issues of law. The Sixth Circuit affirmed the conviction in a per curiam opinion.²⁰⁰ The case is noteworthy, however, for the remarkable concurring opinion of Circuit Court Judge Stephen Reinhardt. Reinhardt felt "bound by *Faretta*" to affirm the conviction but concurred separately in order to urge the Supreme Court to reconsider the holding in that case.²⁰¹ His argument was direct and simple: the right to self-representation could not be permitted to trump the more fundamental right to a fair trial:

[T]he Court has never directly addressed the argument of the *Faretta* dissenters that the Sixth Amendment right to self-representation would lead to unfair trials and unjust convictions. By now, it is clear that the dissenters' concerns have been borne out. Farhad's trial illustrates the effect of this conflict, one that the Court now has the opportunity to face squarely. Under *Faretta*, courts have no occasion to assess the consequences of the waiver of the right to counsel on the constitutionality of the trial itself. Nevertheless, on the record, it is quite plain that Farhad, like many criminal defendants who choose to be tried without a lawyer, was convicted in a proceeding so fundamentally flawed that, were it not for *Faretta*, it would undoubtedly offend minimal constitutional standards of fairness.²⁰²

197. *Id.*

198. *Id.*

199. *Id.* at 1105.

200. *Id.*

201. *Id.* at 1101 (Reinhardt, J, concurring).

202. *Id.*

Judge Reinhardt presented an impassioned argument that *Faretta* has failed. He lamented the fact that courts everywhere were forced to participate in these *pro se* travesties of justice—and to do so in the name of the Constitution. “We thus become a judiciary ‘with eyes wide shut’ . . . 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 defense.’”²⁰³ He reiterated the profound and pervasive commitment in the Supreme Court case law that the right to a fair trial is fundamental to all of the other trial-related rights and argued that cases like Farhad were a self-inflicted wound without justification. “It is, thus, not only the defendant, who ‘suffers the consequences’ [from *Faretta*] when a fair trial is denied, but the justice system itself.”²⁰⁴ The Supreme Court did not accept Judge Reinhardt’s invitation to reconsider *Faretta* and denied certiorari.²⁰⁵

International criminal courts and tribunals, following the precedent set at Nuremberg, are dedicated in large part to constructing the authorized record, the historical narrative, of the grave crimes *sub judice*. Given the circumstances typical of such criminality, that goal is sufficiently challenging even with a functioning and competent defense counsel. But the foregoing stories of high profile *pro se* cases demonstrate how self-representation threatens to fatally undermine that goal. In *pro se* cases the primary story, the critical narrative witnessed by the public, becomes the story of the *pro se* proceeding: a spectacle unto itself, often more immediate and compelling than the underlying crimes. The American experience with self-representation is not directly transferable to any other legal system, particularly an international system. The exaggerated consequences in these cases can perhaps best be understood as another unique aspect of the American adventure in exceptionalism. But the American experience is at the very least foreboding and indeed foretelling, as we will see below in examining several of the recent trials of the international tribunals.

IV. THE INTERNATIONAL RIGHT

Given the compromised history and experience of self-representation in the common law system, why would the nascent international system of criminal justice make an informed choice to burden its own

203. *Id.* at 1102.

204. *Id.* at 1107.

205. Farhad v. U.S., 529 U.S. 1023 (2000).

historic mission by adopting such a right for its own courts and tribunals? The best answer, it would appear, is that the international system never made such an informed choice. Self-representation slipped unnoticed through the international door at Nuremberg, where the Charter of the International Military Tribunal included a right to self-represent but not a right to have counsel assigned.²⁰⁶ The right received no notice and was of no consequence since none of the Nazi war criminals elected to represent themselves.²⁰⁷ The right was thereafter incorporated, again without review or consequence, in the seminal document that inaugurated the "rights of the accused" in international criminal proceedings: the International Covenant on Civil and Political Rights (ICCPR).²⁰⁸ The ICCPR rights of the accused then became a standard package of rights that were incorporated wholesale in a broad number of newly established national constitutions and international conventions. Again, the individual right of self-representation typically generated little notice and no critical review. That same package of rights was ultimately incorporated in the rules governing the interim criminal tribunals for Yugoslavia and Rwanda, where the individual right would receive its first consequential review outside the common law system.

But at this critical point of first-impression review, the beleaguered jurists on the international tribunals have found themselves in the same compromised posture as American trial judges in the post-*Faretta* era. They are forced to recognize an outmoded and dysfunctional privilege that was carelessly enshrined in an earlier and much-removed setting as

206. Agreement and Charter, International Conference on Military Trials (London, 1945), Art. 16 (d) *available at* <http://avalon.law.yale.edu/imt/jack60.asp> (stating that a defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of Counsel).

207. Albert Goering apparently intended at the outset to self-represent but reversed himself almost immediately. "There is astonishing newsreel footage of Goering, called upon to plead, marching confidently to the microphone with a sheaf of notes for a political diatribe. Justice Geoffrey Lawrence, presiding, curtly informs him that he must say either "Guilty" or "Not Guilty", whereupon the camera catches the collapse of stout party as Goering obediently drops his notes, meekly denies his guilt, and stumbles back, a broken man, to his place in the dock. To the modern war crimes judge, that clip appears utterly nostalgic, in courts where defendants rant and rage and boycott and generally treat their trial as a continuation of war by other means." Geoffrey Robertson, *General Editor's Introduction to Essays on Fairness and Evidence in War Crimes Trials*, 4 INT'L COMMENTARY ON EVIDENCE 1, at 2 (2006), *available at* <http://www.bepress.com/ice/vol4/iss1/art1>.

208. ICCPR, *supra* n. 13, art. 14 (3) (d) ("In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing").

a near-absolute, and therefore unavoidable, right of both normative and semi-immutable status. As might be expected, the same right that has proven to be dysfunctional in a modern common law system is incompatible within the structural and normative matrix of a contemporary international criminal tribunal. The initial encounters of the temporary international tribunals with the right of self-representation have already proven compromising—in some cases disastrously so—and must not be perpetuated by the first permanent international criminal court, the ICC, if that court is to have any chance of achieving the formidable goals that have been set for it.

A. *The Initial Adoption*

The history of the careless adoption of a right of self-representation in the international arena bears many resemblances to that of its American counterpart. The true right at issue was the right to be represented by counsel; the “right” to self-represent was simply the default, not the commensurate, alternative in a system where accused individuals without resources had no right to state-assigned counsel. The right to counsel and the right to self-represent were never either normative or utilitarian equivalents. The drafters of the American Constitution, as we have seen, did not even include a passing reference to self-representation in the Sixth Amendment.²⁰⁹ In the international context there was never any discussion or reference to an independent or transcendent value to self-representation. As with the American experience, the critical concern was always with expanding and ensuring the right to be represented by professional counsel.

The drafting of the U.N. Charter in 1945 led to the call for the drafting of an international bill of rights, reminiscent of the post-constitutional drafting history of the American Bill of Rights.²¹⁰ The original working draft for such a bill, the so-called Secretariat Outline, contained no mention of a right of self-representation. The first submission of proposals by the United States contained a reference only to the aid of counsel.²¹¹ The discussions that developed around the right of representation centered upon several issues: the right to

209. See *Faretta v. California*, 422 U.S. 806, 819 (1975).

210. DAVID WEISSBRODT, *THE RIGHT TO A FAIR TRIAL UNDER THE UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: BACKGROUND, DEVELOPMENT, AND INTERPRETATIONS* 5 (2001).

211. U.N. Econ. & Soc. [ECOSOC], Commission on Human Rights Second Session, *Proposal For a Human Rights Convention Submitted by the Representative of the United States on The Commission on Human Rights*, U.N. Doc. E/CN.4/37 (Nov. 27, 1947).

assistance of counsel; the right to counsel of one's choosing; the right to assignment of counsel; and the right to notice of the various rights to counsel. There appears to have been no discussion of the right to self-representation.²¹² The first mention of such a right appeared in a proposed amendment submitted by the Philippines which reduced the counsel rights to the right to defend oneself in person or through legal assistance of one's own choosing.²¹³ This proposed amendment was not acted upon as such; however, the language was subsequently included in a joint proposal submitted by five countries, including the United States, which was adopted.²¹⁴ That language is now included in ICCPR Section 14(3)(d): Rights of the Accused. Despite the widespread adoption of this section in subsequent national constitutions and international conventions, prior to its recent activation in the various international criminal tribunals it had been interpreted by leading experts in international law as providing a strictly qualified "complementary" right of the accused to participate in the trial only to the extent that it did not otherwise compromise the integrity of the process.²¹⁵

It was only after this self-representation language entered the ICCPR draft that the drafters finally agreed, after considerable debate, to include a guaranteed, or subsidized, right to counsel.²¹⁶ It is therefore fair to say that the modern system of international criminal justice has entered its own post-*Gideon* era with a commitment to provide every defendant with professional counsel to ensure an "equality of arms,"

212. "According to the official records, no discussion ensued concerning an absolute right to defend oneself; rather the delegates were solely concerned about the right to access counsel, the choice of counsel, and who pays for counsel if the defendant is indigent." Michael P. Scharf & Christopher M. Rassi, *Do Former Leaders have an International Right to Self-Representation in War Crimes Trials?*, 20 OHIO ST. J. ON DISP. RESOL. 3, 12 (2005).

213. U.N. Econ. & Soc. [ECOSOC], Commission on Human Rights Fifth Session, *Draft International Covenant on Human Rights, Philippines: Amendment to Articles 13, 15, 20*, U.N. Doc. E/CN.4/232 (May 23, 1949).

214. U.N. Econ. & Soc. [ECOSOC], Commission on Human Rights Fifth Session, *Draft International Covenant on Human Rights, Article 13, Chile, Egypt, France Philippine and United States of America: Joint Proposal*, U.N. Doc. E/CN.4/286 (2 June 1949).

215. "The right to self-representation complements the right to counsel and is not meant as a substitute thereof Thus the court should appoint professional counsel to supplement self-representation; conversely, whenever it is in the best interests of justice and in the interest of adequate and effective representation of the accused, the court should disallow self-representation and appoint professional counsel." M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 283-84 (1993).

216. ICCPR, *supra* note 13, art. 14(3)(d).

the civil/international law counterpart to adversarial due process.²¹⁷

B. *The Structural Incompatibility*

Perhaps the most abiding assumption in the field of comparative law scholarship is that the procedural rights and mechanisms of one system are not appropriate for direct transfer (or “transplantation”) to a foreign system, however normatively inscribed those rights may be in their native (or “host”) format, unless demonstrated to be compatible with the critical structural features of the recipient body of laws and institutions.²¹⁸ We have already seen how the entitlement to self-representation has become a dysfunctional appendage even within the contemporary American constitutional system where the normative set points, or defaults, have been structurally and materially transformed. Yet this “vertical” incompatibility that has developed internally over an extended period of time pales in comparison to the manifold structural incompatibilities that are present with the “horizontal” attempt to embed this right within the contemporary framework of an international court or tribunal. Whatever lingering value there may be to the practice of self-representation in the American setting, it is a pointless exercise in the international setting.

The number of pertinent differences between the traditional common law adversarial system and the new systems of international criminal justice are legion. A comparison drawn against the structural features of the new standard-bearer in the international forum, the ICC, will make the point. We will emphasize here the following critical, if not dispositive, differences: the trial proceeding at the ICC is not constructed to serve as an essentially democratic institution. There is no lay jury, no citizen “peers” of the defendant, in a trial at the ICC. There is nothing of a political or normative nature, not even a common language, which is presumptively shared between the defendant and his triers. There is no political sovereign at the ICC bringing a criminal charge against one of its subjects; the defendant is more typically a sovereign representative himself being prosecuted by a non-sovereign entity. The ICC is a free-standing judicial institution; it maintains no authority—political, social, economic, or military—independent of its limited judicial authority. The mission of the ICC is not to render a

217. See generally Stefania Negri, *The Principle of “Equality of Arms” and the Evolving Law of International Criminal Procedure*, 5 INT’L CRIM. L. REV. 513 (2005).

218. See generally Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003); Alan Watson, *Aspects of Reception of Law*, 44 AM. J. COMP. L. 335 (1996).

politically acceptable verdict to repair an established social order but rather to produce a literal verdict based upon an objective rendering of the historical record. There can be no fair trial before the ICC that is not independently grounded in that historical "truth." The libertarian concept of autonomy has a highly reduced role to play in the ICC setting, where the defendant is not making existential, self-defining choices that have themselves been legitimated by a pertinent indigenous community.

The common law jury trial is an iconic political institution. It is traditionally thought to exemplify a commitment to democratic self-government. It is a sovereign power of the people capable of negating the power of the state to use its powers of criminal prosecution against its citizens. It has been deemed to be the "birthright" of every Englishman.²¹⁹ Jefferson referred to it as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."²²⁰ Tocqueville observed that it was "as direct and extreme a consequence of the dogma of the sovereignty of the people as universal suffrage."²²¹ It is within the context of this trial dogma of representative self-government that the practice of self-representation has assumed a democratic aura, if not dogma, of its own. But in countries outside the common law network, the institution of trial is typically not intended to serve this democratic function, and it certainly cannot assume such a function in the free-standing, non-sovereign setting of the ICC, where there is no demos, either in the form of the defendant himself or in that of the jury, represented at the trial.

The idealized democratic iconography of the *pro se* defendant invokes a plain-speaking individual appealing his case of unwarranted prosecution directly to an engaged jury of fellow citizens bearing no formal allegiance to the state. The heroic imagery never contemplates such a *pro se* defendant trying his case directly to a panel of state officials in robes. The U.S. Supreme Court has declared that the right of self-representation has no application beyond the trial court level.²²² In the international system, as in the civil law system, there is never a panel of lay jurors. At the ICC, the defendant will be tried before a mixed

219. TRIAL BY JURY: THE BIRTH-RIGHT OF THE PEOPLE OF ENGLAND (London, 1865).

220. THOMAS JEFFERSON, 15 THE PAPERS OF THOMAS JEFFERSON: 27 MARCH 1789–30 NOVEMBER 1789, 269 (Julian Boyd ed., 1958).

221. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 261 (Harvey C. Mansfield & Delba Winthrop, eds. & trans., Univ. of Chicago Press 2000) (1835).

222. Martinez v. California, 528 U.S. 152 (2000).

panel of three international jurists.²²³ This fact alone should be dispositive with regard to the structural incompatibility of the self-representation transplant in the international criminal justice system. The image of a defendant, perhaps himself a former sovereign representative, presenting his own case to a panel of professional international jurists from various countries other than his own, with no shared social or political culture to rely upon, bears none of the indicia of a self-determining sovereign people essential to the mystique of self-representation. Furthermore, as Michael Scharf and Christopher Rassi have noted,²²⁴ the narrow spectrum of defendants subject to a war crimes prosecution are precisely those politically engaged individuals who are most likely to view a criminal trial, like diplomacy, as merely a continuation of hostilities by other means.

The classical liberal individualism that supported the development of the common law adversarial system presumes a central antagonism, a clash of adverse interests, between the individual and the state, which is deemed to have an inherent governing interest in restraining the native liberties of its subjects. The state is therefore held to be inherently suspect or at least self-interested when seeking to deprive any individual of his liberty. This mistrust of the power of public prosecution has supported the libertarian notion that the accused may reasonably believe that he has only himself to trust fully when engaged in a struggle for his liberty in one of the state's own forums. The image of a self-representing citizen standing alone against the prosecutorial power of the state provides the native appeal of self-representation. This deference to a much-exalted notion of embattled autonomy directed against the state has permitted the Supreme Court in *Faretta* to acknowledge both the absolute right to self-represent while simultaneously recognizing that it was "undeniable" that such a choice would in most cases prove harmful to the defendant and that "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction."²²⁵ It is inconceivable that the ICC, a strictly judicial non-sovereign institution that will try almost exclusively high-profile cases, will be able to adopt such a deferential and cavalier approach to the responsibility of the court to remain accountable for the integrity of its own proceedings and the credible outcomes of the trials it conducts.

The common law adversarial system is also commonly conceded to

223. Rome Statute of the International Criminal Court art. 39(2)(b)(ii), July 17, 1998, 37 I.L.M. 999.

224. Scharf & Rassi, *supra* note 212.

225. *Faretta v. California*, 422 U.S. 806, 834 (1975).

have a lesser commitment to establishing the objective “truth” of the facts at issue in a criminal trial when compared to its civil law counterparts.²²⁶ The civil law system is said to be strictly committed to determining a more objective historical truth, while the common law system is thought to require only a systemic, or contingent, truth that permits the lay jury to resolve the conflict between the opposing parties. The adversarial philosophy supporting that system reflects a classically liberal laissez-faire approach to the production of truth. The silent premise is that truth itself is a marketable concept that is best arrived at through a minimally regulated market mechanism, the trial, which provides a fair competition between self-interested parties. The competing parties, the state and the accused, are therefore permitted to pursue only a truth that supports their interest in the outcome of the case. The court itself is deemed not to have any overriding interest in the proceeding, which includes not having any interest in securing an independent or objective truth not developed by the parties themselves. It is this premise of party-responsibility for developing the truth that has permitted American courts to ignore the fact that self-represented individuals commonly refuse to introduce evidence that would, as a matter of law, tend to demonstrate a mitigating or even exculpating condition—even in circumstances where the accused is facing a capital conviction.²²⁷ This common law/civil law divide is even more pronounced with regard to international tribunals which have typically, if not completely, assumed the mantle of the Nuremberg tribunal to compile a true and accurate historical record for the world community.²²⁸ Already, international tribunals have begun to move away from the more party-directed adversarial trial and towards a more judge-directed trial where there is less sacrifice to the integrity of the historical record.²²⁹

Self-representation as an expression of political autonomy also has virtually no grounding in the modern template of international criminal justice. As described earlier, the principle of autonomy as the

226. See generally Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

227. See, e.g., *United States v. Davis*, 285 F.3d 378 (5th Cir. 2002) (circuit court refused to permit the trial court to appoint counsel to present mitigating evidence at a capital proceeding).

228. See Patricia M. Wald, *Foreword: War Tales and War Trials*, 106 MICH. L. REV. 901, 911 (2008) (noting that recent experience, including her own as a judge at both American and ICTY proceedings, has called into question “whether judges and adversary proceedings are indeed the best way to ferret out historical truth (if such a thing can be determined).”).

229. Kai Ambos, *International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?*, 3 INT’L CRIM. L. REV. 1, 18 (2003).

primary philosophical support for a freedom of choice regarding individual self-identity is not self-sustaining. The choice at issue must itself be independently validated as a normatively sanctioned option. Self-representation has not obtained such recognition within the various institutions of international law. Outside the common law system, self-representation is not recognized to have intrinsic value. An individual charged today with war crimes, crimes against humanity or genocide in a non-common law national forum would have no such right.²³⁰ "Given the contrary widespread practice of the civil law countries, it would be difficult to properly conclude that the right of self-representation has in fact attained the level of customary international law"²³¹ International law, beginning at Nuremberg and as now reflected in the several recent international criminal tribunals and the ICC, has certainly assigned a clear value to the common law adversarial trial system.²³² But the various conventions and working groups that have constructed these more recent international courts and tribunals have never examined and assigned a value to self-representation as such. This silence suggests that self-representation has simply been assumed to be a necessary adjunct to the adoption of the adversarial system. But this is not the case. For example, the right to a lay jury is one of the more revered adversarial entitlements in the common law system, yet international law, beginning with Nuremberg, has rejected it as a necessary element of international criminal justice. Self-representation, particularly absent a lay jury, is entitled to no greater accommodation as an essential choice of right within the evolving structures of international adversarial justice.

230. Despite the fact that self-representation is not recognized in the continental European countries and most such countries have national laws which permit compulsory representation by counsel, neither the Human Rights Committee (HRC), which monitors compliance with the right of self-representation in ICCPR art. 14(3) (d), nor the European Court of Human Rights (ECHR), which has jurisdiction over violations of the identical language in the European Convention on Human Rights art. 6(3) (c), has ever developed a line of cases which essentially repudiate the laws and practices in those countries. The single case before the HRC which did uphold a right of self-representation, *Hill v. Spain*, was decided on the limited basis of an exceptional set of facts. For a discussion of the limited opinion in *Hill*, see Scharf & Rassi, *supra* note 212, at 16.

231. Scharf, *supra* note 1, at 36.

232. "It is generally recognized that the adversarial system is more suitable when it comes to offering protection to the rights of the accused." SALVATORE ZAPPALA, HUMAN RIGHTS IN INT'L CRIMINAL PROCEEDINGS 16 (2003).

C. *The International Cases*

Until the International Criminal Tribunal for Yugoslavia (ICTY), there had never been an instance of self-representation before an international criminal tribunal. The primary examples of self-representation have taken place at the ICTY, but there have also been a few near-occurrences at several of the other contemporary tribunals. Each of the tribunals has found itself required to recognize at the outset that there is a right of self-representation but only the ICTY has found itself bound to implement the right. The other tribunals have contrived ways to avoid the right. But no matter where or how the right has been raised in the courtroom, it has raised trouble for the tribunal—in some cases, quite serious trouble.

The signature proceeding of the contemporary international campaign against impunity occurred with the ICTY prosecution of Slobodan Milosevic, the first head of state to be prosecuted for war crimes by any international criminal tribunal. Unfortunately, the prosecution became a signature failure in several critical respects. Foremost was the fact that the prosecution failed even to be completed; after years of protracted and interrupted proceedings, the trial was terminated when the accused died of a heart attack. More significantly for purposes of this discussion, the trial failed because its major confrontation with impunity was both obstructed and compromised; the integrity and professional competence of the tribunal itself was impugned; and the trial proceeding actually served to resurrect, rather than to condemn, the status of the accused in his native Serbia with regard to allegations of his having directed a national campaign of genocide and related atrocities. The critical factor that contributed to each of these failures was that the defendant was permitted to self-represent.

Slobodan Milosevic was President of Serbia and then the Federal Republic of Yugoslavia during the Balkan Wars that raged during the period 1991–1999. Beginning in May 1999, he was charged in three separate indictments for multiple war crimes committed in Kosovo, Croatia and Bosnia-Herzegovina. He was arrested in April 2001, and transferred to the ICTY in June of that year. At his initial appearance before the ICTY Trial Chamber in July 2001, he refused to recognize the legitimacy of the court, refused to enter a plea to the indictment and refused the assignment of counsel. He repeatedly attempted to deliver a diatribe against the court itself as an “illegal” and “false” tribunal, as a result of which the presiding judge, Richard May, ultimately had the defendant’s microphone cut off with the hopeful words:

"Mr. Milosevic, this is not the time for speeches."²³³ The court did, however, accept without challenge Milosevic's right to self-represent.²³⁴ Milosevic was at that point asserting a right as a defendant that he would not have enjoyed in his own country; the statutes of the Federal Republic of Yugoslavia would have required him to be represented by counsel on such charges.²³⁵ Thus began the trial odyssey that endured for over four years without coming near to completion.

The Trial Chamber was exceptionally accommodating to Milosevic. In August 2001, six months prior to the start of the trial itself, the court *sua sponte* ordered the assignment of three *amici curiae* who were to serve strictly as friends of the court, and not as counsel to Milosevic, in order to assist the court in providing a fair trial to the accused. At the same time, the court denied a request by the prosecutor to appoint defense counsel to the defendant. In November of that year and thereafter the court also recognized various counsel, designated by the defendant, as "legal associates" who obtained various counselor privileges but were officially neither friends of the court nor counsel to the defendant. Milosevic, certainly no ordinary fool, managed from the outset to take extended advantage of the court's largesse. "Bending over backward to maintain the appearance of fairness, the Trial Chamber . . . permitted Milosevic to treat the witnesses, prosecutors, and themselves in a manner that would earn ordinary defense counsel expulsion from the courtroom."²³⁶ The court nonetheless continued to accommodate Milosevic even as his health deteriorated as a result of a severe high blood pressure condition. The court gradually reduced the number of trial days per week, the number of hours per trial day and also granted a series of extended adjournments of the trial. Eventually the Trial Chamber resorted to directing the prosecution to pare down its list of witnesses "to the point where prosecutors claim[ed] their case [was] being emasculated."²³⁷

233. Prosecutor v. Milosevic, No. IT-02-54, Initial Appearance 5 (July 3, 2001), available at <http://www.un.org/icty/>.

234. "You do have the right, of course, to defend yourself." *Id.* at 1.

235. Article 71(1) of The Criminal Procedure Code of the Republic of Serbia, based upon the earlier code of the Republic of Yugoslavia, requires defense counsel in all cases where the defendant faces a possible sentence of ten years or more, available at <http://www.legislationline.org/documents/section/criminal-codes/country/5>.

236. Scharf & Rassi, *supra* note 212, at 4–5.

237. Mirko Klarin, *War Crimes Manipulation: Slobodan Milosevic's Refusal to Accept Help in his War Crimes Trial is Making it Difficult to Provide him a Fair Hearing*, LONDON FREE PRESS, August 24, 2002 at F4, cited in Michael P. Scharf, *The Legacy of the Milosevic Trial*, 37 NEW ENG. L. REV. 915, N7 (2005).

Throughout the trial, the prosecutor maintained that the court should appoint formal defense counsel to Milosevic. Approximately nine months into the trial, the prosecutor initiated another such request with a new tactic. He relied upon an English case, *McKenzie v. McKenzie*,²³⁸ which would have permitted the Trial Chamber to appoint a particularized version of standby counsel commonly referred to as a "McKenzie friend." During the court colloquy on his request, the prosecutor passed forward a copy of the *McKenzie* case. Milosevic's immediate response drew the line clearly:

As—despite my referring to all these international pacts and covenants, European, American, Roman etcetera, the opposing party is now once again referring to court practice and is offering up *McKenzie* versus *McKenzie*. I am also going to provide you with something. It is a copy from a court case, and it is *Faretta* versus California, the United States Court, where quite clearly once again it excludes the possibility of having anybody impose a Defence counsel or lawyer to anybody unless the accused wishes to appoint one himself. So I think it is useless to carry on a discussion of this kind.²³⁹

Milosevic was not alone in his belief that *Faretta* was the touchstone reference for the right of self-representation in international as well as American law. Following a series of oral decisions and comments recognizing Milosevic's right to proceed *pro se*, the Trial Chamber issued a full-length written opinion expressing its "Reasons" for denying the prosecution's motions for the appointment of counsel.²⁴⁰ The court began its discussion by establishing that the ICTY was an essentially adversarial forum.²⁴¹ What followed was a clear reliance on *Faretta* as the seminal statement of the role of the right of self-representation in such an adversarial setting:

238. 1970 3 All. E. R. 1034.

239. Prosecutor v. Milosevic, No. IT-02-54, Transcript at 12840 (Nov. 11, 2002), available at <http://www.un.org/icty/transe54/021111ED.htm>.

240. Prosecutor v. Milosevic, No. IT-02-54, Reasons for Decision on the Prosecution Motion Concerning Assignment of Counsel (Apr. 4, 2003), available at <http://www.un.org/icty/milosevic/trialc/decision-e/040403.htm>.

241. "[T]he proceedings of the International Tribunal are essentially adversarial and it is against that background that this Discussion must follow." *Id.* at ¶ 20.

Adversarial proceedings are a feature of the common law and find little echo in systems based on civil law. As the *Amici Curiae* have correctly observed, the imposition of a defence counsel upon an accused who does not want one is a feature of inquisitorial systems, but not of the adversarial systems . . . The reasons for this common law rule are clearly set out by the U.S. Supreme Court in *Faretta v. California* . . .²⁴²

The Trial Chamber would later refer back to this reliance on *Faretta* for having set out “the classical statement of the right to self-representation.”²⁴³ The Trial Chamber insisted that the Tribunal had to be understood as one that had adopted the common law/adversarial system *as opposed to* the civil law/inquisitorial system, and furthermore that the right of self-representation was itself inherent in or essential to that adversarial structure. Judge Richard May, the author of the opinion, apparently did not share the insight of his fellow British jurist, Geoffrey Robertson, an Appeal Judge for the Special Court for Sierra Leone, who later stated, “Courts which are ‘international’ must accommodate judges and lawyers from disparate legal traditions and adapt the adversary model developed for Anglo-American jury trial to a system in which guilt is established through judicial reasoning, and to procedures influenced by the inquisitorial models adopted by European countries.”²⁴⁴

Milosevic continued to represent himself throughout the prosecution’s case. When the prosecution concluded its case in February, 2004, things began to come apart. Ill health forced presiding Judge May to resign from the trial panel. He was replaced by Judge Iain Bonomy and Patrick Robinson became the Presiding Judge. On July 5, 2004, the new trial panel initiated a “radical review”²⁴⁵ of the conduct of the proceedings in light of the fact that the trial was obviously flagging and the defendant continued to insist on lengthy adjournments to address his own ill health. Finally, on August 31, 2004, the defense began its case with a two-day opening statement by Milosevic. Several days later, the court issued an oral ruling on the most recent motion by the prosecution to appoint defense counsel. Over the defendant’s strenuous

242. *Id.* at ¶¶ 21–22.

243. Prosecutor v. Milosevic, No. IT-02-54, Reasons for Decision on Assignment of Defence Counsel ¶45 (Sept. 22, 2004), available at <http://www.un.org/icty/milosevic/trialc/decision-e/040922.htm>.

244. Robertson, *supra* note 207, at 2–3.

245. Prosecutor v. Milosevic, No. IT-02-54, Hearing 32153-4 (July 5, 2004).

objection, the court directed that counsel be assigned. The court attempted to rationalize its decision not as a restriction on the defendant's right to self-represent but rather as a measure designed to protect his superior right to a fair trial. As part of its decision, the Trial Chamber issued an Order on the Modalities to be Followed by Court Assigned Counsel, in which it outlined a primary role for the assigned counsel in the presentation of the defense case. The following day, two of the *amici* were appointed as defense counsel. They immediately appealed their assignment.

The Appeals Chamber accepted, in the light of Milosevic's continued episodes of ill health, the appointment of counsel. But the appeals panel sharply reversed the Order on Modalities as presenting an excessive and disproportional restriction on the defendant's right to self-representation. Once again, the court turned to *Faretta* to provide the rationale for a right deemed to be universally recognized as an inherent and essential component of a fair trial in an adversarial setting:

This is a straightforward proposition: given the text's binary opposition between representation "through legal assistance" and representation "in person," the Appeals Chamber sees no reasonable way to interpret Article 21 except as a guarantee of the right to self-representation. Nor should this right be taken lightly. The drafters of the Statute clearly viewed the right to self-representation as an indispensable cornerstone of justice, placing it on a structural par with the defendants' right to remain silent, to confront the witnesses against them, to a speedy trial, and even to demand a court-appointed attorney if they cannot afford one themselves. In the words of the United States Supreme Court in *Faretta v. California*, which was recognized by the Trial Chamber as the classic statement of the right to self-representation, an "unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction," such that "counsel [becomes] not an assistant, but a master." Defendants before this tribunal, then, have the presumptive right to represent themselves notwithstanding a Trial Chamber's judgment that they would be better off if represented by counsel.²⁴⁶

246. Prosecutor v. Milosevic, No. IT-02-54, Decision on Interlocutory Appeal of the Trial Chamber's Decision on the Assignment of Defense Counsel ¶ 11 (Nov. 1, 2004), available at <http://www.un.org/icty/milosevic/appeal/decision-e/041101.htm>.

The trial continued to stumble along until Milosevic died in his cell on March 11, 2006. The trial was terminated three days later, thus ending, without conclusion, international law's first and only major experience with a self-represented defendant at a war crimes trial. The public reaction has been unforgiving. The BBC News immediately intoned, regarding the termination: "It raises questions which may tarnish the reputation of the International Criminal Tribunal for Yugoslavia (ICTY) and undermine confidence in war crimes justice generally."²⁴⁷ The trial appeared to have turned the concern with "victor's justice" on its head:

Throughout the proceedings, Milosevic berated witnesses and launched scathing attacks against the legitimacy of the tribunal. His tactics have had some resonance back home as Milosevic's approval ratings have doubled, and he has gone from the most reviled individual in Serbia to number four on the list of most admired Serbs.²⁴⁸

"He played to his supporters back in Serbia, put his accusers on the defensive, and in general, turned the trial into an international spectacle."²⁴⁹ This was hardly an outcome consistent with the ambitions of the contemporary international campaign to end impunity and restore a public state of justice.

The *Milosevic* trial may prove to be the dispositive experiment with self-representation in the international arena. Both the Trial and Appeals Chambers presented an exalted view of the need to safeguard a defendant's right to self-represent and were enormously generous in the degree to which they accommodated that right. Yet, in the end, it appeared rather pointless. The trial proceedings were characterized as farcical by observers on all sides and there were no positive revelations with regard to the putative existential or liberty interests said to inhere in the practice of self-representation. Rather, Milosevic transformed the right to self-represent into a spectacle which he enjoyed and abused at least as much as his American counterparts in the trials described above.

247. Jon Silverman, *Worst outcome for Milosevic tribunal*, BBC NEWS, Mar. 11, 2006, <http://news.bbc.co.uk/2/hi/world/europe/4797696.stm>.

248. Milan Markovic, *In the Interests of Justice?: A Critique of the ICTY Trial Court's Decision to Assign Counsel to Slobodan Milosevic*, 18 GEO. J. LEGAL ETHICS 947, 947 (2005).

249. Jerrold M. Post & Lara K. Panis, *Tyranny on Trial: Personality and Courtroom Conduct of Defendants Slobodan Milosevic and Saddam Hussein*, 38 CORNELL INT'L L.J. 823, 825-26 (2005).

It did not take long for the legacy of the *Milosevic* trial to be fully realized. As the *Milosevic* case was fitfully wending its way through the tribunal, the case of another Serbian political leader, Vojislav Seselj, was slowly taxiing into position for a trial that has managed to outdo the spectacle and failure of the *Milosevic* trial in almost every respect.²⁵⁰ "Seselj's court manner has been much more threatening and insidious than Milosevic's, the freedom he enjoys in court considerably greater (gone is the remotely controlled microphone that the late Judge May used to silence Milosevic), and the semblance of a criminal proceeding even harder to locate in this case."²⁵¹ Seselj was a radical Serb nationalist who assumed major credit for developing the ideology of ethnic cleansing. He was a major political activist who was noted for his incendiary nationalist rhetoric on behalf of his crusade for a Greater Serbia. In the early stages of the Balkan conflict he was positioned as an ally of Milosevic but he rather quickly evolved into an outspoken rival. Milosevic himself once referred to Seselj as the "personification of violence and primitiveness."²⁵² He appeared to relish the opportunity to extend his rivalry with Milosevic by utterly, and outrageously, outperforming him on the stage of his own trial.

Seselj appears to have well understood the opportunity for spectacle presented by a war crimes tribunal. As early as 1994, shortly after the formation of the ICTY, Seselj stated in an interview: "Personally, I do not recognize this Hague tribunal. I think it has no legal foundation, but if I am ever invited to The Hague I'll gladly go there immediately. I would never miss such a show."²⁵³ His trial produced a publicly broadcast campaign for political martyrdom. In the four-hour opening statement he eventually presented at his trial, during which he repeatedly denigrated the judges and prosecutors, he closed by thanking them "for allowing me to suffer for my ideology." He also expressed his greatest regret that the Tribunal did not have a death penalty "so that proudly, with dignity, my head upright like my friend Saddam Hussein, I could die and put the final seal on my ideology. It would become

250. The Seselj trial began in November 2007 and remains in progress as of this writing. *Prosecutor v. Seselj*, No. IT-03-67, available at http://www.icty.org/x/cases/seselj/cis/en/cis_seselj_en.pdf.

251. Alexander Zahar, *Legal Aid, Self-Representation, and the Crisis at the Hague Tribunal*, 19 CR. L. FOR. 241, 242 (2008).

252. Marlise Simons, *Serb Nationalist's Trial Begins in the Hague*, N.Y. TIMES, November 8, 2007.

253. *Prosecutor v. Seselj*, No. IT-03-67-PT, Decision on Prosecutor's Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defense n.5 (May 9, 2003), available at <http://www.icty.org/x/cases/seselj/tdec/en/030509.htm>.

immortal.”²⁵⁴

Seselj has been far more successful than his predecessor at exploiting the protocols of accommodation adopted by the ICTY during the *Milosevic* trial. At his initial appearance before the Tribunal in February of 2003, he declared his absolute resolve to represent himself and demanded essentially all of the accommodations already extended to Milosevic on the ground that “such practice cannot be changed from case to case.”²⁵⁵ Shortly thereafter the prosecution filed a motion seeking to have counsel appointed to Seselj on the ground that he avowedly intended to “destroy” the Tribunal and that he intended “to use the Tribunal as a political stage and source of media attention.”²⁵⁶ The Trial Chamber acknowledged that Seselj was already “demonstrating a tendency to act in an obstructionist fashion . . . and making various frivolous demands framed in language inappropriate for a legal document.”²⁵⁷ But the court nonetheless upheld his right to self-represent and merely appointed, over the defendant’s objection, a single standby counsel. The case thereafter struggled along with the defendant exploiting virtually every opportunity presented to him to offend the court. The vulgarity alone of his extensive written submissions to the court became extraordinary.²⁵⁸

Three-and-a-half years after his initial appearance and six months after Slobodan Milosevic died and his trial was terminated, the trial of Seselj was scheduled to begin in November 2006. But the debacle of the *Milosevic* trial was yet a fresh wound at the Tribunal. The trial chamber had endured enough and appeared determined to avoid a repeat performance by Seselj. In August, 2006, the court issued a preemptive

254. Marlise Simons, *Fiery Speech by Serbian Leader at Trial*, N.Y. TIMES, Nov. 9, 2007.

255. Prosecutor v. Seselj, No. IT-03-67-PT, Decision on Prosecutor’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defense ¶¶ 8–9 (May 9, 2003), available at <http://www.icty.org/x/cases/seselj/tdec/en/030509.htm>.

256. *Id.* ¶ 4 n.5.

257. *Id.* ¶ 23.

258. For example, Seselj wrote in reference to the Tribunal Registry: “You, all you members of the Hague Tribunal Registry, can only accept to suck my cock.” With regard to another named individual associated with the Tribunal, he wrote: “‘Shit remains shit even if it is wrapped in gold.’ Therefore, if this slime were to remove the black garment in which he appears that makes him look like a raven and put on a golden uniform, he would still be what he is, shit in a human form.” And with regard to another named individual, he wrote: “How to tell him to kneel down and start sucking Dr. Vojislav Seselj’s Orthodox dick, but only on cue ‘bow and begin.’? How to simply tell him, monkey, eat shit, that’s all you can?” Prosecutor v. Seselj, No. IT-03-67-PT, Decision on Assignment of Counsel, ¶¶ 48–52 (Aug. 21, 2006), available at <http://www.icty.org/x/cases/seselj/tdec/en/ses-dec060821e.pdf>.

ruling revoking Seselj's right to continue to self-represent.²⁵⁹ The court provided an extensive review of the behavior of the defendant which "compromise[d] the dignity of the Tribunal and jeopardize[d] the very foundations upon which its proper functioning is based."²⁶⁰ The chamber provided a lengthy typology carefully delineating the defendant's misbehaviors under the following headings: Obstructionist behavior; Deliberate disrespect for the rules; Disruptive behavior; Intimidation and slanderous comments in relation to witnesses; Accused's ability to defend himself; and, Warnings to the accused.²⁶¹

The decision to revoke Seselj's right to continue to proceed *pro se* set in motion a contentious split between the Trial and Appeals Chambers that compromised the integrity of both the Trial Chamber and the trial proceeding itself. The Appeals Chamber overturned the trial court's decision and reinstated the defendant's right to self-represent. It did so on the narrow ground that the Trial Chamber had not provided the defendant with sufficiently specific warning prior to its decision. The Trial Chamber thereupon reinstated Seselj as counsel and reappointed standby counsel. The defendant immediately objected to the reappointment of standby counsel and became even more strident in his campaign to disrupt the proceedings. The Trial Chamber once again attempted to draw the line and issued a set of findings related to the defendant's conduct since the reinstatement of his *pro se* status:

The Trial Chamber finds that the Accused has continued to deliberately disregard decisions by the Trial Chamber, in particular its Decision on Filing of Motions, submitting motions that are often tens of thousands of words over the limit set by the Trial Chamber. The Trial Chamber finds that the Accused has repeatedly disrupted court hearings by deliberately and unreasonably interrupting the proceedings and by refusing to appear in court to represent himself. The Accused has been put on notice, and specifically warned by the Trial Chamber, that should his disruptive and obstructionist conduct continue, the Trial Chamber will consider imposing counsel on the Accused.²⁶²

And it did just that. In early November, 2006, the defendant went on

259. *Id.* ¶ 81.

260. *Id.* ¶ 77.

261. *Id.* ¶¶ 34–71.

262. Seselj, Status conference, 8 November 2006, Closed Session, T. 766.

a hunger strike to protest the reappointment of standby counsel and refused to appear in court. On November 27, the Trial Chamber once again revoked the defendant's right to self-represent and ordered the trial to begin with the appointment of counsel.²⁶³ But once again the Appeals Chamber sided with the defendant in his stand-off with the trial court. The Appeals Chamber ruled that the Trial Chamber had incorrectly appointed standby counsel and nullified the trial proceedings that had taken place up to that point.²⁶⁴ It ordered the trial to begin anew when the defendant "is fit enough to fully participate in the proceedings as a self-represented accused."²⁶⁵ The trial did not in fact recommence until almost one year later on November 7, 2007:

The handling of Seselj's case calls into question the very idea of international criminal justice as an orderly, rational, functional, legal system. One wonders how (if that were not the case) it could come to pass that a vexatious litigant who is the leader of a party of ultra-nationalists whose declared aim is to destroy the Tribunal, who regularly hurls insults at judges, prosecutors, and other Tribunal staff, who issues threats to potential witnesses and members of the public, and who is mentally unstable, has managed twice to win back the privilege of self-representation and is allowed to conduct his defense at trial at his pleasure with almost total impunity.²⁶⁶

Milosevic has therefore become the *Fareta* of international law. It is the seminal case that was generously but foolishly decided and it has immediately spawned a humiliating spectacle of its own design.²⁶⁷

Fortunately, the other extant war crimes tribunals have not allowed

263. See Prosecutor v. Seselj, No. IT-03-67-T, Decision on Request for Certification to Appeal Decision (No. 2) on Assignment of Counsel ¶ 1 (Dec. 5, 2006), available at <http://www.icty.org/x/cases/seselj/tdec/en/061205e.pdf>.

264. See Prosecutor v. Seselj, No. IT-03-67-AR73.4, Decision on Appeal Against the Trial Chamber's Decision (No. 2) on Assignment of Counsel ¶¶ 29-30 (Dec. 8, 2006) available at <http://www.icty.org/x/cases/seselj/acdec/en/061208e.pdf>.

265. *Id.*

266. Zahar, *supra* note 251, at 261.

267. The arrest, in July, 2008 of Radovan Karadzic, the fugitive former Bosnian Serb leader, who immediately claimed his right to self-represent, will almost certainly require the ICTY to review its commitment to its *Milosevic/Seselj* protocols. His trial has not begun as of this writing but Karadzic has already informed the court of his heroic purpose in exercising his right to self-represent: "I'm not defending myself in actual fact. What I am defending are the people over there who have suffered It will of course be a precedent for small nations, small countries, not

themselves to be quite so taken in by the false prophet of *Faretta*. Although the right of self-representation appears in virtually the same form in the founding documents of all the other international criminal tribunals, all of the other courts have managed to avoid the creation of their own “*Milosevic*.” The other tribunals have typically acknowledged the existence of the right of self-representation, when raised, but have then avoided its application by either relying upon a procedural default by the defendant²⁶⁸ or, more radically, by insisting that the unwaivable right to a fair trial trumps the subordinate right to proceed *pro se*.²⁶⁹

CONCLUSION

The practice of self-representation was for centuries the default position for the common law trial. Its initial purpose and enduring legacy were to prevent or forestall the presentation of a fair and

large ones.” Prosecutor v. Karadzic, No. IT-95-5/18-PT, Status Conference 43 (Sept. 17, 2008), available at <http://www.icty.org/x/cases/karadzic/trans/en/080917SC.htm>.

268. See, e.g., Prosecutor v. Jean-Paul Akayesu, No. ICTR-96-4-A, Trial Judgment ¶ 65 (June 1, 2001), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=4084f42f4&page=search> (“[T]he Appeals Chamber finds that it was difficult for the Trial Chamber to discern any firm and unyielding desire on the part of the accused to represent himself. Even though Akayesu did, on several occasions, express the desire to defend himself, his attitude towards the Chamber suggested otherwise”). For other ICTR cases expressing reluctance to recognize self-representation, see Prosecutor v. Jean-Bosco Barayagwiza, No. ICTR-97-19-T, Decision on Defence Counsel Motion to Withdraw (Nov. 2, 2000), available at <http://69.94.11.53/ENGLISH/cases/Barayagwiza/decisions/021100.htm>; Prosecutor v. Arsene Shalom Ntahobali, No. ICTR-97-21-T Decision on Ntahobali’s Motion for Withdrawal of Counsel, (June 22, 2001), available at <http://69.94.11.53/ENGLISH/cases/Ntahobali/decisions/220601.htm>.

269. See, e.g., Prosecutor v. Augustine Gbao, et al, Decision on Application to Withdraw Counsel, No. SCSL-04-15-T, ¶ 15 (July 6, 2004) (“It is clear from examining all of the circumstances of this case that the interests of justice would not be served by allowing Mr. Gbao to be unrepresented before this Court. The Trial Chamber accordingly takes the position that it must safeguard the rights of the accused and the integrity of the proceedings before the Court by insisting that Mr. Gbao should continue to be represented by the Counsel that have represented him throughout these proceedings. We hold that in this regard that an accused person cannot waive his right to a fair and expeditious trial whatever the circumstances.”). See also the very encouraging opinion of the same tribunal in another case where it denied self-representation with the following comment: “In arriving at this conclusion, we are guided by the opinion of Hon. Judge Reinhardt’s in the case of Farhad v. United States, where The Learned Judge said that the permitting of self-representation regardless of the consequences, threatens to divert criminal trials from their clearly defined purpose of providing a fair and reliable determination of guilt or innocence.” Prosecutor v. Sain Hinga Norman, Decision on the Application of Samuel Hinga Norman for Self-Representation, ¶ 25 No. SCSL-2004-14-T (June 8, 2004). With regard to Judge Reinhardt’s opinion, see U.S. v. Farhad, 190 F.3d 1097, 1101 (9th Cir. 1999) (Reinhardt, J., concurring).

equitable defense within the context of an increasingly adversarial system. Ironically, the practice was not installed by the Supreme Court as a constitutional right until after that Court had rendered the practice both obsolete and odious to the contemporary counsel-based adversarial system. Yet however ill-begotten the practice has been within the common law national systems, it is utterly ill-conceived as an adopted right within the normative and structural matrix of the contemporary institutions of international criminal justice. In the international arena, the right is an example of a malignant reception from the common law without purpose or value, which must be aborted if the campaign to construct credible and durable institutions of international justice is to have a fair chance.

The new standard-bearer for this campaign is the ICC. The mission and structural design of the ICC are unique, and neither directly replicates that of any other court or tribunal, either national or international. The ICC is the first and only international criminal tribunal created without a designated, *ad hoc* mandate. It shares the retrospective ambition of the international tribunals of creating a judicial historical record by credible prosecutions of designated atrocities, and the more prospective ambition of national criminal courts of deterring future crime. It is designed as a semi-autonomous, permanent organ of unprecedented prosecutorial power with no guaranteed political or law enforcement support for its selected endeavors. The ultimate success of the court will therefore stand or fall on the demonstrated integrity attached to its individual prosecutions. It is not a court with a wide margin for compromised prosecutions. It is highly unlikely that the judges and other legal personnel committed to the success of the court itself will find it tolerable to suffer the pointless compromises to their professional and institutional integrity common to *pro se* cases.

The right of self-representation is embodied within the articles of the ICC. Yet Article 121 of the Rome Statute provides that “[a]fter the expiry of seven years from the entry into force of this Statute, any State Party may propose amendments thereto.” The Statute went into force in July, 2002. A Review Conference is planned for 2009.²⁷⁰ The States Parties should therefore seize this timely opportunity to remove the burden of self-representation from the trying campaign of international criminal justice.

270. Information regarding the proposed conference is available at <http://www.iccnw.org/?mod=review>.