The Right to Defend Pro Se--Faretta v. California: Due Process and Beyond

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NOTES AND COMMENTS

THE RIGHT TO DEFEND PRO SE—FARETTA v. CALIFORNIA: DUE PROCESS AND BEYOND

I. INTRODUCTION

In comparatively recent years, judicial review in the realm of criminal procedure has increasingly focused upon the constitutional right to "assistance of counsel" conferred upon the criminally accused. This focus inevitably culminated in United States Supreme Court declarations that the sixth and fourteenth amendments to the Constitution guarantee that a criminal defendant be afforded the right to counsel before he can be validly convicted and sentenced to imprisonment. ¹ Now that the constitutional mandates of the right to counsel have been extended beyond felonies to all cases where the accused may be imprisoned, ² attention has been directed toward the pro se defendant.³

The Federal Constitution expressly provides in the sixth amendment that the accused in a criminal prosecution shall "have the Assistance of Counsel for his defence," but does not expressly provide individuals with the right to proceed in propria persona.⁴ Traditionally, the

⁴. In propria persona is defined literally as [i]n one's own proper person," while pro se simply means "[f]or himself; in his own behalf; in person." BLACK'S LAW DICTIONARY 899, 1364 (4th rev. ed. 1968). For the purposes of this comment, the terms pro se and in propria persona will be synonymously used to denote the procedure through which a criminal defendant represents himself at trial.

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Supreme Court has recognized the right of a defendant to waive counsel if such waiver is "competently and intelligently made." In Johnson v. Zerbst, the Court stated: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."

But to conclude that a trial is valid where there is a knowing and intelligent waiver is not to say that the accused possesses a constitutional right to waive counsel and proceed pro se. Indeed, it has been the Court's rationale in the right-to-counsel cases—that the guarantee of counsel is "necessary to insure the fundamental human rights of life and liberty" and is "fundamental and essential to a fair trial"—that has been subsequently employed to severely curtail the right to proceed pro se and in some cases to force counsel upon the accused against his wishes. The Second Circuit in 1964 accurately perceived the developing constitutional quagmire in noting that in many cases the denial of the pro se defense would not have occurred had the courts not become accustomed to assigning "[I]legal Aid counsel and other lawyers" to criminal indigents with no means of retaining counsel of their choice.

In view of the fundamental status accorded the right to counsel in the aforementioned cases, the right to proceed in propria persona and its precise nature have been inadvertently elevated to significance. It is within the foregoing context that the Supreme Court granted certiorari to Faretta v. California, the facts of which appear below.

Petitioner Faretta was charged with grand theft in an information filed in the Superior Court of Los Angeles County, California. Although the public defender was initially appointed to represent Faretta, an indigent, Faretta subsequently requested well before the date of trial that he be permitted to proceed without counsel. Inquiries by the trial court elicited that petitioner had previously represented himself, that

7. Id. at 463.
8. Id. at 462.
14. The record indicated that Faretta had successfully negotiated a plea bargain
he possessed a high school education, and that although he recognized that the public defender's office was capable of furnishing "equal protection," he believed it to be "very loaded down with ... a heavy case load." The trial court responded that in its view Faretta was "making a mistake" and that in all further proceedings he would be treated "like a lawyer" and would receive no special favors. After establishing on the record that Faretta desired to proceed without counsel, the court made a "preliminary ruling" accepting Faretta's waiver of assistance of counsel and granting him the right to proceed pro se. The court, however, reserved the right to revoke its ruling if at any time it became apparent that petitioner was unable to adequately represent himself.

Several weeks thereafter, but prior to trial, the trial court held a hearing to inquire into Faretta's ability to defend himself, questioning him specifically about both the hearsay rule and the voir dire. After giving consideration to Faretta's responses and his "demeanor," the court ruled that petitioner had not made a knowing and intelligent waiver of his right to counsel, and that pursuant to a recent California Supreme Court decision, Faretta had no constitutional right to conduct his own defense. Accordingly, the trial court reversed its earlier ruling and again appointed the public defender to represent Faretta. At the conclusion of the trial, Faretta was convicted and sentenced to imprisonment upon representing himself in an earlier criminal proceeding. See Brief for Respondent at 7.

15. 422 U.S. at 807.
16. For a record of the trial court's rather explicit caveat to Faretta see Brief for Respondent at 7.
18. Following the reversal of the preliminary ruling by the trial court, defendant Faretta's requests to act as co-counsel were denied. He also urged unsuccessfully that he was entitled to the counsel of his choice and on three occasions moved for the appointment of counsel other than the public defender. These motions, too, were denied by the trial court. 422 U.S. at 810 & n.5. See Brief for Petitioner at 10.

Although the denial of these motions was not in issue in the Faretta decision, it should be mentioned that in many, if not most, cases where a defendant requests the right to represent himself, this is only as a last resort. The typical situation arises when an indigent receives court-appointed counsel with whom he does not agree as to trial tactics, in whom he reposes no confidence, or as in Faretta, where he believes the public defender's office to be so overloaded with cases as to place his defense in jeopardy. Upon being informed that an indigent is not entitled to counsel other than that appointed by the court, Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631, cert. denied, 414 U.S. 979 (1973), the defendant turns to the pro se defense as the only available alternative. See United States v. Seale, 461 F.2d 345 (7th Cir. 1972); United States ex rel. Maldonado v. Denno, 348 F.2d 12, 14 & n.1 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966); Grano, supra note 3, at 1181.
The California Court of Appeals affirmed the conviction following suit to *People v. Sharp* with the California Supreme Court subsequently denying review.

The United States Supreme Court vacated the holdings of the California courts and remanded the case without a showing of prejudice. Justice Stewart, writing the majority opinion, held that the implied dictates of the sixth amendment give rise to the constitutional right of a criminal defendant to forego counsel and represent himself at trial. Furthermore, the right was viewed by the Court as of such a fundamental nature as to constitute due process requirements, made applicable to the states through the fourteenth amendment. Thus, it follows that the accused in a criminal proceeding has a fundamental right to choose between representation by counsel and pleading *pro se*, provided the choice is "knowingly and intelligently" made.

Although the issues which inevitably arise in any discussion of the *pro se* defense are several, *Faretta* primarily addressed itself to only one: whether a defendant in a state criminal trial possesses the constitutional right to proceed without counsel; or, in other words, whether a state may constitutionally force a lawyer upon a defendant, even though he insists otherwise. *Faretta* seems to have resolved any doubt concerning the status of the right, yet inherent in the Court's reasoning there appear subtle hints of inconsistencies regarding the attempt to pinpoint the precise nature of the right, an issue not necessarily resolved by *Faretta*. With respect to the foregoing, this comment represents an attempt to articulate a viable constitutional basis for the *pro se* defense through a critical inquiry into the legal reasoning promulgated by the *Faretta* Court. In addition, a further objective will be to formulate a working hypothesis of the procedural implications of the *Faretta* decision, in an effort to more clearly effectuate its fundamental mandates.

**II. SOURCES OF THE PRO SE DEFENSE**

Prior to *Faretta*, the Supreme Court had never directly addressed itself to the constitutional right of self-representation in a criminal proceeding. But in 1942, the Court in *Adams v. United States ex rel.*

19. The California Court of Appeal held that the trial court could not be said to have "abused its discretion in concluding that Faretta had not made a knowing and intelligent waiver of his right to be represented by counsel," and that the defendant "did not appear aware of the possible consequence of waiving the opportunity for skilled and experienced representation at trial." Brief for Petitioner at 10.

20. 422 U.S. at 835. See notes 107-118 infra and accompanying text.
McCann, although in dictum, recognized an affirmative right to defend *pro se*; therefore, thorough analysis dictates that the discussion begin here. *Adams* involved the contention by a criminal defendant that the constitutional right to a jury trial could only be waived with the advice of counsel. Justice Frankfurter dismissed the claim and proceeded to collateral comments concerning the *pro se* right:

> The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have the means of presenting his best defense.

> . . . When the administration of criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of the accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.  

Upon scrutiny these rather cryptic statements obtain significance for it is from within this language that persuasive arguments for the constitutional right to defend *pro se* emanate. Thus, *Adams* suggested a correlative-right argument wherein the right to appear *pro se* is derived mechanically from the assistance of counsel clause of the sixth amendment. The Court further seemed to intimate that implicitly in the sixth amendment, there arises the right of a criminal defendant to present "his best defense," one best suited to his own subjective desires. Finally, Justice Frankfurter tacitly pointed to due process considerations of fairness and liberty as giving birth to the right of a choice of defense procedure when the accused "knows what he is doing and his choice is made with eyes open."

Four years subsequent to *Adams*, the Court in *Carter v. Illinois*  

22. *Id.* at 279-80.
23. In the context of constitutional theory, the distinction between a "correlative" right and an "independent" right is directly related to their origins. A correlative right is one which is necessarily derived through the affirmative right to waive rights of a reciprocal nature which have been *independently* established in the constitutional text. See notes 40-50 infra and accompanying text.
24. 317 U.S. at 279.
25. *Id.*
26. 329 U.S. 173 (1946). *Accord* *Price v. Johnston*, 334 U.S. 266, 285 (1948) (the absence of the right of an accused to represent himself on appeal is to be sharply
made explicit reference to the fundamental nature of the *pro se* right. The case involved the claim by a defendant that he had been denied the right to counsel after pleading guilty to a criminal offense. Although holding that the defendant had a constitutional right to counsel at every stage of the trial, the Court ruled that the accused had waived counsel by not requesting the assistance of such. Again, Justice Frankfurter proceeded in dictum to assert the constitutional right of an accused to proceed without counsel:

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

Throughout the period following *Adams* and *Carter*, due to the infrequency with which the Court addressed itself to the constitutional issue, the configuration of the *pro se* right was, by necessity, forced onto the shoulders of the lower courts. Among the federal courts, the Court of Appeals for the Second Circuit is prominent for its adherence to the Supreme Court's dicta in *Adams*. In *United States v. Plattner*,

contrasted with the constitutional right to be present at trial and defend *pro se*); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (dictum stating that the *pro se* right is derived from the right to be present at trial and the confrontation clause of the sixth amendment). *See also* Moore v. Michigan 355 U.S. 155, 161 (1957).  
27. 329 U.S. at 177.  
28. Id. at 174.  
29. A majority of the federal courts have demonstrated regard for the *pro se* defense as one of constitutional dimensions and have supported their conclusions through the various arguments expressed in *Adams*. *See*, e.g., Haslam v. United States, 431 F.2d 362, 365 (9th Cir. 1970), cert. denied, 402 U.S. 976 (1971) (sixth amendment correlative right); United States v. Warner, 428 F.2d 730, 733 (8th Cir.), cert. denied, 400 U.S. 930 (1970) (sixth amendment correlative right); Lowe v. United States, 418 F.2d 100, 103 (7th Cir. 1970), cert. denied, 397 U.S. 1048 (1970); United States v. Sternman, 415 F.2d 1165, 1169-70 (6th Cir. 1969), cert. denied, 397 U.S. 907 (1970) (right held constitutional through reliance on *Adams*); United States v. Washington, 341 F.2d 277, 285 (3d Cir. 1965), cert. denied, 382 U.S. 830 (1965) (implying the constitutional nature of the right although the holding is not explicit); United States ex rel. Maldonado v. Denno, 348 F.2d 12 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966); United States v. Plattner, 330 F.2d 271 (2d Cir. 1964); MacKenna v. Ellis, 263 F.2d 35, 41 (5th Cir.), cert. denied, 360 U.S. 935 (1959) (holding the right to be implicitly derived through the fifth amendment due process clause). *But see* United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1973); Van Nattan v. United States, 357 F.2d 161 (10th Cir. 1966) (concluding right to be merely statutory). Although the District of Columbia Circuit had previously described the right as statutory in Brown v. United States, 264 F.2d 363 (D.C. Cir.), cert. denied, 360 U.S. 911 (1959), the *Dougherty* court viewed the issue as unresolved, noting, however, that the right to self-representation appeared to have a "constitutional aura" about it. 473 F.2d at 1122-23.  
30. 330 F.2d 271 (2d Cir. 1964).
the court held the right to appear pro se to be one "arising out of the Federal Constitution" and remanded the case without a showing of prejudice. The Plattner court expanded upon and to some extent refined propositions of law suggested by Adams. Although only alluding to the correlative-right theory, the court proceeded to locate a separate constitutional basis for the pro se right implicitly in both the fifth and sixth amendments. The sixth amendment provisions for notice, confrontation, and compulsory process, considered to be "minimum requirements of due process," were viewed as giving the criminally accused personal rights with which to pursue an effective defense at trial. As a logical corollary, Plattner concluded that the sixth amendment's contemplation of "personal rights" coupled with procedural due process considerations in the fifth amendment cogently suggested the inference of "the right of the accused personally to manage and conduct his own defense."

The Plattner dual amendment rationale, however, may be regarded as exhibiting alternative sources through which to derive the right to defend pro se, suggesting perhaps that the respective constitutional interests protected therein are of a conflicting nature. The theory that a conceptual dichotomy of due process is supportive of the fundamental nature of the right was subsequently manifested in United States ex. rel. Maldonado v. Denno, where the court, in construing Adams, placed the origins of the right on two rather contrary bases. While acknowledging the sixth amendment argument presented in Adams and Plattner as giving the accused "his best defense," the Denno court further recognized that although the accused may receive his most inferior

31. Id. at 273.
32. The Plattner allusion to the pro se right as being "correlative" may be implicitly derived from a perusal of the following language: "The right to counsel and the right to defend pro se in criminal cases form a single, inseparable bundle of rights, two faces [sic] of the same coin." 330 F.2d at 276.
33. 330 F.2d at 273-74. The Plattner court elicited support for its arguments through a brief historical discussion of the sixth amendment, noting that the "assistance of counsel" clause contained therein was "not intended to limit in any way the absolute and primary right to conduct one's own defense in propria persona." Id. at 274. The court's discussion also included reference to the Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73 (for the current provision see 28 U.S.C. § 1654), enacted by the First Congress and signed by President Washington one day before the proposal of the sixth amendment, and Rule 44 of the Federal Rules of Criminal Procedure, both of which compel the existence of a statutory right to dispense with counsel and proceed pro se. 330 F.2d at 274.
34. 330 F.2d at 274. See Note, Where Is the Constitutional Right to Self-Representation and Why Is the California Supreme Court Saying All Those Terrible Things About It?, 10 CALIF. W.L. REV. 196, 201 (1973).
defense through the use of the pro se device, "respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires . . . ." 36

To summarize the supportive case law, then, it would appear that the right of self-representation sustains its constitutional dimensions in varying forms. Thus, a literal reading of the Adams and Carter dicta points toward the right as "correlative,” receiving its vitality from a valid waiver of the right to counsel. 37 The Adams-Carter dicta acquire added meaning, however, when read in conjunction with subsequent case law in the Second Circuit seeking to interpret the earlier references to the right. A more expansive reading of Adams, therefore, reveals an independent basis for the pro se defense, implicitly derived from the confrontation and compulsory witness clauses in the sixth amendment. 38 Yet in addition to its sixth amendment origins, a third constitutional argument for the pro se right may be gleaned from a flexible reading of the case law exclusively in terms of due process. This basis appears to exist as a result of Denno's emphasis on statements made in Adams and Carter lending sway to the right as emanating from natural law sources contained within the due process clauses of the fifth and fourteenth amendments. 39 Whether and to what extent the various pro se theories are constitutionally compatible may only be resolved by subjecting to scrutiny the Faretta reasoning and its consistency with constitutional theory.

III. NATURE OF THE RIGHT IN LIGHT OF CONTEMPORARY CONSTITUTIONAL THEORY

A. FOUNDATIONS IN THE SIXTH AMENDMENT

In reaching its decision, the Faretta Court placed admitted reliance upon the sixth amendment propositions enunciated in both Adams and Plattner. However, while the salient thrust of the Adams dicta was concerned mostly with the pro se right as being a "correlative-right," 40 this premise was perfunctorily dismissed by Faretta. Discussing the argument in a footnote, the Court conveyed skepticism toward the idea that rights may be automatically derived from constitutional expressions guaranteeing rights of the opposite character:

36. Id. at 15.
37. See notes 23-28 supra and accompanying text.
38. See notes 21-22 supra and accompanying text; notes 30-33 supra and accompanying text.
39. See notes 34-36 supra and accompanying text.
40. 317 U.S. at 279. See notes 22-23 supra and accompanying text.
Our concern is with an independent right of self-representation. We do not suggest that the right arises mechanically from a defendant's power to waive the right to the assistance of counsel. . . . On the contrary, the right must be independently found in the structure and history of the constitutional text.41

The Court's attitude in this respect must be attributed to Singer v. United States,42 a decision concerning the constitutional mandate of trial by jury. The Singer issue involved claims by a defendant that the right to waive a jury trial and be tried solely by the court existed as a necessary correlate to the expressly compelled trial by jury in article III, section 2 of the United States Constitution. Although rejecting the correlative-rights argument as giving constitutional status to the right to be tried without a jury, Singer intimated the possibility of an exception to the rule: "The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right."43

Faretta's approval of the Singer rationale was apparently based on the presumption that the nature of the right to counsel is analogous to that of trial by jury, the presumption extending as well to their alleged correlates. But it is through this reasoning that Faretta's acceptance of Singer proves to be ill-warranted, for there are perceptible distinctions which can be derived from the rights involved. The right to a jury trial as expressed in article III is formulated in terms which bespeak commands of an absolute or imperative nature: "The trial of all Crimes . . . shall be by Jury . . . ."44 By contrast, the "Assistance of Counsel" provision embodied in the sixth amendment is expressed in somewhat less-than-imperative language, evincing expressions of a suggestive or supplementary nature.45 Thus, it would seem that legislative intentions with respect to trial by jury were of a more compelling nature than those regarding the right to counsel. Although present case law does not hold the jury trial to be absolutely required,46 historically, there is evidence in the federal courts to the effect that trial by jury was solely

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41. 422 U.S. at 819-20 n.15 (emphasis in original).
42. 380 U.S. 24 (1965).
43. Id. at 34 (emphasis added).
44. U.S. Const. art. III, § 2.
45. For an excellent discussion suggesting that the sixth amendment guarantees of counsel are significantly different from the more directory constitutional language with regard to jury trials see Self Representation in Criminal Trials, supra note 3, at 1488.
contemplated in criminal proceedings. The origins of the right to counsel suggest otherwise. In fact, it is on grounds of historical usage and custom that the rights litigated in *Faretta* and *Singer* must be distinguished. The *Singer* Court indicated that since no compelling historical basis for the right to be tried without a jury had existed in English common law or American colonial experience, the right could not be insisted upon via the correlative-rights argument. Antithetically, the correlate of the right to counsel—pleading *pro se*—was found by *Faretta* to be pervasive in English and American colonial history, with the right to assistance of counsel appearing subsequently as an alternative. Perhaps the *Singer* Court would have found the correlative-


49. 422 U.S. at 821-32. The *Faretta* inquiry into the historical origins of the right to defend *pro se* revealed that at the English common law, self-representation and not representation by counsel was the usual mode of procedure in the trial of serious crimes. *Id.* at 823. Throughout the 16th and 17th centuries, then, individuals charged with felonies or treason, as a practice, represented themselves in defending against the accusations of the Crown. See 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 211 (1909); J. Stephen, *A History of the Criminal Law of England* 341 (1883), noted in 422 U.S. at 823-24. Subsequent criminal reforms in English law extended the right to counsel to all defendants, first to alleged traitors through the Treason Act of 1695, 7 Will. 3, c. 3, § 1, and subsequently to felons by statute in 1836, 6 & 7 Will. 4, c. 114, § 1. However, the common law rule, stated in *R. v. Woodward*, [1944] 1 K.B. 118, continued to be that counsel could not be forced upon the criminally accused without his consent. 422 U.S. at 826. For discussions of the English common law practice see Grano, *supra* note 3, at 1190-92 and *The Right to Appear, supra* note 3, at 244 n.64.

In the American colonies, the right to self-representation was found by *Faretta* to be of an even more fundamental nature than in England. Reflected by "virtues of self-reliance and a traditional distrust of lawyers" among the colonists, the right to plead *pro se* was manifested in many colonial charters and declarations of rights as well as in theories of natural law pervading the political climate. 422 U.S. at 826-28. For example, see art. 26, Massachusetts Body of Liberties (1641), reprinted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 74 (1971), which provides in part:

> Every man that findeth himselfe unfit to plead his owne cause in any Court shall have Libertie to imploie any man against whom the Court doth not except, to helpe him. Provided he give him noe fee or reward for his paines. This shall not exempt the partie him selfe from Answering such Questions in person as the Court shall thinke meete to demand of him.

Similarly the Pennsylvania Frame of Government of 1682, thought to be one of the more influential colonial documents on individual liberties, further provided: "That, in all courts all persons of all persuasions may freely appear in their own way, and according to their own manner, and there personally plead their own cause themselves; or, if unable, by their friends . . . ." 1 B. Schwartz, *The Bill of Rights: A Documentary History* 140 (1971). Post-Revolution state constitutions began to recognize the value of representation by counsel, but only as a supplement to the more basic right of self-representation. 422 U.S. at 828-29 & n.38. See generally Schwartz, *supra*, at 256-379. For a rather detailed discussion of the American colonial experience with regard to the *pro se* right see *Criminal Defendants at the Bar, supra* note 3, at 346-50.
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rights argument more persuasive, had the right to waive a jury trial been established as truly analogous to the pro se right in its common law origins. Nevertheless, proper analysis of Singer suggests the right to self-representation as one of those exceptional situations to which the Singer rationale should not be applicable.

As noted above, the Faretta Court was circumspect in its search for an “independent” constitutional basis for the affirmative right to proceed to trial without counsel. Adopting the Second Circuit’s reasoning in Plattner, this basis was established implicitly through the notice, confrontation, and compulsory witness clauses of the sixth amendment. Initially the Court adverted to the settled proposition that rights secured by the sixth amendment reflect values so fundamental as to constitute due process requisites of a fair trial. Discerning that these fundamental “rights to make a defense as we know it” are granted personally to the criminal defendant, the Court concluded that the generic thrust of the sixth amendment contemplates the accused as more than a mere spectator at trial:

It is the accused, not counsel, who must be “informed of the nature and cause of the accusation,” who must be “confronted with the witnesses against him,” and who must be accorded “compulsory process for obtaining witnesses in his favor.” Although not stated in the Amendment in so many words, the right to self-representation—to make one’s own defense personally—is thus necessarily implied by the structure of the Amendment.

The Faretta reasoning appears to be sound. The sixth amendment expressly guarantees to the accused the right to be confronted with witnesses and to have compulsory process. Clearly, the safeguards contained therein were intended to enhance as well as protect the

50. In addition to the apparent historical distinctions between the waivers of the right to counsel and that of trial by jury, it should be noted that Singer accurately perceived the distinctions between the rights in question. Thus, it is significant that when the Court specifically enumerated various rights which could not be waived over the objections of the prosecution, the waiver of counsel was not included therein. 380 U.S. at 35. Instead, Singer referred to the waiver of counsel as merely susceptible to “reasonable procedural regulations.” Id. In any event, the refusal by Faretta to distinguish the Singer mandate proves to be provident in the subsequent implementation of the pro se right. See notes 119-126 infra and accompanying text.

51. 422 U.S. at 819.
52. Id. at 818.
53. Id. at 819 (footnote omitted).
54. For a brief discussion of the structure and terms of the sixth amendment see Criminal Defendants at the Bar, supra note 3, at 339-41.
defendant in the presentation of his defense. Moreover, although the Supreme Court has traditionally stated the right to be present at all pertinent stages of the trial as one inhering in precepts of due process,65 Justice Black more recently in Illinois v. Allen,66 referred to the right as implicitly founded in the sixth amendment.67 The view that the right to be present at trial derives from the confrontation and compulsory witness clauses is significant, for it demonstrates the personal character of the amendment. If rights provided by the sixth amendment could be exercised solely through the intermediary of counsel, the fundamentally held right to be present at trial would be subordinated to little more than mere formalism. Thus, the notion that the sixth amendment revolves around the accused and not counsel receives support from Snyder v. Massachusetts,68 where the Court acknowledged the right to be present at trial as involving the right of the accused "to give advice or suggestions or even to supersede his lawyers altogether and conduct the trial himself."69 Although the defendant's retention of counsel may provide counsel with "the power to make binding decisions of trial strategy in many areas,"70 surely a logical construction of the sixth amendment

55. See, e.g., Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934); Dowdell v. United States, 221 U.S. 325, 331-32 (1911); Lewis v. United States, 146 U.S. 370, 374 (1892); Schwab v. Bergen, 143 U.S. 442, 448-49 (1892); Hopt v. Utah, 110 U.S. 574, 579 (1884).


57. Id. at 342.


59. Resolution of the issue pursuant to this line of reasoning necessarily involves the judicial construction of the sixth amendment's structure and history. Framed in these terms, the question becomes whether the right to counsel is superior to, and therefore predominant over other sixth amendment guarantees, the result of which would require the exercise of those rights through the intermediary of counsel; or put more succinctly, whether the right to be present at trial is indeed a mere formality. The Second Circuit, however, in Plattner v. United States, 330 F.2d 271 (2d Cir. 1964), seems to have reached an opposite result, concluding that the right to counsel was intended to "buttress and supplement" other sixth amendment rights and not "to limit in any way the absolute and primary right to conduct one's own defense in propria persona." Id. at 274. The Plattner conclusions were based on the historical premise that the framers of the sixth amendment recognized that many criminal defendants would not have the legal capabilities necessary to properly effectuate their sixth amendment rights and therefore drafted the assistance of counsel clause accordingly. Id. See The Right to Defend, supra note 3, at 686. To the extent that Faretta accorded preference to Plattner in deriving the pro se right implicitly from both the confrontation clause and the right to be present at trial, the foregoing historical construction of the sixth amendment was adopted by Faretta. 422 U.S. at 818-19. See notes 30-33, 51 supra and accompanying text.

60. 422 U.S. at 820. Much of the discord for the right to self-representation has concerned the apprehension that once criminal defendants were made cognizant of this right, they would attempt to assert it at every dissatisfaction with trial decisions made by counsel. However, these fears are unfounded, for it should be emphasized that under current law, the acceptance of a lawyer by the accused establishes counsel as "the
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justifies this by giving the defendant the basic control of his defense, that is, whether to proceed pro se, or accept counsel with its concomitant allocation of power.

B. APPLICABILITY TO THE STATES:
THE PROCEDURAL DUE PROCESS DICHOTOMY

Notwithstanding the sixth amendment basis for the pro se defense, perhaps the true nature of the Faretta right is most discernible through an examination of the Court’s utilization of procedural due process in providing fundamental limitations on state enforcement policies.\footnote{61} Pursuant to the more contemporary constitutional decisions with regard to the incorporation theory of the Bill of Rights,\footnote{62} Faretta ostensibly extended the implied sixth amendment precepts to the states through the due process clause of the fourteenth amendment.\footnote{63} Yet it is through the use of the sixth amendment as the \textit{tour de force} in precipitating the

manager of the lawsuit.” Rhay v. Browder, 342 F.2d 345, 349 (9th Cir. 1965). This “acceptance” by the criminal defendant gives counsel the authority to make important tactical decisions at trial, including the assertion or waiver of certain rights guaranteed to the defendant by the Constitution. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973) (counsel may waive the defendant’s confrontation right under the sixth and fourteenth amendments by failing to cross-examine an adverse witness); Barker v. Wingo, 407 U.S. 514, 534-36 (1972) (implies the power of counsel to agree to a continuance, thus waiving the defendant’s sixth amendment right to a speedy trial); Henry v. Mississippi, 379 U.S. 443, 447 (1965) (counsel may decline to make evidentiary objections, thus waiving the defendant’s fourth amendment rights against unreasonable search and seizure); Nelson v. California, 346 F.2d 73, 81 (9th Cir.), cert. denied, 382 U.S. 964 (1965) (granting to counsel power to determine trial strategy and tactics generally). For a discussion of the allocation of power accorded trial counsel see Grano \textit{supra} note 3, at 1213-20. On the other hand, however, the waiver of a jury trial, the decision to enter a guilty plea, and the decision not to appeal convictions are viewed as exclusively within the province of the defendant and not subject to waiver by counsel. See Comment, Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest, 54 \textit{Cal. L. Rev.} 1262, 1268 (1966). In according the criminal defendant the basic and initial control of his defense, Faretta depicted the sixth amendment as a constitutional safety valve, giving the accused the choice of accepting counsel as the manager of his case, or dispensing with counsel and proceeding pro se. But see notes 119-26 \textit{infra} and accompanying text.

61. In the context of the fourteenth amendment, procedural due process has been characterized as a “constitutional reservoir of values” judicially employed to place fundamental limitations on state procedures in the adjudication and seizure of persons or property. \textit{See} \textit{Ratner, The Function of the Due Process Clause, 116 \textit{U. Pa. L. Rev.}} 1048, 1049 (1968) [hereinafter cited as Ratner].

62. The modern trend of the Supreme Court has been to view the fourteenth amendment due process clause as “selectively” incorporating various Bill of Rights limitations into state policies, not necessarily because they are expressed in the Constitution but because they are “fundamental to the American scheme of justice . . . necessary to an Anglo-American regime of ordered liberty.” \textit{See} \textit{Ratner, supra} note 61, at 1054-55, quoting Duncan v. Louisiana, 391 U.S. 145 (1968).

63. 422 U.S. at 818.
functional use of due process that the Court's reasoning becomes superfluous, rendering itself subject to criticism.

The Supreme Court has frequently identified procedural due process requirements as those constitutional expressions considered so fundamental as to be "essential to a fair trial." Toward this end, due process is designed to insure and promote what has been termed "the reliability of the guilt-determining process," a substantial social objective in every criminal proceeding. It is through these fair trial-truth ascertainment policies that rights contemplated by the sixth amendment have been accorded fundamental stature. In fact, it should be emphasized that each protection rendered the criminal defendant by the sixth amendment bears a direct and exclusive relation to the truth-determining objective of due process. Hence, the accused in a state criminal trial has the constitutionally guaranteed right to confront all witnesses proffering evidence against him, to compulsory process for obtaining favorable evidence, and to receive the assistance of counsel. Furthermore, although the Court has adverted to fair trial definitions of due process in restricting state procedures not expressly proscribed by the Constitution, these conclusions have served to further the truth interests found within the purview of the sixth amendment.

65. Kadish, Methodology and Criteria in Due Process Adjudication—A Survey and Criticism, 66 YALE L.J. 319, 346 (1957) [hereinafter cited as Kadish]. For a discussion of the "fair trial" values contained within procedural due process and their objective of facilitating the determination of truth at trial see Ratner, supra note 61, at 1064-65.
66. "[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI (emphasis added).
70. The judicial development of the constitutional right to be present at trial provides sufficient evidence of this point. Although not expressly in the Constitution, the right of a criminal defendant to be present at trial has been traditionally identified with fair trial considerations of due process in the fourteenth amendment. See note 55 supra. Subsequently, however, when the various incorporation theories became in vogue with the Court, the truth interests engendered by the right prompted Justice Black in Illinois v. Allen, 397 U.S. 337, 342 (1970), to derive the sources for the right through the sixth amendment by implication. For other decisions recognizing the constitutional stature of rights not expressly included in the Constitution, but which promote the sixth amendment objective of a reliable guilt-determining process, see Harris v. New York, 401
The question inevitably arises, therefore, whether the right to proceed without counsel facilitates truth determination in the criminal setting. Arguably it does not, for it must be acknowledged that the gist of the right-to-counsel cases involved the realization that representation by counsel is indispensable if accurate factual and legal determinations are to be made at trial. Admittedly, occasion will arise whereby Faretta's sixth amendment rationale will become appropriate as a constitutional basis with which to provide to the accused "his best defense," yet the probability of such seems to be rather exiguous. It should be observed that the sixth amendment rationale for the pro se defense is consistent with due process only in those specific instances where self-representation will exceed representation by counsel in more nearly effectuating the determination of truth at trial. In a more practical

U.S. 222 (1971) (defendant has the right to testify in his own behalf); In re Winship, 397 U.S. 358 (1970) (defendant may be convicted only if his guilt is proven beyond a reasonable doubt); Ferguson v. Georgia, 365 U.S. 570 (1961) (state may not deny a defendant the right to have his counsel guide him on direct examination). See generally Ratner, supra note 61, at 1065-66.

71. See notes 1, 8-10 supra and accompanying text. Indeed, Justice Sutherland's words in Powell v. Alabama, 287 U.S. 45 (1932), have become classic in describing the belief that, in most circumstances, the determination of truth at trial is best effectuated through the assistance of 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. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Id. at 69. See Grano, supra note 3, at 1195.

72. There are essentially two circumstances through which it may be argued that pro se representation is preferable to representation by counsel when measured objectively by the fair trial standard. First, there seems to be growing concern with the quality of advocacy furnished to defendants in the criminal courts, especially to those defendants considered to be indigent. For comments on the competence, or rather incompetence of legal representation being offered in many urban communities, see Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 Fordham L. Rev. 227 (1973). The second situation, of course, is that in which the defendant, by reason of personal knowledge or capabilities in specific areas, can best defend himself through his own efforts. This would be particularly true in prosecutions for crimes of a technical nature. See, e.g., United States v. Private Brands, Inc., 250 F.2d 554, 556 (2d Cir. 1957) (defendant was expert on the chemistry of chloroform and believed he could cross-examine witnesses better than counsel). With regard to trials of a political nature, it has been suggested that defendants more concerned with "maintain[ing] the integrity of their political and moral commitments" than with defending on the merits may, by "personally interacting" with the court, be able to defend themselves successfully through moral justifications. See Self Representation in Criminal Trials, supra note 3, at 1503-04.

73. This conclusion is premised on the following syllogism:
sense, it is beyond dispute that a vast majority of persons endeavoring to represent themselves possess inadequate financial resources, have received limited educational opportunities, and/or have retained political philosophies deemed undesirable by majoritarian attitudes. It is submitted that this class of criminal defendants is most susceptible to harm in attempting to participate personally in a rather complex adversary system. Perhaps more importantly, it would appear to be the general consensus of the courts that the probability of conviction is raised significantly when the accused dispenses with counsel and proceeds pro se.

Thus, congruity compels the assertion that if the promotion of the truth-determining process is the sole criterion in adjudicating procedural due process, then, a fortiori, it would seem that in a majority of cases where the benefits of counsel transcend those of lay representation, due process would require the appointment of counsel. Under these circumstances, the sixth amendment, by having been consistently applied to the states through the fair trial concept of due process, does not provide fundamental legitimacy to the pro se defense.

The Court, however, has not hesitated to implement alternative formulations of due process in reaching conclusions not fully explicable.

Rights contemplated by the sixth amendment have consistently provided fundamental limitations on state procedures exclusively through the fair trial-truth concept of due process. See notes 64-70 supra and accompanying text. However, self-representation does not, in most circumstances, facilitate the determination of truth at trial. See notes 71-75 and accompanying text. Therefore, the sixth amendment rationale for the pro se defense is repugnant to due process in a majority of cases. For a somewhat analogous criticism of the sixth amendment as a pro se source, see The Right to Appear, supra note 3, at 246; Note, Criminal Procedure—Right to Defend Pro Se, 48 N.C.L. REV. 678, 682 (1970).

74. See generally L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts 7 (1965) (half of 300,000 felony defendants in state courts classified as indigent based on inability to make bail); Potts, Right to Counsel in Criminal Cases: Legal Aid or Public Defender, 28 Tex. L. REV. 491 (1950); Self-Representation in Criminal Trials, supra note 3, at 1498-1504.

75. See The Right to Appear, supra note 3, at 248-49, for the results of an empirical study concerning the pragmatic implications of pro se representation, conducted among ninety-nine Illinois judges. Questions asked the judges included, inter alia, their opinions as to the success rate of pro se defendants, and their priority of reasons for the convictions or acquittals of such defendants. Significantly, many judges replied that they could not remember a successful pro se defendant in a felony trial, while the remainder put the success rate at less than 5 percent. Although a majority of the judges believed the "obvious guilt" of the defendants to be the predominant reason for pro se convictions, the defendant's ignorance of the law, and his general ignorance received second and third billing, respectively. Interestingly enough, when asked about the reasons for a pro se defendant's acquittal, forty-one of the forty-six judges who replied to the question believed the acquittals to have been caused by the weakness of the prosecution's case.
in the truth-ascertainment objectives discussed above. These formulations, exemplified by interests protected by the fourth and fifth amendments, serve to sustain and enhance the dignity and autonomy of the individual in retaining certain freedoms of choice regarded as inherent in every democratic society. Thus, freedom from unreasonable searches and seizures as well as the privilege against self-incrimination have been concluded as being fundamental and therefore applicable to the states through the fourteenth amendment even though these conclusions are, to a great extent, prohibitive with regard to the fair trial concept of due process.

Perhaps the real value of this alternative concept of due process lies in the fact that fundamental protections may be judicially derived from extra-constitutional, natural law sources embodied in the due process clauses of the fifth and fourteenth amendments, in an effort to prevent unduly burdensome interference with individual liberties. The judicial formulation of due process, the author states:

76. Kadish, supra note 65, at 347, where in referring to case law revealing this alternative formulation of due process, the author states: [T]hey all suggest the presence of a value other than the reliability of the guilt affixing process. Central to these requirements is the notion of man's dignity, which is denigrated equally by procedures that fail to respect the defendant's intrinsic privacy or that entail the imposition of shocking brutality upon him. The ideal of man's individuality, which, . . . is what infuses meaning into the concept of freedom, is an emotional and personal as well as an intellectual affair. The temper of society is the soil in which it must find nourishment. Where society's sanctioned procedures exhibit a disdain for the value of the human personality, that ideal is not likely to flourish.

77. Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment self-incrimination privilege); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusion of evidence obtained through violation of fourth amendment search and seizure extended to states); Wolf v. Colorado, 338 U.S. 25 (1949) (unconstitutional search and seizure violative of due process although exclusionary rule restricted to federal government). The development of the exclusionary rule from Wolf to Mapp is instructive on this point. While the Court in Wolf recognized a zone of privacy interests protected by the fourteenth amendment due process clause, these protections were held to be distinct from and less substantial than those embodied in the fourth amendment. 338 U.S. at 26. As a result, Wolf failed to extend the full import of the fourth amendment exclusionary rule to the states, thereby causing disparate treatment of the rule in the federal and state courts. However, Mapp subsequently remedied this disparity by "selectively incorporating" the fourth amendment into the fourteenth and thereby making it applicable to the states. 367 U.S. at 654-55. Whether the actual underpinnings of due process are disguised by the incorporation theories or not, the Mapp-Wolf rubric demonstrates a predisposition towards the identification of due process as protecting the autonomy and privacy of the individual. The doctrinal significance of Mapp lies in the fact that the foregoing alternative concept of due process may at times be as compelling as its truth-determining counterpart. For a discussion of the Mapp formulation of due process versus the reliability of the guilt-determining process as they relate to the right to counsel, see Kamisar, The Right to Counsel and the Fourteenth Amendment: A Dialogue of "The Most Pervasive Right" of an Accused, 30 U. CHI. L. REV. 1, 37 (1962).

78. See Ratner, supra note 61, at 1048-49, 1056-57. Natural law values, as used in the context of due process, refers to societal interests, not transcendental values. Id. at 1049. See also Kadish, supra note 65, at 325-26.
cial belief that due process may be employed to articulate fundamental rights affording respect for individual autonomy not expressly indicated by the Bill of Rights is reflected by the Court's decision in *Rochin v. California.*

*Rochin* involved the issue of whether reliable evidence forcibly retrieved from the stomach of the defendant was admissible in a state criminal trial. Although the concurring opinions ruled the evidence inadmissible as violative of fifth amendment self-incrimination values incorporated into the states via the fourteenth amendment, a majority of the Court, speaking through Justice Frankfurter, placed the holding exclusively within the confines of due process:

Due Process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend "a sense of justice. . . ."

. . . [Coerced confessions] are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. [They] offend the community's sense of fair play and decency.

Although the Court has labeled natural law values in varying terms, the "sense of justice" test of procedural due process represented by *Rochin* reflects the judicial notion that in some circumstances, fair trial-truth objectives must be subordinated to more fundamental policies insuring respect for the freedom, dignity, and privacy of the individual.

Thus framed in terms of due process, the typical issue presented in

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80. Id. at 175 (Black, J., concurring); id. at 179 (Douglas, J., concurring).
81. Id. at 173 (majority opinion) (citation omitted). Subsequent to *Rochin*, the Court concluded in *Mapp v. Ohio*, 367 U.S. 643 (1961), and *Malloy v. Hogan*, 378 U.S. 1 (1964), that the unlawful search and seizure and self-incrimination values of the fourth and fifth amendments were applicable to the states through the fourteenth amendment due process clause, thereby rendering the *Rochin* standard superfluous in the area of self-incrimination. Ratner, supra note 61, at 1054 n.31. See note 77 supra. It is significant to note, however, that the *Rochin* "sense of justice" standard has been reaffirmed in *Schmerber v. California*, 384 U.S. 757, 760 (1966) (dictum). Ratner, supra note 61, at 1054 n.31. The *Schmerber* reference to *Rochin*, made after the selective incorporation of the fourth and fifth amendments in *Mapp* and *Malloy*, seems to indicate that fundamental protections not expressed in the Constitution may be independently derived through the due process clause.
82. The development of Anglo-American procedures associated with due process in the traditional criminal law area exemplifies . . . value accommodation. The important values of maximizing the reliability of the guilt determination process and preserving respect for the individual would appear on the surface to conflict with the value of enforcing the criminal law by punishing as many guilty persons as possible. In actuality, however, the procedures evolved to define criminal law due process can be more usefully and accurately
cases involving procedural coercion concerns whether the societal interest in objectively determining innocence or guilt is sufficiently high to, in effect, abrogate the individual’s interest in retaining some degree of autonomy and discretion in criminal matters to which the accused has been involuntarily subjected. The social model, however, has interests which extend beyond the guarantee that a trial be objectively fair. These interests serve to assure the continued public faith in government through the credibility of its judicial system, a credibility dependent, to a large extent, upon the security which it provides to its constituents.83 This security is best maintained when society is convinced that a person may only be deprived of life or liberty through procedures which, in addition to being objectively fair, are fair in the subjective sense that they demonstrate regard for the intrinsic quality of each individual in the community.84

Considered analysis of the constitutional policies underlying the right to defend pro se compels its inclusion within the more subjective formulations of due process inherent in the *Rochin* category. Like most of the rather personal safeguards protected in the fourth and fifth amendment area, self-representation in most instances, does not present great appeal to the truth-determining process.85 Indeed, both *Faretta* and *Rochin* disclose attempts by state authorities to severely restrict the accused's freedom of choice in an effort to implement fair trial policies. Yet under existing case law where the forced appointment of counsel is particularly oppressive to the indigent defendant,86 due process may be viewed, not . . . as a compromise of the conflicting values, [but] as their accomodation . . . .

Kadish, supra note 65, at 348-49. See The Right to Defend, supra note 3, at 704.
83. See note 87 infra.
84. See The Right of an Accused, supra note 3, at 1152-53.
85. See notes 71-75 supra and accompanying text.
86. See notes 18 & 60 supra. That the prohibition of pro se representation would be unduly oppressive to the indigent was recognized by Justice Stanley Mosk in *Drumgo v. Superior Court*, 8 Cal. 3d 930, 506 P.2d 1007, 106 Cal. Rptr. 631, cert. denied, 414 U.S. 979 (1973), where, in dissenting, he stated:

The desirability of a relationship of trust and confidence between an indigent defendant and his attorney has been elevated to indispensability as a result of this court's recent decision in People v. Sharp [7 Cal. 3d 448, 499 P.2d 489, 103 Cal. Rptr. 233 (1972)], holding that a defendant has no constitutional right to defect pro se at trial. Prior thereto an indigent defendant had three choices open to him if he lacked confidence in his appointed counsel and the judge refused to designate an attorney of his choice: he could permit the attorney to represent him and abjectly be bound by crucial trial decisions with which he might disagree . . .; he could dismiss the attorney and proceed to represent himself . . .; or he could in unusual circumstances dismiss the attorney from responsibility for the case and represent himself but have counsel standing by for advice . . . . After Sharp an indigent defendant has no choice as a matter of right: he must be represented by the appointed counsel. Thus
extended to prohibit the coercion of counsel through countervailing societal interests demanding "fair play and decency" in the manner in which individuals are brought to trial.\textsuperscript{87} The public conscience must be assured that the government will not exercise its obvious power advantages in enacting procedures which unduly restrict the accused's basic choice in the means of his defense, for the consequences of that choice will inevitably be attributed to him.\textsuperscript{88}

Despite the apparent \textit{Faretta} sixth amendment rationale, perusal and inspection of the Court's reasoning reveal the \textit{pro se} right to be predicated on a procedural dichotomy of due process contained in both the fifth and fourteenth amendments. Thus, in circumstances where \textit{pro se} representation will enhance the guilt-determining process in criminal trials, the fair trial concept of due process will become appropriate as the means through which the fundamental nature of the right is derived. It is by way of this concept that the Supreme Court has, consistently with constitutional theory, provided the implicit foundations for procedural rights in the sixth amendment.\textsuperscript{89} As \textit{Faretta} recognized, however, the conferral of the right to self-representation is inimical to the determination of truth at trial, since in a majority of circumstances, the dispensation of counsel will significantly diminish any real defense the accused may have otherwise had.\textsuperscript{90} The Court's increasing demands for the "guiding hand of counsel" in criminal litigation during the past four decades seem sufficient testimony to that in this case, the defendant must proceed with the appointed attorney, in place of other counsel in whom he has expressed confidence; as a result he will be compelled to acquiesce in subsequent trial tactics which he may find objectionable. . . . It seems inevitable that this procedure will create serious problems in the administration of justice throughout the trial and future appeals, if any. \textit{Id.} at 938-39, 506 P.2d at 1012-13, 106 Cal. Rptr. at 636-37 (Mosk, J., dissenting) (citations omitted).

\textsuperscript{87}Due Process is involved only marginally with who wins or who loses; its primary focus is on how the accused was brought to trial and how his case was tried. The judicial system's credibility depends on this. Crucial to this credibility is the defendant's own determination of his defense, \textit{i.e.}, his trial strategy, his theory of defense, his decision whether or not to take the witness stand. The choice should be left to him because he has the most to lose if the choice is wrong and the community-at-large must not be allowed to believe that the fate of an accused was sealed before trial began due to government dictation as to methods of defense. The same due process considerations that allow a defendant to choose his defense also require that he be allowed the choice of representing himself. Without this right of choice, the defendant becomes a mere spectator at his trial, his destiny to be decided by a system over which others exercise complete control. \textit{The Right to Appear, supra} note 3, at 247 (footnote omitted).

\textsuperscript{88} \textit{Faretta v. California}, 422 U.S. 806, 834 (1975).

\textsuperscript{89} See notes 64-70 \textit{supra} and accompanying text.

\textsuperscript{90} 422 U.S. at 834. See notes 71-75 \textit{supra} and accompanying text.
fact. It was this rather magnanimous trend that prompted the *Faretta* majority to face squarely a more elusive formulation of due process, one which, in providing deference to individual autonomy, necessarily clashes with the fair trial concept in balancing the interests of self-representation. Although due process in its subjective sense has been judicially employed mostly in the vernacular of the fourth and fifth amendment zone of privacy interests, the *Faretta* extension of these principles provides fundamental protection to the criminal defendant's self-determinism in matters crucial to his future liberty.

IV. PROCEDURAL IMPLICATIONS OF THE RIGHT

Although *Faretta* failed to provide specific procedural guidelines with which to implement subsequent assertions of the right to self-representation, nevertheless the Court reaffirmed the existence of qualifications to the right where countervailing interests are demonstrated. Evaluation of the extent to which the *pro se* right may be asserted therefore necessitates the analysis of existing case law purporting to limit the right and the simultaneous measuring of the interests pervading these limitations by the fundamental mandate of *Faretta*.

A. INTEREST IN OBJECTIVE ADMINISTRATION OF JUSTICE

 Assertions of the Right Before Trial

Since the assertion of the *pro se* right invariably conflicts, at least in most circumstances, with the fundamental policies surrounding the

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91. See note 1 *supra* and accompanying text.
92. See notes 77-81 *supra* and accompanying text.
93. The *Faretta* analogy to the *Mapp-Rochin* privacy scheme of due process may be discerned through the Court's emphasis on the criminal defendant's freedom of choice values, enabling the defendant to either defend *pro se* or through the representation of counsel:

Freedom of choice is not a stranger to the constitutional design of procedural protections for a defendant in a criminal proceeding. For example, "[e]very criminal defendant is privileged to testify in his own defense, or to refuse to do so."


94. In criticizing the *Faretta* majority's failure to address the procedural problems involved in implementing the *pro se* right, Justice Blackmun in his dissent posed many of the more immediate issues:

Must every defendant be advised of his right to defend *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?

422 U.S. at 852 (Blackmun, J., dissenting).
right to counsel, it is well established that self-representation at trial may only be permitted where the defendant "'knows what he is doing and his choice is made with eyes open.'" As the Court stated in Johnson v. Zerbst:

The constitutional right to an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused.

The implications of requiring that a defendant be fully cognizant of the consequences of dispensing with counsel are two-fold. First, it is indicative of the criterion to which a trial judge must adhere in balancing the individual's pro se requests with the interests of society in achieving the proper administration of justice. Where the accused is incapable of understanding the consequences of his decision, counsel must be appointed in order to insure that the objective ends of justice are achieved. Moreover, the requirement of a competent waiver of counsel serves to preclude subsequent attacks on appeal by disappointed pro se defendants, urging reversible error through the denial of the fair trial benefits of counsel.

95. Id. at 835 (majority opinion), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279 (1942).
96. 304 U.S. 458 (1938).
97. Id. at 465 (emphasis added). Subsequently, in Von Moltke v. Gillies, 332 U.S. 708 (1948), the Court said:

It is the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to insure the fullest protection of this constitutional right [to the assistance of counsel] at every stage of the proceedings.

Id. at 722.
98. Under these circumstances, societal interests in the fair trial-truth determining process become compelling and therefore must override the individual's otherwise fundamental pro se interest. See United States v. Brown, 335 F.2d 170, 172 (2d Cir. 1964); The Right of an Accused, supra note 3, at 1146; Grano, supra note 3, at 1200-03. See generally notes 61-93 supra and accompanying text.
99. The dilemma in which courts are frequently placed in dealing with the attempted waiver of counsel is illustrated in People v. Addison, 256 Cal. App. 2d 18, 63 Cal. Rptr. 626 (Dist. Ct. App. 1967), where the court stated:

Cunning criminals consistently take advantage of it and all too often the demand for self-representation becomes a "heads I win tails you lose" proposition. If the trial court too readily accedes to it an appellate court will find the waiver of the right to counsel to be ineffectual. Conversely, if the court leans over backwards in protecting the latter right, it runs the risk of depriving defendant of the former.

Id. at 23-24, 63 Cal. Rptr. at 629. See Note, Where is the Constitutional Right to Self-Representation and Why Is the California Supreme Court Saying All Those Terrible Things About It?, 10 CALIF. W.L. REV. 196, 209 (1973).
In order to properly apprise the accused of his constitutional rights and to establish a record wherein the thread of reversible error will not be sewn, the Second Circuit has suggested a model inquiry which should be made by the courts upon being presented with criminal defendants:

[It is incumbent upon the presiding judge, by recorded colloquy with the defendant, to explain to the defendant: that he has the choice between defense by a lawyer and defense pro se; that, if he has no means to retain a lawyer of his own choice, the judge will assign a lawyer to defend him, without expense or obligation to him; that he will be given a reasonable time within which to make the choice; that it is advisable to have a lawyer, because of the special skill and training in the law and that the judge believes it is in the best interest of the defendant to have a lawyer, but that he may, if he elects to do so, waive his right to a lawyer and conduct and manage his defense himself. If the result is a waiver of the right to counsel and an election to defend pro se, the presiding judge should conduct some sort of inquiry bearing upon the defendant's capacity to make an intelligent choice.]

Although the Second Circuit does not view the foregoing colloquy as constitutionally compelled, there appears to be some question as to whether post-Faretta defendants should be given notice of the right to defend pro se equivalent to that of the right to counsel. While Faretta did not address itself specifically to this issue, the Court's finding that the defendant had "clearly and unequivocally declared to the trial judge that he wanted to represent himself. . . ." may be construed as obviating any requirement that notice of the right be given. Such a reading, however, tends to ignore the true import of the Faretta decision and limits the holding unnecessarily to its facts. Assuming vis-à-vis Faretta, that self-representation is of such a fundamental character as to

100. United States v. Plattner, 330 F.2d 271, 276 (2d Cir. 1964).
101. Id. at 276-77. While the Second Circuit requires that inquiry be made into the competence of the pro se decision, notice of the right is not constitutionally required: "Regardless of whether he has been notified of his right to defend himself, the criminal defendant must make an unequivocal request to act as his own lawyer in order to invoke the right." United States ex rel. Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), cert. denied, 384 U.S. 1007 (1966). See Grano, supra note 3, at 1186.
103. 422 U.S. at 835. The Court's statements may be read as adopting the Second Circuit's requirement of an unequivocal request by the accused, in lieu of notice. See note 101 supra. However, the requirement in Faretta that the accused must "clearly and unequivocally" declare his pro se desires has been viewed as a means through which the right must be asserted after being apprised of its existence. See Criminal Defendants at the Bar, supra note 3, at 354, 358 n.143.
be "basic to our adversary system of criminal justice," it thereafter becomes difficult to contend that the pro se right is transcended by that of counsel or that notice thereof may be implied from a notice of the right to counsel. Furthermore, if the valid waiver of a constitutional right is to be defined as the "intentional relinquishment or abandonment of a known right," it would seem that the accused in Faretta could not have waived his right to defend pro se without having been informed of its existence.

Once the accused has knowledge of the right and has indicated the desire to defend personally, Faretta requires the trial court to preliminarily adjudicate the requests by inquiring into whether the defendant has exercised the right "knowingly and intelligently." Although the Court failed to elaborate on the precision with which this standard is to be implemented, its reliance on Johnson v. Zerbst and Von Moltke v. Gillies suggests somewhat alternative guidelines which have been used to condition assertions of the pro se right upon a competent waiver of counsel. The Court in Zerbst emphasized that an intelligent appreciation of the consequences of a waiver must "depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."
Further inquiry into the Zerbst rationale, however, reveals its standard to be of questionable value in measuring the assertion of constitutional rights, since its focus on purely subjective factors may be employed to severely restrict the scope of the pro se right. Hence, while the test would provide adequate protections for those defendants in need of counsel, its discretionary implications could be read as requiring some sort of professional ability by the accused to represent himself, a requirement explicitly rejected by Faretta.112

Perhaps a more objective method by which to determine the "knowing and intelligent" character of the defendant's pro se decision is presented in Von Moltke, where the Court commented on the duty of the trial judge to "investigate as long and as thoroughly as the circumstances of the case . . . demand," for

To be valid such waiver [of counsel] must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.113

In applying these standards, the federal courts have expressed preference for the more general Zerbst test of a knowing and intelligent waiver, believing the Von Moltke standard to require unattainable "procedural exactitude."114 However, any discontent with the latter formu-
lation involves at least a partial misreading of its mandates, for the accused need not comprehend the legal intricacies of his case in order to satisfy the standard, but must only be made aware of the facts, charges, possible pleas, allowable punishments, etc., involved therein to enable him to assess the implications of proceeding pro se. Furthermore, failure by the courts to insist upon definite criterion by which to inform the accused of matters essential to a "broad understanding" of the case may result in a waiver of counsel without the true knowledge of its consequences. While the age, education, and mental stability of the accused may have an indirect bearing upon whether he has "knowingly and intelligently" exercised the right, the primary focus in such a determination should follow more objective guidelines. The right of a defendant to dispense with counsel should not be made to turn directly upon such factors as his background, experience or conduct but rather on whether the defendant is "aware of the dangers and disadvantages of self-representation, so that the record will establish that... 'his choice is made with eyes open.'" The principles set forth in Von Moltke seem best suited to the effectuation of this design, according fundamental protection not only to the constitutional right to counsel but to the pro se right as well.

Simultaneous Representation by Counsel (Herein Standby Counsel)

While the authority of Faretta imposes on the courts the rather tenuous task of balancing self-representation with the assistance of counsel, perhaps this burden would be mitigated by the appointment of

where the court concluded: "It appears that the federal courts have looked to the substance of the Von Moltke formulations, and not to its formulas." Id. at 72. It seems, therefore, that the implementation of Von Moltke has drifted toward the Zerbst approach, by focusing not so much on the defendant's knowledge of relevant circumstances, but on the competence, and in some cases the capabilities of the accused to represent himself. See notes 111-12 supra and accompanying text. But see United States ex rel. Ackerman v. Russell, 388 F.2d 21, 23 (3d Cir. 1968); Shawan v. Cox, 350 F.2d 909, 912 (10th Cir. 1965).

115. 332 U.S. at 723-24. See note 112 supra and accompanying text.

116. For an excellent case in point see Salazar v. Sigler, 441 F.2d 834 (8th Cir. 1971). In Sigler, a twenty-one-year-old Mexican possessing a ninth grade education was permitted to waive counsel, and plead guilty to a charge of murder, despite the fact that the trial court had not informed the defendant of the nature of the charges, allowable punishments, possible defenses or circumstances in mitigation. Id. at 838-39.

117. 422 U.S. at 835.

118. It should be noted that the requirement of a competent decision by the pro se defendant is necessarily included within the Faretta determination of whether the right has been "knowingly and intelligently" exercised. For a method of objectively measuring Faretta competence most effectively through the Von Moltke standard see The Right of an Accused, supra note 3, at 1145-46.
standby counsel to assist those defendants desirous of representing themselves. The appointment of such counsel at the arraignment would facilitate adherence to the somewhat burdensome Von Moltke scheme, by providing someone other than the trial court to advise the accused not only of the essential facts involved in the case, but also of the desirability of legal assistance in certain matters.\footnote{119} This procedure has also been proposed in order to furnish pro se defendants with professional advocacy at trial, where counsel may, upon request, interject procedural motions or direct and cross-examine witnesses on behalf of the accused.\footnote{120} In addition, the standby device would, in many instances, generate a greater rapport between the accused and counsel, since the defendant would be assured that the final tactical decisions at trial would be his.\footnote{121}

While the trial court may, in its discretion, appoint standby counsel even over the objections of the accused,\footnote{122} the weight of authority appears to be that the pro se defendant is not entitled to the simultaneous assistance of counsel as a matter of right.\footnote{123} Proper analysis of

120. See Mayberry v. Pennsylvania, 400 U.S. 455 (1971), where Chief Justice Burger stated:

When a defendant refuses counsel . . . a trial court is well advised . . . to have such "standby counsel" to perform all the services a trained advocate would perform ordinarily by examination and cross-examination of witnesses, objecting to evidence and making closing argument.

Id. at 467-68. This procedure has been further recommended by the ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 6.7 (App. Draft 1972):

When a defendant has been permitted to proceed without assistance of counsel the trial judge should consider the appointment of standby counsel to assist the defendant when called upon and to call the judge's attention to matters favorable to the accused upon which the judge should rule on his own motion.

Standby counsel should always be appointed in cases expected to be long or complicated or in which there are multiple defendants.


121. See note 60 supra; Criminal Defendants at the Bar, supra note 3, at 361 n.159.
123. See, e.g., Lee v. Alabama, 406 F.2d 466, 469 (5th Cir. 1968), cert. denied, 395 U.S. 927 (1969); Duke v. United States, 255 F.2d 721, 725 (9th Cir.), cert. denied, 357 U.S. 920 (1958); Shelton v. United States, 205 F.2d 806, 813 (5th Cir.), cert. dismissed, 346 U.S. 892 (1953), motion to vacate denied, 349 U.S. 943 (1955). But see Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).}
the Faretta decision, however, seems to place standby counsel in a more preferred constitutional light. This position inevitably hinges on whether the Court conditioned the assertion of the pro se right upon a valid waiver of the right to counsel. The contention that Faretta's knowing and intelligent standard referred solely to the assertion of the pro se defense and not necessarily to a waiver of counsel is supported by the fact that the Court found the right to be independent of the right to counsel clause of the sixth amendment and not as a correlate thereof.124 Furthermore, evaluation of the Faretta "dichotomy" of interests pervading the origins of the right serves to reinforce the conclusion that due process permits and perhaps even requires the appointment of standby counsel in cases involving pro se applicants.125 Thus, its use by the courts would minimize the interference with the accused's freedom of choice in defending himself, while concomitantly promoting the fair trial-truth determining process by providing the accused with professional assistance if he so desires.126

Although Faretta did not explicitly direct the usage of standby counsel, nevertheless the case demonstrates a rationale into which the simultaneous representation by counsel may be neatly placed. To the extent that this procedure is of benefit to a pro se litigant then, the appointment of standby counsel should be encouraged.

B. INTEREST IN THE ORDERLY ADMINISTRATION OF JUSTICE

Assertions of the Right During Trial

Although the pre-trial assertion of the right to self-representation commands only that the defendant possess an intelligent appreciation of its consequences, there appear to be additional considerations relating to the efficient and orderly administration of justice which inhibit assertions of the right during trial.127 Deference to these considerations has prompted the general belief by the courts that although the right is constitutionally compelling if asserted prior to trial, its attempted exercise subsequent to that time may be subjected to the discretion of the

124. See notes 40-41 supra and accompanying text; Criminal Defendants at the Bar, supra note 3, at 354.
125. See notes 61-93 supra and accompanying text; Criminal Defendants at the Bar, supra note 3, at 361.
126. See notes 82-93 supra and accompanying text.
trial courts. Accordingly, the standard of review used in reconciling the individual's pro se interests with those of social expediency has been typically illustrated by the Second Circuit in United States ex. rel. Maldonado v. Denno: 129

There must be a showing [by the accused] that the prejudice to the legitimate interests of the defendant overbalances the potential disruption of proceedings already in progress, with considerable weight being given to the trial judge's assessment of this balance. 130

Thus where mid-trial motions to dispense with counsel have potentially threatened to complicate the orderly procedures of the court, or unavoidably delay the proceedings, the courts have denied the requests.

While Faretta had no reason to consider the issue of whether the pro se right permeates the entire trial, its principles should substantially outweigh the continued adherence to the "potential disruption" rationale by increasing significantly the defendant's interest in proceeding pro se. Indeed, the Court's implicit rejection of the discretionary standard may be countenanced by the fact that the possibility of complication and delay, which the Denno test finds disdainful during trial, appears just as ubiquitous when the right is asserted precedent to trial. 133 It would therefore seem that the only disruption occasioned by the assertion of the pro se right during trial would be the continuance required by Faretta to determine whether the accused had exercised the right "knowingly and intelligently." 134


130. Id. at 15 (emphasis added). For a discussion of the variations of the "potential disruption" interests which have restricted the exercise of the right during trial see Grano, supra note 3, at 1181-84.


133. See Grano, supra note 3, at 1183-84.

134. See note 107 supra.
Termination of the Right

In spite of the fact that the Faretta liberalization of self-representation serves to diminish, to some extent, interests in the orderly processes of justice, circumstances of misconduct by pro se litigants may provide sufficient reason to terminate the right.\textsuperscript{135} Thus, in Illinois v. Allen,\textsuperscript{136} the defendant was initially permitted to represent himself, although during the voir dire he “started to argue with the judge in a most abusive manner.” The court immediately forewarned the defendant and instructed standby counsel to continue the proceedings, whereupon the defendant renewed the abusive threats to the judge and attempted to destroy papers belonging to counsel. Accordingly, the trial court ordered the defendant’s removal from the courtroom.\textsuperscript{137} The United States Supreme Court in Allen affirmed the trial court’s conviction of the defendant, holding that in circumstances where the accused manifests behavior which is “so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom,” the right to be present at trial and its concomitant pro se right may be appropriately terminated.\textsuperscript{138}

While the Allen decision is usually represented as disclosing the periphery of the sixth amendment right to be present at trial, considered treatment of the Faretta rationale warrants the contention that the pro se right should be viewed in a similar vein.\textsuperscript{139} As a result, courts should distinguish the various degrees of misconduct which sometimes accompany pro se representation, only one of which should involve the termination of the right. The Allen situation, of course, is the most extreme, where the disruptions are sufficiently great as to be considered intolerable. However, this circumstance is to be contrasted to situations where misconduct is tolerable.\textsuperscript{140} The distinction which should be drawn

\textsuperscript{136} 397 U.S. 337 (1970).
\textsuperscript{137} People v. Allen, 37 Ill. 2d 167, 226 N.E.2d 1, 2, cert. denied, 389 U.S. 907 (1967).
\textsuperscript{138} 397 U.S. at 343. The Court further stated:

It is essential to the proper administration of criminal justice that dignity, order, and decorum be the hallmarks of all court proceedings in our country. The flagrant disregard in the courtroom of elementary standards of proper conduct should not and cannot be tolerated. We believe trial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case.

\textit{Id.}

\textsuperscript{139} See notes 51-59 supra and accompanying text; Self-Representation in Criminal Trials, supra note 3, at 1493.
\textsuperscript{140} Illinois v. Allen, 397 U.S. 337, 343 (1970). The Allen test of tolerance-intolerance seems to be whether the disruption is such that the trial cannot possibly
between the two is dependent upon the effectiveness of alternative judicial sanctions which may be available to the courts. In circumstances similar to Allen, where notice of impropriety and the contempt device will likely achieve little, termination of the pro se right is in order.\textsuperscript{141} It has been suggested, however, that many misconduct situations involve serious pro se litigants forcefully advocating claims and defenses as vehemently as the courts will allow.\textsuperscript{142} To the extent that warnings to defendants and the contempt procedure in more extreme cases will remedy any disruption extending beyond the Allen periphery, the defendant's behavior should be considered tolerable, with the pro se right thus protected.

V. CONCLUSION

The pro se issues pervading the Faretta appeal presented the Supreme Court with the typical task of reconciling conflicting constitutional values—values which are inherent in due process as it relates to the right to counsel and the progeny which it inevitably produced. By way of traditional argument for the assistance of counsel, these values consisted, on the one hand, of societal interests demanding the proper administration of justice by maximizing, as much as possible, the reliability of the guilt-determining process. Opposite the collective social interests existed values seeking to preserve respect for the dignity and autonomy of the individual by giving the criminal defendant the prerogative of freedom of choice in selecting methods through which to defend against the potential deprivation of liberty by state authority. By recognizing the constitutional right of self-representation, the Faretta Court balanced the opposing ends of due process, thereby accommodating the less substantial interest to the other. Through the utilization of the Supreme Court's traditional accommodation process, protection was afforded both interests involved, first by acknowledging the individual pro se interest as fundamental, but by subsequently qualifying that interest through the continued deference to the objectives of truth at trial. Thus, the criminal defendant may represent himself at trial, but the assertion of the right is conditioned upon a knowing and intelligent decision to forego counsel and proceed alone.


\textsuperscript{142} Self-Representation in Criminal Trials, supra note 3, at 1494.
The *Faretta* framework, however, is susceptible to an adjudication process other than that of accommodation, namely, *resolution* of the conflict without the compromise of otherwise antithetical constitutional values. Toward this end, perhaps the opposing interests of due process can best be resolved through both *pro se* representation and the simultaneous assistance of counsel. Certainly, the judicial appointment of standby counsel would assuage the traditional demands of the right-to-counsel cases, yet it would also meet the requirements of *Faretta* by permitting the criminal defendant to engage in the decision-making processes relating to his defense. Although the construction of the *Faretta* decision must remain for the future academics of the lower courts, the resolution of procedural complexities affecting the implementation of the *pro se* right is dependent, to a great extent, on the selection by the courts of either the accommodation process or that of judicial resolution.

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