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Joan W. Garrott

The Constitutional Right of Self-Representation: Faretta and the "Assistance of Counsel"

In the landmark case of *Faretta v. California*,[1] the Supreme Court ended the controversy surrounding the nature of self-representation. Finding that the right was of constitutional rather than merely statutory[2] dimension and not a matter reserved to the discretion of the trial court,[3] the Court held that the right of self-representation was independent of the right to counsel. This right was found implicit in the language and historical background of the Sixth Amendment.[4] Mr. Justice Stewart, writing for the majority, declared that a state may not force a defendant to accept counsel against his will if the choice is a "knowing and intelligent" relinquishment of the benefits associated with the right to counsel.[5]

The full impact of the constitutional right enunciated in *Faretta* has yet to be determined. In addition to discussing the general right of self-representation, this article will explore both the changes mandated in the conduct of criminal trials to accommodate adequate assertion of this right and competing interests in the context of the total criminal justice system.

To better facilitate this discussion, a backdrop of the facts of this

1. 422 U.S. 806 (1975).
2. In the federal courts the right of self-representation has been preserved from the enactment of the Judiciary Act of 1789, and is currently embodied in 28 U.S.C. § 1654.
3. People v. Sharp, 7 Cal. 3d 461, 103 Cal. Rptr. 233 (1972). This California case, holding that the right of self-representation did not have constitutional protection, was overruled by Faretta.
4. 422 U.S. 806, 821.
5. *Id.* at 836.

most recent Supreme Court enunciation on self-representation will be provided. The pertinent facts of *Faretta* are as follows: Anthony Faretta requested permission to represent himself "well before the date of trial,"[6] and a waiver was accepted. Several weeks later and after another examination of the defendant, the trial judge reversed this ruling, finding that Faretta, lacking legal knowledge, had not made a knowing and intelligent waiver of his right to counsel; the court also found that Faretta enjoyed no constitutional right to defend himself.[7] A public defender represented Mr. Faretta throughout the trial.

In reversing the lower court, a majority of the U.S. Supreme Court undertook an extensive review of the history of the right of self-representation as interpreted in federal and state courts, in the language and logic of the Sixth Amendment, and in the roots of British and colonial legal history.[8] The Court analogized the attempt to force unwanted counsel upon a defendant to the Star Chamber's practice of having a lawyer sign the defendant's answer to an indictment or considering the failure to have an attorney sign such answer as a confession.[9]

Granting that the Court's historical examination of the right of self-representation reveals a practice of allowing an accused to present his own defense, the development of this practice should be considered in relation to other aspects of criminal law and procedure at common law. At early common law, a prisoner "defended" himself under myriad disadvantages.[10] First, he was confined so that he could not prepare a defense. The prosecution conducted an examination, which was recorded and used against him. The accused was not furnished with notice of the evidence to be used against him and was not permitted access to counsel before or during the trial. Further, the proceeding was conducted without the use of evidentiary rules as we know them. The accused could not confront witnesses nor could he call witnesses on his own behalf. Confessions of accomplices were not only admissible, but were "re-

6. *Id.* at 807.
7. *Id.* at 811.
8. *Id.* at 821.
9. *Id.* at 822, n.18.
10. The following practices are enumerated in an examination of the position of a criminal accused by A.T. Carter. CARTER, A HISTORY OF THE ENGLISH COURTS (6th ed. 1935), 134-135, hereinafter referred to as CARTER.

garded as specially cogent."[11] Frankly, it would appear that the only "right" possessed by a criminal defendant at early common law was the "privilege" of self-representation to the extent that the prisoner was permitted to respond to the prosecution's charges and evidence.[12]

Reforms in the procedures of British criminal law were relatively slow. Sir Harry Poland, Q.C., Treasurer of the Inner Temple, in a lecture given on November 15, 1900,[13] touted the reforms of the nineteenth century. In the Prisoner's Counsel Act of 1836,[14] separate provisions were made for treason, felony and misdemeanor trials. In the case of high treason, two counsel and the accused were permitted to address the jury. For a misdemeanor charge, only one counsel was permitted to address the jury. Where a defendant was accused of a felony, however, counsel's role was limited to cross-examination of witnesses, argument of points of law, and examination of witnesses for the defense. The attorney was permitted to *write* a defense for the accused. Not until Lord Halsbury's Act of 1898 were an accused and the spouse of an accused permitted to be competent witnesses.[15]

By 1758, it was noted that from the late seventeenth or early eighteenth centuries, "[a] practice also sprang up, the growth of which cannot be traced, by which counsel were allowed to do everything for prisoners accused of a felony except address the jury for them."[16] "On the other hand, . . . two years afterwards, [a] prisoner was obliged to cross-examine the witnesses without the aid of counsel. . . ."[17]

From the foregoing, it appears that a major influence upon the privilege of self-representation was the exclusion of lawyers from any proceedings which involved threats against the state's interests. The prohibitions on the activities of counsel, combined with vague and restrictive procedural and evidentiary practices, may have been potent factors in the practice of self-representation. Lawyers on the scene appear to have gradually changed the procedures to regulated and more balanced presentations of evidence.

On the other hand, recent American legal history reveals the development of the concept that the right to counsel is one element

11. CARTER at 134.
12. *See* discussion on this area, 54 MINN. L. REV. 1175, 1190-1194 (1970).
13. 14 MERSKY & JACOBSTEIN, CLASSICS IN LEGAL HISTORY (1901), hereinafter referred to as MERSKY & JACOBSTEIN.
14. MERSKY & JACOBSTEIN at 50-51.
15. *Id.* at 54.
16. CARTER at 135.
17. *Id.*

essential to securing a fair trial for a defendant in a criminal prosecution. *Powell v. Alabama*,[18] *Gideon v. Wainwright*,[19] and *Argersinger v. Hamlin*[20] have guaranteed counsel to persons accused of any charge for which they risk the possibility of loss of liberty. This has been extended to proceedings involving juveniles,[21] to pretrial activities of the state,[22] and to post-trial activities of the state such as sentencing after a plea of guilty,[23] probation revocation,[24] and, in California, to parole rescission.[25] The complexities of criminal procedure, revealed in the decisions of the Supreme Court in the past two decades,[26] seem to require a special expertise in this area, as evidenced by the fact that criminal law is one of three areas of law for which certification as a specialist is available in California.[27]

The Court in *Faretta*, however, relying heavily on language found in *Adams v. U.S. ex rel. McCann*,[28] found that the Constitution does not force a lawyer upon an unwilling defendant and that freedom of choice requires a "correlative right to dispense with a lawyer's

18. 287 U.S. 45 (1932). Note also the use of Justice Sutherland's oft-quoted language cited by both the majority (422 U.S. 833, n.43) and minority (422 U.S. 838-839) pertaining to the necessity for counsel in criminal proceedings.

19. 372 U.S. 335 (1963).

20. 407 U.S. 25 (1972).

21. *In Re* Gault, 387 U.S. 1 (1967).

22. *See generally* Escobedo v. Illinois, 387 U.S. 478 (1964); Miranda v. Arizona, 384 U.S. 436 (1966); U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

23. Townsend v. Burke, 334 U.S. 736 (1948).

24. Mempa v. Rhay, 389 U.S. 128 (1967); Gagnon v. Scarpelli, 411 U.S. 778 (1973).

25. Gee v. Brown, 14 Cal. 3d 142, 120 Cal. Rptr. 876 (1975).

26. Just a few examples of major significance are the following: Katz v. U.S., 389 U.S. 347 (1967); Spinelli v. U.S., 394 U.S. 410 (1969); Berger v. N.Y., 388 U.S. 41 (1967); U.S. v. Harris, 403 U.S. 573 (1971); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Terry v. Ohio, 392 U.S. 1 (1968); Chimel v. California, 395 U.S. 752 (1969); Wong Sun v. U.S., 371 U.S. 471 (1963). The subtleties of the search and seizure cases and the "fruit of the poisonous tree" doctrine are enough alone to call for expertise and experience in this area.

27. The Board of Governors of the State Bar of California has established the California Board of Legal Specialization which issues certificates of specialization upon completion of prescribed requirements. The areas of law for which specialization certificates are available are criminal, tax and worker's compensation law.

28. 317 U.S. 269 (1943).

help." Such a right is a correlative of the Sixth Amendment right to counsel.[29]

The nature of this newly-recognized right appears qualified rather than absolute. Before the right of self-representation will be recognized, the defendant must make a "knowing and intelligent" waiver of the "traditional benefits associated with the right to counsel."[30] Additionally, the trial judge "may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct."[31] Implementation of procedures in the trial courts to fulfill the mandate of *Faretta* presumably will be accomplished through development of standards enunciated in prior decisions recognizing the right of self-representation.

One of the factors necessary to the assertion of the right to defend oneself is a clear and unequivocal demand to do so.[32] For the defendant's own protection, a full explanation of his rights must be given to the accused so that he has a clear understanding of all consequences of his choice.[33] Justice Douglas' dissent in *Adams v. U.S. ex rel. McCann*,[34] addressing the issue of jury waiver, indicates that before a constitutional right can be intelligently waived, a defendant should have the benefit of legal advice; this reasoning applies with equal force to a waiver of the right to counsel. While this practice has not generally been followed by trial courts, it would be most beneficial to all concerned if the courts were required to allow an attorney to explain to a defendant his rights and the consequences of his choice prior to the court's required examination of the defendant's competence.

A conditional waiver is not enough to give up the right to counsel unless the condition is accepted by the court[35] nor is the waiver of joint representation a waiver of the right to independent counsel.[36] The value placed upon the right to counsel in our legal sys-

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29. 422 U.S. at 814.
30. *Id.* at 835.
31. *Id.* at 834, n.46.
32. *See* U.S. *ex rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965). *See also* U.S. *ex rel.* Higgins v. Fay, 364 F.2d 219, 222 (2d Cir. 1966).
33. Von Moltke v. Gillies, 332 U.S. 708 (1948). The court in this case indicated that the explanation would vary according to the nature of the charges and the defendant's own demeanor, but as a minimum it should include the nature of the charges, statutory offenses which are included in those charges, the range of allowable punishments, possible defenses and/or factors in mitigation. The investigation should be as long and as thorough as is required for a complete understanding by the defendant of all aspects of his waiver.
34. 317 U.S. 269 (1942).
35. People v. Carter, 66 Cal. 2d 666, 58 Cal. Rptr. 614 (1967).
36. People v. Douglas, 61 Cal. 2d 430, 38 Cal. Rptr. 884 (1964).

tem has required courts in the past to determine that an accused understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available and the punishments which may be exacted.[37] The courts, too, have "indulged every reasonable presumption against waiver" of such a fundamental right.[38] No waiver can be accepted unless it is a knowing and intelligent relinquishment of guaranteed rights;[39] such a determination requires a "consideration of the nature of the charge, the facts and circumstances of the case, and the education, experience, mental competence and conduct of the accused."[40] In *U.S. v. Dougherty*,[41] the court stated that the right to defend *pro se* was conditioned upon a timely assertion of the right as well as an intelligent waiver of the right to counsel.

It has also been stated that competence to waive counsel does not require that the accused exhibit the knowledge or training of a lawyer nor need he be cognizant of the rules of law by which he will be bound in the conduct of his trial.[42] Even an inadequate waiver of the right to counsel coupled with an assertion of the right to defend *pro se* may not be prejudicial (and any such defect will be cured) where an accused actually conducts his defense as competently as any layman.[43]

If, as stated in *Faretta*, a competent waiver of counsel is required, then the trial court should retain discretion to deny the right of self-representation to an "incompetent" defendant. In the past, the court could examine the defendant's conduct and demeanor to determine whether or not a defendant had the ability to make an intelligent waiver of counsel and had the competency to represent himself

37. *In Re* James, 38 Cal. 2d 302, 313, 240 P.2d 596, 603 (1952).
38. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
39. *See In re* James, 38 Cal. 2d 302, 313, 240 P.2d 596, 603 (1952); People v. Shroyer, 203 Cal. App. 2d 478, 21 Cal. Rptr. 460 (1962); People v. Chesser, 29 Cal. 2d 815, 178 P.2d 761 (1947); People v. Kemp, 55 Cal. 2d 458, 11 Cal. Rptr. 361 (1961); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959).
40. People v. Butcher, 174 Cal. App. 2d 722, 726, 345 P.2d 127, 130 (1959).
41. 473 F.2d 1113 (D.C. 1972).
42. *See* People v. Addison, 256 Cal. App. 2d 18, 63 Cal. Rptr. 626 (1968); People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Linden, 52 Cal. 2d 1, 338 P.2d 397 (1959); People v. Terry, 224 Cal. App. 2d 415, 36 Cal. Rptr. 722 (1964).
43. People v. Kranhouse, 265 Cal. App. 2d 440, 448, 71 Cal. Rptr. 223, 228 (1968).

at trial.[44] A recent decision of the California Court of Appeal, First Appellate District, interpreting this aspect of *Faretta* is *People v. Brown*.[45] The court in *Brown* distinguished the denial of self-representation in *Faretta* from that in *Brown* on the ground that the denial of the right to Faretta was based solely upon his lack of legal knowledge, while Brown's demand for self-representation was not within the scope of the standards set forth in *Faretta* because it was not timely.[46] The motion was made the day before trial and only after a proposed disposition had been rejected by the district attorney. In addition, the court found no competent waiver by the defendant. This was based not solely upon a lack of legal knowledge, but on the age, background, experience and demeanor of the accused. He showed a lack of comprehension or ability to comprehend the nature of the waiver of counsel and displayed a lack of common sense.[47]

Whether this view of the discretion of a trial court to deny self-representation will prevail depends ultimately upon the emphasis given to the free choice of the accused in this decision, even where it will result in an obvious detriment to him. The Court in *Faretta* emphasized that Faretta was "literate, competent and understanding, and that he was voluntarily exercising his informed free will."[48] A balance of interests based upon the totality of circumstances in a particular case may well be the test utilized to determine whether an "intelligent" free choice is made by a "competent" defendant.

Given a competent defendant making an informed and intelligent choice to defend himself, what then is meant by the Sixth Amendment right to the "Assistance of Counsel?" The majority in *Faretta* speaks of a choice between representing oneself and being represented by a lawyer. Is there necessarily such a dichotomy?

California cases prior to *People v. Sharp*,[49] overruled by *Faretta*,

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44. People v. Shields, 232 Cal. App. 2d 716, 722, 43 Cal. Rptr. 188, 192-193 (1965).

45. 51 Cal. App. 3d 284, 124 Cal. Rptr. 130 (1975). This case was accepted for hearing by the California Supreme Court in November, 1975.

46. *Id.* at 294, 124 Cal. Rptr. at 136. The requirement of a timely demand was not specifically delineated in Faretta, but earlier cases (cited herein) have indicated that such a requirement may be within the discretion of the trial court.

47. *Id.* at 295, 124 Cal. Rptr. at 136. One of the reasons for finding a lack of "knowing and intelligent" waiver of counsel was that the accused here knew "very little" about his case, and his asserted grounds for dismissing counsel were "vague and unsupported generalities."

48. 422 U.S. at 835.

49. 7 Cal. 3d 448, 103 Cal. Rptr. 233 (1972).

recognized a right of self-representation and appeared to regard the right to defend oneself as an alternative to representation by counsel.[50] In *People v. Mattson*, the court stated that "a defendant is not entitled to have his case *presented* in court *both by himself and by counsel* acting at the same time or alternating at defendant's pleasure."[51] [Emphasis supplied by the court.] Recognizing that a defendant could not be forced to accept representation of counsel and maintaining that this was an election of "either/or" consequences, the court in *Mattson* also acknowledged the difference between the right to employ private counsel "in an inferior position in the defense" and the power of the trial court in its discretion to:

> . . . permit a party who is represented by counsel to participate in the conduct of the case, or permit a defendant who appears in propria persona to employ an attorney to sit by him and advise him during the presentation of the case in court, or even appoint an attorney (with the latter's consent) to render such advisory services to an indigent defendant who wishes to represent himself.[52]

In *People v. Linden*, the court in midtrial, upon defendant's request, relieved "counsel as attorney of record and, with his consent and with express recognition of the difficult position in which he was placed, appointed him as legal advisor."[53] The defendant proceeded *pro se*. In *People v. Bourland*, the court was dissatisfied with the ability of the accused to defend himself, and "requested and secured the assent" of the assistant public defender to assist the defendant as an agent or arm of the court.[54] This action was found entirely within the scope of the trial court's discretionary powers. In *People v. Ruiz*, the court maintained the position, consistent with the foregoing authorities, that where a defendant waives the right to counsel's representation, "he is in no position to demand legal assistance during the trial."[55]

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50. *See generally* People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Linden, 52 Cal. 2d 1, 338 P.2d 397 (1959); People v. Thomas, 58 Cal. 2d 121, 23 Cal. Rptr. 161 (1962); People v. Bourland, 247 Cal. App. 2d 76, 55 Cal. Rptr. 357 (1966); People v. Ruiz, 263 Cal. App. 2d 216, 69 Cal. Rptr. 473 (1968).
51. 51 Cal. 2d at 789, 336 P.2d at 946.
52. *Id.* at 797, 336 P.2d at 951.
53. 52 Cal. 2d at 16, 338 P.2d at 403.
54. 247 Cal. App. 2d at 81, 55 Cal. Rptr. at 361.
55. 263 Cal. App. 2d at 223, 69 Cal. Rptr. at 477. *See also* Comment,

Prior to *Faretta*, therefore, the decisions indicate that while a defendant has no right to demand advisory counsel upon electing to represent himself, the court in its discretion may permit the accused, even where represented by counsel, to participate actively in the case if this would promote the ends of justice and not hinder or delay the "orderly and expeditious conduct of the court's business."[56] They further indicate that a court may, additionally or alternatively and upon a showing of good cause, appoint counsel in an advisory capacity where the defendant requests such assistance and where such appointment will serve the interests of justice.[57] These earlier decisions indicate that the consent of counsel is required since the lawyer is surrendering his traditional role of advisor to assume a subservient role.[58]

On the other hand, the role of advisory counsel was held to be encompassed within the duties imposed upon the public defender by statute[59] and, thus, the appointment of the public defender to render services in an advisory capacity may be found to be within the scope of the public defender's duties.[60] In *Ligda v. Superior Court of Solano County*, the court did not resolve the issue of whether the consent of the public defender was necessary.[61] It was, however, stated:

> The fact that the public defender is a public officer, acting by deputy, does not institutionalize the representation. Once a deputy has appeared as counsel in a cause, the court may retain him before the court in such a matter. . . . Having the right and duty to assign the defense to the public defender, the court has the power to assign him to serve for the more limited included function of advising and assisting.[62]
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> The legislative intent in the progressive expansion of the duties of the public defender [citations omitted] seems clear. The purpose is, to keep pace with the progressive requirements of due process of law, declared in the decisions of our Supreme Courts, in providing counsel for indigent defendants. The word "defense" is clearly to be interpreted as embracing "the Assistance

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Self-Representation in Criminal Trials: The Dilemma of the Pro Se Defendant, 59 CAL. L. REV. 1479 (1971), which advocates that both self-representation and counsel's assistance are separate and independent constitutional rights and that both should be afforded to a defendant.

56. People v. Darling, 58 Cal. 2d 15, 20, 22 Cal. Rptr. 484, 487 (1962).

57. 51 Cal. 2d at 797, 336 P.2d at 951; 247 Cal. App. 2d at 86-87, 55 Cal. Rptr. at 36-37.

58. *See* 51 Cal. 2d at 793, 336 P.2d at 949.

59. CAL. GOVT. CODE, § 27706(a) (West, 1968).

60. Ligda v. Superior Court of Solano County, 5 Cal. App. 3d 811, 85 Cal. Rptr. 744 (1970).

61. *Id.* at 817, 85 Cal. Rptr. at 747.

62. *Id.* at 823, 85 Cal. Rptr. at 751.

> of Counsel for his defence" as specified in the Sixth Amendment. That assistance clearly embraces more than control of the case in formal proceedings.[63]
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> . . . [I]t has aptly been held that the public defender has all the powers and privileges for his client that would exist in respect to any private employment of counsel. . . .
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> But the public defender as a ministerial officer of the court does not have the power to decline an assignment to defend or any function thereof, as if he were a private attorney. He is employed by the people to render such services.[64]

Apparently, the role of advisory counsel would fall within the scope of *Faretta*. Footnotes in the majority opinion and in the Chief Justice's dissent indicate that the courts have inherent powers to appoint an attorney either as "standby" counsel or as the traditional "friend of the court" to aid the accused and to be available to assume representation of the defendant should that necessity arise.[65] There was no indication in *Faretta*, however, that advisory counsel, as such, was required under the provision for "Assistance of Counsel" in the Sixth Amendment. It would seem, nevertheless, that the appointment of standby counsel over the objection of the accused would not be within the contemplation of the right to counsel and would be subject to the same arguments that prohibit the state from forcing unwanted counsel on the accused. The only conceivable function of standby counsel would be that of *amicus curiae* with no relationship to the accused. This limited role would be relevant here only if the defendant loses his right to defend *pro se* as, for example, by disruptive tactics. Standby counsel could be available in that case to represent the defendant midtrial without a total disruption of the proceedings.

Whether or not advisory counsel is available to an accused in a criminal proceeding, it appears that the consequences of an election to represent oneself are severe. A defendant who chooses to forego representation by counsel cannot be heard later to complain of the quality of the defense presented.[66] While a defendant need not have the "acumen or the learning of a skilled lawyer"[67] to assert

63. *Id.* at 825, 85 Cal. Rptr. at 752.
64. *Id.* at 827, 85 Cal. Rptr. at 754.
65. 422 U.S. at 834, n.46; 422 U.S. at 846, n.7.
66. *Id.* at 834, n.46.
67. *See* People v. Linden, 52 Cal. 2d 1, 338 P.2d 397 (1959); People v. Harmon, 54 Cal. 2d 9, 4 Cal. Rptr. 161 (1960).

his right of self-representation, once such an election is made the defendant will be bound by his choice; he "assumes for all purposes connected with his case, and must be prepared to be treated as having, the qualifications and responsibilities concomitant with the role he has undertaken."[68] Failure to comply with the rules of evidence will not be excused because of ignorance,[69] because "a defendant who chooses to represent himself assumes the responsibilities inherent in the role which he has undertaken."[70] Also a defendant acting as his own attorney

> does not lose the status of prisoner and become entitled to extraordinary privileges not accorded defendants who are represented by counsel, nor does he become entitled to proceed in a manner different from that permitted to attorneys.[71]

He retains the status of a defendant and does not attain that of "an attorney of law who is an officer of the court and responsible to it."[72] The restriction of activity or movement in the courtroom is thus justified.

Once a competent election is made by a defendant "prior to or at the commencement of his trial, [he] is not entitled thereafter to interrupt and delay the hearing at any stage he deems advantageous merely to interpose a demand for legal assistance."[73] The right to counsel or of self-representation may be "invoked only in the course of orderly procedures."[74] The exercise of these rights is subject to the regulation and control of the court, and it may not be used for delay or to subvert or disrupt the "orderly and efficient administration of justice."[75] The right to free choice encompasses the requirement that a defendant be aware of these consequences so that he may know what he is doing and make a choice with his eyes wide open.[76] Thus, regardless of the quality of representation required of an attorney,[77] a defendant apparently

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68. People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959); People v. Harmon, 54 Cal. 2d 9, 4 Cal. Rptr. 161 (1960).

69. People v. Robinson, 62 Cal. 2d 889, 44 Cal. Rptr. 762 (1965); People v. Bourland, 247 Cal. App. 2d 76, 55 Cal. Rptr. 357 (1966).

70. 62 Cal. 2d at 894, 44 Cal. Rptr. at 765.

71. People v. Chessman, 38 Cal. 2d 166, 174, 238 P.2d 1001, 1006 (1951).

72. 38 Cal. 2d at 176, 238 P.2d at 1007.

73. People v. Thomas, 58 Cal. 2d 121, 131-32, 23 Cal. Rptr. 161, 166-67 (1962).

74. People v. Loving, 258 Cal. App. 2d 84, 65 Cal. Rptr. 425 (1968).

75. 258 Cal. App. 2d at 87, 65 Cal. Rptr. at 427.

76. Adams v. U.S. *ex rel.* McCann, 317 U.S. 269, 279 (1942); Johnson v. Zerbst, 304 U.S. 458, 468-469 (1938); People v. Ruiz, 263 Cal. App. 2d 216, 225, 69 Cal. Rptr. 473, 478-479 (1968).

77. *See* People v. Ibarra, 60 Cal. 2d 460, 34 Cal. Rptr. 863 (1963) where relief was granted to a defendant under the "farce or sham" standard of competent representation by counsel. Rejecting this standard, Beasley v.

stands alone with respect to his efficacy in trial when he elects to proceed without counsel.

The above consequences of self-representation, however, do not mean that a defendant *pro se* is entitled to any less than an attorney. A reasonable amount of time to prepare for trial is as fundamental as the right to counsel,[78] and it is a denial of due process to refuse a reasonable continuance so that a defendant *pro se* may be afforded the opportunity to prepare a defense to the charges lodged against him.

The role of judge and prosecutor may be affected profoundly by the accused's election to defend himself. A judge's role is presumed to be that of an impartial arbiter; it would be inappropriate to this role to have the trial court assist the defendant with the intricacies of law. It is also the duty of the court to contain the evidence to the charges and defenses. On the other hand, the courts are committed under our legal system to the concept of justice and the requirements of due process through a "fair" trial. The prosecutor's objective, mandated by legal ethics and the value system under which we operate, is to seek justice rather than to obtain a conviction at any cost. The difficulties inherent in the concept of active advocacy by "equal" opponents to determine the guilt or innocence of an accused may invoke psychological fetters to active advocacy and impartial justice for a defendant unable to cope with the legal intricacies of criminal procedure. As the Chief Justice's dissent in *Faretta*[79] points out, the goal of justice and the public's confidence in the integrity of the judicial system could be undermined by the inability of a defendant to secure an adequate defense.[80]

The assumption that the defendant *pro se* will be bound totally by his choice is perhaps too glib a response to a complex question.

U.S., 491 F.2d 687 (6th Cir. 1974) sets a higher standard. Such standard would require that "counsel must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest undeflected by conflicting considerations. Defense counsel must investigate all apparently substantial defenses available to the defendant and must assert them in a proper and timely manner."

78. People v. Maddox, 67 Cal. 2d 647, 63 Cal. Rptr. 371 (1967); People v. Mendez, 260 Cal. App. 2d 302, 67 Cal. Rptr. 31 (1968).

79. 422 U.S. at 839.

80. *See also* Justice Blackmun's dissent (422 U.S. at 849) speaking of the injury to society's interests in the procuring of an unjust result because of a defendant who inadvisedly or for "whimsical" reasons seeks to defend *pro se*.

Where a record reveals total inability to respond to serious charges and where prejudicial evidence is erroneously admitted without objection, a herculean challenge will be presented to an appellate court who will have to balance the integrity of the total judicial system against the defendant's choice to be bound by his errors. Not all of these errors can be construed as "harmless" in the context of the overall system. Many defendants who proceed alone may, of course, be sufficiently intelligent and conversant with most aspects of criminal law to present a fairly adequate defense to the charges. The greatest problem will arise where for personal, political or psychological reasons a defendant by an objective standard lacks the necessary experience or awareness of the procedures and issues involved to adequately represent himself, yet adamantly insists upon presenting his own defense to his detriment.

A parallel problem and one which often promotes a desire for self-representation is the inability of an indigent defendant to secure counsel of his choice. It is a denial of due process to deny to a defendant a reasonable continuance to obtain a lawyer of his own choosing[81] or to deny association of out-of-state counsel in whom a defendant reposes his personal confidence[82] where counsel is retained. Where counsel is appointed by the court and paid for by public funds, however, "constitutional and statutory guarantees are not violated by the appointment of an attorney other than one requested by a defendant."[83] Furthermore, unless the representation is a "farce or sham,"[84] counsel in the control of court proceedings and trial tactics may waive a defendant's rights even without informing him of such waiver.[85] For the indigent there is no constitutional right to counsel who will conduct the defense according to the defendant's "whims"[86] unless a "legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental trial tactic."[87] Perhaps a right to articulate specific grievances and obtain alternative counsel would relieve some of the distrust and lack of confidence experienced by indigent defendants upon having counsel appointed in whom they repose no faith.

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81. People v. Crovedi, 65 Cal. 2d 199, 53 Cal. Rptr. 284 (1966).
82. Magee v. Superior Court, 8 Cal. 3d 949, 506 P.2d 1023 (1973).
83. Drumgo v. Superior Court, 8 Cal. 3d 930, 506 P.2d 1007 (1973). *See also* TAGUE, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).
84. 60 Cal. 2d at 464, 34 Cal. Rptr. at 863 (1963).
85. People v. Hill, 67 Cal. 2d 105, 114, 60 Cal. Rptr. 234, 240 (1967).
86. People v. Nailor, 240 Cal. App. 2d 489, 494, 49 Cal. Rptr. 616, 620 (1966).
87. People v. Moss, 253 Cal. App. 2d 248, 251, 61 Cal. Rptr. 107, 110 (1967).

One question which remains unanswered by *Faretta* is the time at which the right of self-representation attaches. Must a person prior to custodial interrogation be informed that he has the right to counsel[88] or that he may elect to represent himself? Must this notice of election be given at lineups,[89] showups[90] or other pretrial encounters with the state?[91] The courts will undoubtedly be called upon to resolve the issue of whether the election may be revoked, and, if so, when counsel may be substituted for a defendant *pro se*. Presumably, the outcome will depend upon whether, under all the circumstances of a particular case, it would be fundamentally unfair to require a defendant who has become aware of his inadequacy in a criminal proceeding to be bound by his earlier election to proceed alone.

The right of self-representation will give the defendant the right to conduct his own defense. His role as counsel will not affect his role as defendant or prisoner except that he will have the opportunity to research in the prison library and will have access to other aids needed to present his defense. A defendant *pro se* will be held to the standards of an attorney in conducting his defense and will receive no greater consideration in the conduct of his trial than a lawyer nor will he be accorded any greater privileges in court than would be accorded a defendant represented by counsel. Possible disadvantages of his role as defender are a lack of legal training and experience, a loss of the other benefits associated with the right to counsel, and the propriety of arguing his own credibility. On the other hand, there are some possible advantages to an articulate and intelligent defendant. He may argue to the jury without taking the stand and being subjected to cross-examination or impeachment provided, of course, that he is able to obtain other evidence from which to argue. He may exert control over his own defense and will not be bound by decisions of counsel acting in opposition to his own views as to the merits of his defense. For a defendant

88. Miranda v. Arizona, 384 U.S. 436 (1966).
89. U.S. v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).
90. Stovall v. Denno, 388 U.S. 293 (1967).
91. *See* Kirby v. Illinois, 406 U.S. 682 (1972), wherein it was stated that the right to counsel attaches at or after the time adversary judicial proceedings have been initiated against an accused.

whose experience and intelligence is adequate for the task, these advantages may be most persuasive.

There are limitations on the right of self-representation. Its assertion will not be tolerated as a device to delay or abuse the legal system. If excessive time is consumed, the defense may be cut short or limited to relevant issues. The use of the courtroom as a political forum may be found irrelevant to the proceedings at hand, thus foreclosing any benefit of self-representation to the political defendant. Additionally, any disruption of the orderly process of the trial will be cause for termination of the right.

The right of self-representation will undoubtedly call for a reevaluation of the Sixth Amendment right to "Assistance of Counsel." As with other aids[92] which have been found necessary to provide a defendant with a fair trial, perhaps the role of counsel will be expanded to encompass advice and other assistance to a defendant *pro se*, if he so desires. If not, the newly-acquired right may well prove to be a constitutional right to make a fool of oneself.[93]

JOAN W. GARROTT

92. *See* Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Mayer v. Chicago, 404 U.S. 189 (1971).

93. 422 U.S. at 852.