6-1-2010

Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case

Erica J. Hashimoto
University of Georgia, hashimo@uga.edu

RESURRECTING AUTONOMY: THE CRIMINAL DEFENDANT'S RIGHT TO CONTROL THE CASE

ERICA J. HASHIMOTO*

* Associate Professor, University of Georgia School of Law. I greatly appreciate all of the comments provided by my colleague, Dan Coenen. I also want to thank both of my research assistants, Benn Wilson ('09) and Kevin Murphy ('10), for all of their work and Darren Goldman and the staff of the *Boston University Law Review* for their diligence. A very early version of this Article was presented at the University of Missouri School of Law, and I appreciate the helpful comments of the participants in that workshop.

In Faretta v. California, *the Supreme Court exalted the value of autonomy – the criminal defendant's interest in presenting and controlling the defense. Over the past thirty-five years, however, the Court's enthusiasm for this interest has dissipated, and commentators have criticized courts that have given defendants any measure of control over their cases. As a result, lower courts increasingly have shifted control from defendants to their lawyers.*

In light of that retrenchment, this Article reevaluates the autonomy interest on its merits. This reexamination confirms that Faretta *got it right, and the Supreme Court should revitalize the constitutional interest of criminal defendants in controlling their own cases. Both the history and the text of the Bill of Rights demonstrate that the Framers intended to protect defendants' control over their own cases. The legitimacy of the criminal justice system, moreover, rests on the foundational principle that society cannot punish a defendant by diminishing or denying his autonomy without first determining the defendant's guilt through the criminal process. Because that process necessarily precedes a finding of guilt, the government cannot legitimately curtail the defendant's autonomy during the course of criminal proceedings.*

The discomfort of the Court and commentators with the autonomy interest arises from three interrelated arguments: (1) lawyers are more likely than clients to make decisions leading to the best results; (2) defendants waive their autonomy rights by agreeing to be represented by counsel, in particular court-appointed counsel; and (3) autonomy rights threaten mentally ill defendants. Each of these arguments, however, has critical flaws. First, the paternalistic notion that lawyers should be entrusted with all decision-making in criminal cases because their law degrees qualify them to choose more wisely than defendants lacks empirical support, is inconsistent with landmark Supreme Court precedent, and too narrowly defines the "best" results. Second, the argument that defendants waive their autonomy interest by accepting representation ignores the reality that defendants need to retain some control over their cases because the indigent defense system creates powerful incentives for lawyers to breach their duty of loyalty to clients. Finally, the concern that mentally ill defendants will exploit any autonomy interest to their own detriment should be addressed through a narrow rule targeted at mentally ill defendants, rather than by denying rights to all defendants.

INTRODUCTION

Over thirty years ago, the Supreme Court first recognized that the Constitution protects the right of criminal defendants to present their own defense.[1] The Court's holding in *Faretta* that criminal defendants have a right of self-representation reflected a broad and powerful principle – namely, that the right to control the defense of one's own case has deep roots in both the text and history of the Constitution. The Sixth Amendment – which grants

[1] Faretta v. California, 422 U.S. 806, 834 (1975).

rights directly to the defendant and speaks of the "Assistance of Counsel"[2] – reflects the Framers' understanding that the defendant, not counsel, was to be in charge of the defense. In addition, the history of criminal trials in England, in the Colonies, and in the early period in the states demonstrates that the Framers trusted neither lawyers nor the government to make decisions for defendants. Because it was "[i]n the heat of these sentiments [that] the Constitution was forged,"[3] it is readily inferable that the Framers intended to protect the autonomy of criminal defendants when they drafted the Bill of Rights.

In addition to the historical and textual arguments in favor of autonomy, there is a strong jurisprudential argument that the Constitution should protect the interest of a criminal defendant in exercising control over his case. A finding of guilt in a criminal proceeding ultimately results in a reduction of the defendant's autonomy. After sentencing, the defendant must submit to the authority of prison or probation officials rather than controlling his own life. Because the process for ascertaining guilt necessarily precedes a finding of guilt, however, society cannot legitimately curtail the defendant's autonomy while that process unfolds.

For many years after the Bill of Rights was ratified, the government rarely, if ever, infringed upon the defendant's autonomy interest in controlling the case. Through most of the pre-constitutional period, defendants represented themselves and counsel played a limited role at trial. Even into the twentieth century, the represented client's control of the case was far-reaching, particularly because those who hired lawyers had the power to fire lawyers. Beginning in the late 1960s, after the Court's decision in *Gideon v. Wainwright*,[4] however, courts began to shift, in subtle ways, decisional control over cases from clients to counsel.[5] Most importantly, in the past thirty-five years, the Supreme Court has shown only the most tepid cognizance of the autonomy interest celebrated in *Faretta*.[6]

Today, the autonomy interest of criminal defendants is under all-out siege, with the Supreme Court going so far as to signal discomfort with the reasoning

---

[2] U.S. CONST. amend. VI.

[3] *Faretta*, 422 U.S. at 827.

[4] 372 U.S. 335, 344 (1963) (holding that the right to counsel is "fundamental and essential to fair trials").

[5] *See, e.g.*, Haynes v. Cain, 298 F.3d 375, 382 (5th Cir. 2002) (en banc) (holding that counsel has authority to concede defendant's guilt at trial to lesser-included offense, even over defendant's objection); State v. Reddish, 859 A.2d 1173, 1203 (N.J. 2004) (holding that counsel has the obligation to present mitigating evidence, even over the defendant's objection).

[6] Indeed, outside of self-representation cases, the Court has not mentioned the autonomy interest in constitutional criminal procedure cases.

of *Faretta* itself.[7] In the face of this retrenchment, most commentators have either expressed little concern or offered endorsement,[8] and lower courts have not hesitated to restrict client autonomy in important ways. For instance, many courts have held that counsel has the authority to pursue a guilt-based defense at trial and to concede the defendant's guilt of a lesser-included offense, even over the defendant's objection.[9]

Close inspection of the cases in which courts have shifted power from client to counsel suggests that this shift is driven by three key justifications. Even closer inspection suggests that none of these three justifications has merit. First, a strong sentiment of paternalism runs through much of the Court's

---

[7] *See* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 165 (2000) (Scalia, J., concurring) (observing "the apparent skepticism of today's opinion concerning the judgment of the Court" in *Faretta*).

[8] Most of the literature on the criminal defendant's autonomy interest argues that any such interest should be limited. *See, e.g.*, Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 41 (2004) (arguing that decisions at trial, other than those related to the defendant's personal participation such as whether or not to testify, should be entrusted to the lawyer because while the defendant has a "fundamental dignity interest in controlling self-presentation at trial," his autonomy interest in influencing the outcome of the trial is not as weighty); Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1385-86 (1998) (arguing that defense lawyers should be able to engage in "surrogate decisionmaking" for mentally ill clients); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 166-67 (2000) (arguing that the fair trial guarantee should override a defendant's autonomy interest); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 650 (2005) (arguing that autonomy and the rhetoric of free choice are incoherent as they relate to criminal defendants because those defendants have so few options from which to choose); H. Richard Uviller, *Calling the Shots: The Allocation of Choice Between the Accused and Counsel in the Defense of a Criminal Case*, 52 RUTGERS L. REV. 719, 765-66 (2000) (arguing that counsel should have authority to make most decisions at trial except fundamental decisions regarding theory of the defense); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 695-97 (2006) (describing the tension between a criminal defendant's autonomy and society's interest in reliable criminal proceedings and questioning the bases for a tendency to defer to autonomy concerns). There are relatively few articles supporting the constitutional autonomy interest of criminal defendants. *See, e.g.*, David Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 464-65 (describing the conflict between paternalism and the individual autonomy that society values); Kimberly Helene Zelnick, *In* Gideon*'s Shadow: The Loss of Defendant Autonomy and the Growing Scope of Attorney Discretion*, 30 AM. J. CRIM. L. 363, 398-99 (2003) (arguing that the right to counsel exists to protect other constitutional values including autonomy).

[9] *See, e.g.*, *Haynes*, 298 F.3d at 382; Lingar v. Bowersox, 176 F.3d 453, 459 (8th Cir. 1999); United States v. Wilks, 46 F.3d 640, 644 (7th Cir. 1995); Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991).

constitutional criminal procedure jurisprudence[10] and the scholarship in this area.[11] The paternalistic view posits that lawyers are more capable of making decisions that will achieve optimal results for their clients than are the clients themselves. This view, however, lacks empirical support,[12] is at odds with landmark Supreme Court decisions,[13] and takes too narrow a view of what constitutes the best result in a particular case.

Second, there is an argument that, although defendants might have an autonomy interest in self-representation, they waive the autonomy interest when they agree to be represented by counsel, and in particular when they agree to representation by court-appointed counsel.[14] On this view, once a defendant accepts representation by counsel, he no longer has an autonomy interest to assert. This argument wrongly penalizes the assertion of the constitutional right to counsel. Even worse, this argument ignores the realities of indigent defense in this country. The structure of the indigent defense system creates incentives for the lawyer to compromise loyalty to individual clients. The autonomy interest of criminal defendants, which protects defendants' interest in controlling decisions in their own cases, provides defendants with needed tools to protect themselves from the built-in conflicts that appointed counsel confront.

Finally, some have expressed concern that mentally ill defendants will assert the autonomy interest to their own detriment.[15] This concern is legitimate but does not justify abandoning the autonomy interest of defendants who are not mentally ill. Sacrificing the autonomy interest of all defendants in order to deal with special problems that affect only a small minority makes no sense. The proper solution to these special problems should focus, in a carefully tailored way, on mentally ill defendants.

---

[10] *See infra* Part III.A.

[11] *See infra* notes 152-53 and accompanying text.

[12] *See* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 447 (2007) (concluding that there is no data proving that pro se felony defendants have worse outcomes at the trial level than represented defendants).

[13] *See, e.g.*, Florida v. Nixon, 543 U.S. 175, 187 (2004) (recognizing that "the high stakes for the defendant [of a guilty plea] require the utmost solicitude" to ensure that the *defendant* is making a knowing and voluntary decision (internal quotation marks omitted)); Brookhart v. Janis, 384 U.S. 1, 7 (1966) (holding that counsel cannot waive the decision whether to plead guilty or hold the government to its burden of proof at trial over the defendant's objection).

[14] *See infra* Part III.B.

[15] *See, e.g.*, Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) ("[A] right of self-representation at trial will not 'affirm the dignity' of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel . . . [because] given [the] defendant's uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling." (citation omitted)); *see also* infra Part III.C.

This Article proceeds in three Parts. The first Part defines the autonomy interest of criminal defendants and highlights the types of cases that raise significant autonomy issues. Part II sets forth the arguments in favor of recognizing a constitutional autonomy interest. Finally, Part III addresses the criticisms of the autonomy interest. This wide-ranging exploration leads to one simple conclusion: the Supreme Court should reaffirm and apply in robust fashion the broad constitutional right of a criminal defendant to control his own case.

I. THE CRIMINAL DEFENDANT'S AUTONOMY INTEREST

Over the past four decades, autonomy has played an important role in constitutional law. Particularly in the areas of First Amendment and substantive due process law, autonomy considerations have dominated debate.[16] The autonomy interest of criminal defendants, by contrast, has received almost no attention from scholars and the Court. In fact, the historical trajectory of the autonomy interest of criminal defendants essentially begins and ends with the Court's 1975 decision in *Faretta v. California*.[17]

Despite the dearth of literature and Supreme Court cases on the subject, disputes over the right of criminal defendants to exercise control over their own cases continue to arise in a variety of circumstances. Most notably, cases in which defendants either are representing themselves or are represented but have disagreements with counsel regarding the conduct of the defense raise significant autonomy issues. The outcomes of these cases – and thus the extent to which defendants retain control – turn on courts' assessments of the strength of the defendant's constitutional autonomy interest.

A. *Defining the Criminal Defendant's Autonomy Interest*

Not surprisingly, there has been considerable disagreement among legal scholars over what the term "autonomy" entails.[18] The fact that the

---

[16] *See, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876 (1994); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1409 (1986) (positing that First Amendment cases "from *Schenk* in 1919 to *Brandenburg* in 1969" are part of a tradition predicated on valuing the autonomy of the speaker); Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 233 (1992); Yale Kamisar, *Foreword: Can* Glucksberg *Survive* Lawrence*? Another Look at the End of Life and Personal Autonomy*, 106 MICH. L. REV. 1453, 1467 (2008); Rogers M. Smith, *The Constitution and Autonomy*, 60 TEX. L. REV. 175, 175 (1982).

[17] 422 U.S. 806, 834 (1975).

[18] *See, e.g.*, Fallon, *supra* note 16, at 877-78 (describing autonomy as both a descriptive and an ascriptive concept); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 9 (1995) (concluding that "deliberative autonomy" in our constitutional culture encompasses the people's "power to deliberate about and decide how to live their own lives, with respect to certain matters unusually important for such personal self-governance, over a complete life"); Fried, *supra* note 16, at 233 (defining autonomy, which is the "foundation

philosophical community also has varying conceptions of the term complicates the problem.[19] This Article uses the word autonomy as the Supreme Court has used it: to embody the concept of private space within which a person can make and act upon decisions free from government intervention.[20] Because this definition focuses only on governmental intervention,[21] the Article necessarily leaves to the side questions concerning "true" autonomy, i.e., the extent to which someone's decisions actually are the product of free will as opposed to coercion or choice-limiting conditions such as poverty.[22] Nor does this Article dwell on the philosophical justification for autonomy as a general matter. Instead, this Article proceeds from the premise that individual autonomy plays a prominent role throughout constitutional law and investigates how that concept should operate in shaping the rights of criminal defendants as they move through the adjudication process.

The term "criminal defendant's autonomy interest" in this Article encompasses the autonomy interest associated with a criminal defendant's constitutional criminal procedure rights at trial, i.e., all of the rights enumerated in the Sixth Amendment, plus the Fifth Amendment rights to due process and silence at trial, and any constitutional appellate rights of the defendant.[23] Although the Court has never held that there is a constitutional

---

of all basic liberties," as "the Kantian right of each individual to be treated as an end in himself, an equal sovereign citizen of the kingdom of ends with a right to the greatest liberty compatible with the like liberties of all others"); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1036 (1990) ("Autonomy is a hard concept to define, but as a first cut at its intuitive meaning we may say that autonomy means doing what one wants – choosing freely without outside constraints."); Williams, *supra* note 8, at 703 (acknowledging that despite the importance of autonomy, "very little is offered to elucidate what the concept of autonomy means").

[19] *See* JOHN RAWLS, POLITICAL LIBERALISM 72-81 (1993); John Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy*, 99 ETHICS 109, 109-12 (1988).

[20] *See, e.g.*, *Faretta*, 422 U.S. at 834; *see also* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) (emphasizing that "the constitutional protection of individual autonomy in matters of childbearing" protects the right of the individual to make and act upon decisions related to childbearing free from unwarranted governmental intrusion).

[21] *See* Fried, *supra* note 16, at 234 ("The Constitution is concerned only with limits on government, even though a person's autonomy may be assaulted as much if an employer, a neighbor or a family member silences him or stops his access to speech.").

[22] Some argue that there is no such thing as true autonomy in criminal procedure because all of the choices of criminal defendants are so limited. *See, e.g.*, Toone, *supra* note 8, at 655-61. While many of the conditions for true autonomy undoubtedly are absent for most pretrial criminal defendants, this fact does not necessarily mean that a defendant has no constitutional autonomy interest in protecting his right to make certain decisions free of governmental intervention.

[23] As discussed *infra* notes 162-67 and accompanying text, the autonomy interest of a criminal appellant is somewhat diminished from that of a criminal defendant at trial. The criminal appellant does, however, retain some autonomy interest.

right to appeal,[24] the Due Process Clause and the Equal Protection Clause do provide certain rights if the state permits appeals.[25] For purposes of this Article, the term "criminal defendant's autonomy interest" does *not* include any autonomy interest associated with a defendant's Fourth Amendment rights.[26]

Perhaps the best description of the criminal defendant's autonomy interest appears in *Faretta v. California.* In *Faretta*, the Supreme Court concluded that autonomy principles in the Sixth Amendment protect a criminal defendant's right to represent himself.[27] The Court's holding turned on the view that the individual defendant in a criminal case has a strong autonomy interest grounded in logic, fairness, and the deep tradition of our law:

> The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."[28]

Although *Faretta* did not use the word "autonomy" to describe the interest it was protecting, it is clear that the concept of autonomy – the right to make and

---

[24] *See* McKane v. Durston, 153 U.S. 684, 687-88 (1894) (holding that "an appeal from a judgment of conviction is not a matter of absolute right, independent of constitutional or statutory provisions allowing such appeal" and allowing a state to grant appeals as "may be deemed proper").

[25] *See, e.g.*, Douglas v. California, 372 U.S. 353, 356-58 (1963) (concluding that Due Process demands indigent defendants have a right to counsel in appeal); Griffin v. California, 351 U.S. 12, 19 (1956) (holding that the Due Process and Equal Protection Clauses require that indigent defendants be provided trial transcripts for preparation of their appeals).

[26] The Fourth Amendment arguably protects two different autonomy interests. First, there is a Fourth Amendment autonomy interest that is primarily concerned with privacy rather than freedom to make and act upon one's own decisions. *See* Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 4 (2009). The Fourth Amendment's warrant requirement protects this interest. Second, the Court has "invoke[d] the autonomy concept" in decisions relating to the Fourth Amendment's regulation of the seizure of persons. Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727, 730-31 (1993).

[27] I use the masculine pronoun to refer to criminal defendants in this Article because the vast majority of criminal defendants in this country are men. *See, e.g.*, TRACY KYCKELHAHN & THOMAS H. COHEN, BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2004, at 1 (2008), http://bjs.ojp.usdoj.gov/content/pub/pdf/fdluc04.pdf (concluding that eighty percent of felony defendants in large urban counties are male).

[28] Faretta v. California, 422 U.S. 806, 834 (1975) (citation omitted).

act upon one's own decisions free from government intervention – lay behind the Court's recognition of the right of self-representation. And indeed, the Court has since made clear that "[t]he right to appear *pro se* exists to affirm the dignity *and autonomy* of the accused."[29]

B. *The Significance of the Autonomy Interest*

Faretta applied the constitutional principle of defendant autonomy in the context of a claimed right of self-representation at trial. That principle, however, has the potential for much broader application. This Article focuses on three areas of far-reaching practical importance: (1) cases that involve the scope of the right of self-representation; (2) cases in which client and lawyer disagree as to how to conduct the defense; and (3) cases in which the lawyer makes decisions on behalf of the client without receiving the client's permission to do so.[30]

In each of these categories of cases, consideration of the defendant's autonomy interest can have a significant impact on the scope of the rights at issue. To be clear, autonomy is not itself a constitutional right but rather a

---

[29] McKaskle v. Wiggins, 465 U.S. 168, 176-77 (1984) (second emphasis added); *see also* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 160 (2000) ("[T]he *Faretta* majority found that the right to self-representation at trial was grounded in part in a respect for individual autonomy."). The Court has not been entirely clear about the distinction between autonomy and dignity, both of which underlie the Court's decision in *Faretta*. For some members of the Court, dignity refers to the ennoblement or elevation of the individual, a concept arguably distinct from autonomy. *See, e.g.*, Indiana v. Edwards, 128 S. Ct. 2379, 2387 (2008) (asserting that allowing a person "who lacks the mental capacity to conduct his defense without the assistance of counsel" to represent himself will not "affirm the dignity" of that defendant because "the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling"). For other members of the Court, it appears that dignity is roughly synonymous with the term autonomy as it is used in this Article. *See, e.g.*, *id.* at 2393 (Scalia, J., dissenting) ("While there is little doubt that preserving individual 'dignity' . . . is paramount among [the] purposes [of the right of self representation,] . . . the dignity at issue is the supreme human dignity of being master of one's fate rather than a ward of the State – the dignity of individual choice."). Although I am inclined to agree with Justice Scalia's definition of dignity, I use the word autonomy rather than dignity in this Article because the meaning of the term "dignity" is not as clear as the meaning of "autonomy."

[30] There are other categories of cases that arguably raise autonomy issues. For instance, at least some of the Court's decisions on the Fifth Amendment right to remain silent arguably implicate a defendant's autonomy. *See, e.g.*, Robert Gerstein, *The Demise of* Boyd*: Self-Incrimination and Private Papers in the Burger Court*, 27 UCLA L. REV. 343, 344 (1979) (arguing that the Fifth Amendment right to silence is "part of that body of protection which maintains the integrity of moral autonomy"). The three categories discussed here, however, present the clearest examples of autonomy considerations.

constitutional value.[31] Because autonomy is an important constitutional value, the Court, when issuing constitutional criminal procedure decisions, should consider the impact of those rulings on defendants' autonomy.[32]

1. The Parameters of the Right of Self-Representation

Of the three categories, the right of self-representation most clearly implicates the autonomy interest.[33] If the Court had failed to recognize a right of self-representation in *Faretta*, the decision would have allowed states to limit the defendant's ability to present his own case as he saw fit. In other words, in the absence of a constitutional right of self-representation, the state could require the defendant to present his case through his lawyer, rather than personally. Any such constraint by the state necessarily would reduce the defendant's ability to make his own decisions about the presentation of his case to the jury free of government intervention.

Although the Sixth Amendment protects the right of self-representation, the Court has insisted that the right has limits. For instance, the Court has held that trial courts can appoint standby counsel to assist the defendant, even over the defendant's objection,[34] and that defendants representing themselves must follow the same evidentiary rules and courtroom rules of decorum as lawyers.[35] In addition, many lower courts have held that defendants waive their right of self-representation if they do not invoke the right prior to the start of the trial.[36]

Because these limits on the right of self-representation have serious consequences for the autonomy interests of defendants, it is vital that the Court

---

[31] *See* Michael Heise, *Equal Educational Opportunity and Constitutional Theory: Preliminary Thoughts on the Role of School Choice and the Autonomy Principle*, 14 J.L. & POL. 411, 452 (1998).

[32] *See, e.g.*, Maryland v. Craig, 497 U.S. 836, 845 (1990) (considering the effect on reliability of the evidence – the "central concern of the Confrontation Clause" – when determining whether a particular procedure violates the defendant's Confrontation Clause rights). Justice Scalia has expressed concern when the Court in his view has elevated the value underlying the right over the right guaranteed in the text. *See, e.g.*, *Edwards*, 128 S. Ct. at 2392-93 (Scalia, J., dissenting) (arguing that the majority was adopting an approach that the Court had "squarely rejected for other rights – allowing courts to disregard the right when doing so serves the purposes for which the right was intended"). Even Justice Scalia, however, does not appear to disagree that considering the purposes or values underlying the right can be helpful in determining the parameters of the right as long as those purposes are not used to eviscerate the right guaranteed in the text of the Constitution.

[33] *See Faretta*, 422 U.S. at 834.

[34] *See McKaskle*, 465 U.S. at 184; *Faretta*, 422 U.S. at 835 n.46.

[35] *Faretta*, 422 U.S. at 835 n.46 ("The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law.").

[36] *See, e.g.*, United States v. Washington, 353 F.3d 42, 46 (D.C. Cir. 2004); United States v. Bishop, 291 F.3d 1100, 1114 (9th Cir. 2002).

consider the extent of the infringement of the autonomy interest when setting the parameters of the right. So-called mitigation waiver cases illustrate the importance of this principle.[37] In a mitigation waiver case, the defendant in a death penalty case chooses to proceed pro se, and, after conviction at trial, opts to waive presentation of mitigating evidence. The question then arises whether a trial court can appoint counsel to present mitigating evidence over the defendant's objection. Allowing counsel to present this evidence over the defendant's objection clearly implicates the defendant's autonomy. For instance, if the defendant has decided as a matter of strategy to present evidence of his innocence rather than traditional mitigating evidence, counsel's mitigation strategy would be in direct conflict with the defendant's chosen strategy.[38]

The Court of Appeals for the Fifth Circuit has recognized this fact, holding that a defendant's right of self-representation prohibits the trial court from appointing an independent counsel to present mitigating evidence over the defendant's objection.[39] The Florida and New Jersey Supreme Courts, however, have held that if the defendant waives mitigation, standby counsel nonetheless may (and, at least in New Jersey, *must*) present mitigation evidence even if the defendant objects.[40]

These conflicting results illustrate the importance of the court's assessment of the defendant's autonomy interest.[41] The Fifth Circuit in *United States v.*

---

[37] *See* Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1380 (1988) (describing how an individual's autonomy rights may conflict with the presentation of mitigating evidence); Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 76 (2002) (recognizing that mitigation waiver cases illustrate the "tension between society's interest in the appropriate application of the death sentence and an individual's autonomy interests in controlling her own defense").

[38] *See* United States v. Davis, 285 F.3d 378, 384-85 (5th Cir. 2002) (concluding that the defendant's penalty phase strategy of "attack[ing] the strength of the government's case as to his guilt" was in "direct conflict" with the strategy of appointed counsel to present traditional mitigating evidence).

[39] *Id.* at 385.

[40] Barnes v. State, 29 So. 3d 1010, 1025 (Fla. 2010) (per curiam) (holding that appointment of special mitigation counsel to investigate and present mitigation evidence did not violate defendant's right of self-representation where defendant presented no mitigation evidence and where mitigation evidence presented by standby counsel "was not in conflict with [defendant's] mitigation theory that he confessed and took responsibility"); State v. Reddish, 859 A.2d 1173, 1203-04 (N.J. 2004) ("Although a pro se defendant is entitled to maintain control over his defense strategy, waiver of the presentation of mitigating evidence is simply not subject to the defendant's discretion.").

[41] The different outcomes also turned, in part, on the courts' differing assessments of the strength of the defendant's interest in self-representation at the post-conviction capital stage of the trial. *See Davis*, 285 F.3d at 386-87 (Dennis, J., dissenting) (arguing that the majority

Davis[42] concluded that a defendant has a strong autonomy interest in controlling his own defense.[43] Thus, the right of self-representation "cannot be impinged upon merely because society, or a judge, may have a difference of opinion with the accused as to what type of evidence, if any, should be presented in a penalty trial."[44] The New Jersey Supreme Court in *State v. Reddish*,[45] by contrast, diminished the importance of the defendant's autonomy interest, a decision which ultimately allowed the court to conclude that the state's obligation to ensure fairness in capital trials outweighs that autonomy interest.[46] The court asserted: "The most solemn business of executing a human being cannot be subordinate[d] . . . to the whimsical – albeit voluntary – caprice of every accused who wishes unwisely to represent himself."[47] Once one characterizes the defendant's interest in self-representation as a "whimsical caprice," it is not surprising that the state's interest in ensuring fairness in capital trials outweighs the infringement on the defendant's autonomy interest.

2. Disagreements Between Counsel and the Defendant over the Defense of the Case

The second category of cases implicating the criminal defendant's autonomy interest arises when the defendant has not chosen to self-represent, but the lawyer and the defendant disagree about decisions that come up during the course of the case. In some cases of this sort, the autonomy interest has prevailed. In a series of cases dating back to the 1960s, for example, the Court has concluded that the defendant has the "ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."[48]

On the other hand, many courts have held that counsel has authority to make decisions involving the so-called "day-to-day conduct of the defense,"[49] including what witnesses to call and which jurors to challenge, even without

---

erred by concluding that the right of self-representation "is not diminished by the dramatic change in the defendant's autonomy interest resulting from his criminal conviction").

[42] *Id.* (majority opinion).

[43] *Id.* at 384-85.

[44] *Id.* at 384.

[45] 859 A.2d 1173.

[46] *See id.* at 1201.

[47] *Id.* (internal quotation marks and citations omitted).

[48] Jones v. Barnes, 463 U.S. 745, 751 (1983); *see also* Florida v. Nixon, 543 U.S. 175, 189 (2004) (reaffirming that "certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate"); Brookhart v. Janis, 384 U.S. 1, 7 (1966) (holding that counsel cannot "enter a plea which is inconsistent with his client's expressed desire and thereby waive his client's constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him").

[49] *See* Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring).

the client's consent.[50] Stripping defendants of the authority to make these choices diminishes defendant autonomy in some way. The question is whether increased efficiency in the conduct of trials justifies that cost.[51] Perhaps if the decision involves a less fundamental issue, such as whether to object to the admission of a particular piece of evidence or the testimony of a particular witness, increased efficiency may outweigh the relatively minimal cost to defendant autonomy. But it is not at all clear that courts should strike the same balance when, for example, the question concerns what defense to assert,[52] or relatedly, whether to concede guilt on a lesser-included offense during the trial process.

Some courts have recognized that cases in which counsel concedes the defendant's guilt over the defendant's objection seriously threaten defendant autonomy. These courts therefore have concluded that such concessions violate the defendant's rights to the effective assistance of counsel and to plead not guilty.[53] For instance, in *State v. Carter*,[54] the defendant was charged with

---

[50] *See, e.g.*, Taylor v. Illinois, 484 U.S. 400, 418 (1988) ("Putting to one side the exceptional cases in which counsel is ineffective, the client must accept the consequences of the lawyer's decision to forgo cross-examination, to decide not to put certain witnesses on the stand, or to decide not to disclose the identity of certain witnesses in advance of trial."); United States v. Boyd, 86 F.3d 719, 724 (7th Cir. 1996) (holding that decision regarding which jurors to challenge rests with counsel).

[51] As the Court has said, "Giving the attorney control of trial management matters is a practical necessity. The adversary process could not function effectively if every tactical decision required client approval." Gonzalez v. United States, 553 U.S. 242, 249 (2008) (internal quotation marks omitted). The American Bar Association makes a slightly more colorful assertion: "Every experienced advocate can recall the disconcerting experience of trying to conduct the examination of a witness or follow opposing arguments or the judge's charge while the client 'plucks at the attorney's sleeve' offering gratuitous suggestions." ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION 4-5.2, Commentary (3d ed. 1993).

[52] *See, e.g.*, Treece v. State, 547 A.2d 1054, 1058-59, 1062 (Md. 1988) ("[T]he defendant ordinarily has the ultimate decision when the issue at hand involves a choice that will inevitably have important personal consequences for him or her, and when the choice is one a competent defendant is capable of making.").

[53] *See, e.g.*, United States v. Holman, 314 F.3d 837, 841 (7th Cir. 2002) (holding that counsel's decision to concede guilt to one count of a multi-count indictment without client's consent constituted deficient performance on the facts of the case); United States v. Swanson, 943 F.2d 1070, 1073-74 (9th Cir. 1991) (holding counsel's concession of lack of reasonable doubt as to facts to be ineffective assistance); Cooke v. State, 977 A.2d 803, 842 (Del. 2009) (holding that counsel provided ineffective assistance by seeking a guilty but mentally ill verdict despite defendant's strenuous objections because that action by counsel undermined the defendant's "autonomy to make the most basic decisions affecting his case, including whether to plead not guilty and have a trial by jury"); State v. Carter, 14 P.3d 1138, 1148 (Kan. 2000) (finding ineffective assistance where counsel conceded guilt over defendant's objection to felony murder count of indictment in order to focus on premeditated murder count); State v. Anaya, 592 A.2d 1142, 1146 (N.H. 1991).

both first-degree murder and felony murder.[55] Although Carter maintained his complete innocence, his counsel conceded to the jury that Carter was involved in the shooting, thereby conceding the felony murder count of the indictment, and defended only against the first-degree murder charge.[56] The Kansas Supreme Court invoked *Faretta*'s admonition that the Sixth Amendment "grants to the accused personally the right to make his defense,"[57] holding that counsel's concession violated Carter's constitutional rights because that concession "not only denied Carter the right to conduct his defense, but . . . it was the equivalent to entering a plea of guilty."[58]

Other courts, however, have stripped defendants of the authority to decide whether to concede guilt on a lesser charge.[59] In *Haynes v. Cain*, for instance, the defendant was charged with first-degree murder, a death penalty-eligible offense that required the government to prove that the defendant had intentionally killed the victim during the course of a rape or robbery.[60] Over the defendant's strenuous objection, counsel conceded that his client had raped and robbed the victim and argued that the defendant was guilty only of second-degree, rather than first-degree, murder.[61] Without so much as an acknowledgement that its decision would drastically diminish the defendant's autonomy interest,[62] the Fifth Circuit, sitting en banc, held that counsel's decision to concede guilt did not constitute ineffective assistance of counsel[63] and did not violate the defendant's right to plead not guilty and have the government prove his guilt beyond a reasonable doubt.[64] As with the mitigation waiver cases, then, recognition of the defendant's autonomy interest appears central to ensuring that the court preserves the defendant's control over the case.

---

[54] 14 P.3d 1138.

[55] *Id.* at 1141.

[56] *Id.* at 1143. Mr. Carter objected vociferously to his counsel's strategy, asking to speak to the judge and, when that request was denied, lodging his complaint through his counsel. *Id.*

[57] Faretta v. California, 422 U.S. 806, 819 (1975), *quoted in Carter*, 14 P.3d at 1147.

[58] *Carter*, 14 P.3d at 1148.

[59] *See, e.g.*, Haynes v. Cain, 298 F.3d 375, 376-78, 383 (5th Cir. 2002) (en banc) (holding that in a death penalty case, counsel has authority to concede defendant's guilt, even over defendant's objection); Lingar v. Bowersox, 176 F.3d 453, 459 (8th Cir. 1999); United States v. Wilks, 46 F.3d 640, 641, 644 (7th Cir. 1995); Underwood v. Clark, 939 F.2d 473, 474 (7th Cir. 1991).

[60] *Haynes*, 298 F.3d at 377.

[61] *Id.* at 377-78.

[62] The dissent clearly understood that the court's decision infringed the defendant's autonomy interest. *See id.* at 386-87 (Parker, J., dissenting) (invoking *Faretta v. California* to support the conclusion that Haynes "had the constitutional right to decide whether he wanted his counsel to concede guilt on a lesser charge").

[63] *Id.* at 383 (majority opinion).

[64] *Id.* at 379 n.6, 381-82 (citing *Underwood*, 939 F.2d at 474).

3. Determining the Scope of Counsel's Authority Without the Defendant's Consent

The issues embedded in the third category – cases in which counsel makes trial strategy or guilt concession decisions without the affirmative consent of the defendant – raise especially subtle questions about the scope and impact of the autonomy interest.[65] As discussed above, certain decisions – the decisions whether to plead guilty, waive a jury, waive counsel, testify, or appeal – are "so important that an attorney must seek the client's consent in order to waive the right."[66] As to other decisions, however, the Court has held that counsel has the authority to make the decision unilaterally on behalf of the defendant. For instance, in *Gonzalez v. United States*, the Court held that counsel was authorized to make the decision whether to waive the right to have an Article III judge conduct jury selection.[67]

Somewhat more problematically, in *Florida v. Nixon*,[68] the Court held that counsel has the authority to decide whether to concede the defendant's guilt at the guilt/innocence phase of a capital trial.[69] Florida charged the defendant in *Nixon* with capital murder.[70] Based upon court-appointed counsel's judgment that the defendant's guilt was "not subject to any reasonable dispute," counsel decided to concede guilt at trial and to focus on the penalty phase.[71] Before trial, counsel informed the defendant of his concession strategy, but the defendant was "generally unresponsive."[72] At trial, counsel conceded defendant's guilt in his opening statement and cross-examined witnesses at the guilt phase "only when he felt their statements needed clarification."[73] On habeas, represented by new counsel, the defendant argued that the decision

---

[65] Justice Scalia has emphasized the difference between cases of affirmative disagreement between counsel and defendant and cases where the defendant has failed to give affirmative consent to counsel's decision. *See* Gonzalez v. United States, 553 U.S. 242, 254-55 (2008) (Scalia, J., concurring). In the former category of cases, the client's objection to counsel's decision "would have the effect of revoking the agency with respect to the action in question." *Id.* at 524.

[66] *Id.* at 250 (majority opinion). *But see id.* at 255 (Scalia, J., concurring) (concluding that other than cases involving waiver of the right to counsel, "no decision of this Court holds that, as a constitutional matter, a defendant must personally waive certain of his 'fundamental' rights").

[67] *Id.* at 250-51 (majority opinion).

[68] 543 U.S. 175 (2004).

[69] *Id.* at 178, 189, 192.

[70] *Id.* at 180-81.

[71] *Id.* at 181 (internal quotation marks omitted).

[72] *Id.* The defendant displayed "bizarre behavior" prior to trial and ultimately waived his right to be present at trial. *Id.* at 182.

[73] *Id.* at 182-83.

whether to concede guilt at trial, like the decision whether to plead guilty,[74] rested with the defendant and therefore required explicit consent by the defendant.[75]

The Court held that under these circumstances,[76] conceding guilt at trial was not the "functional equivalent" of a guilty plea, and the decision whether to concede guilt therefore was within counsel's purview after consultation with the client.[77] Unfortunately, other than its conclusion that a concession of guilt is not equivalent to a guilty plea, the Court never addressed why the defendant had no constitutional right to make this decision nor did it mention the defendant's autonomy interest in making this decision.

As with cases involving mitigation waivers and concessions over the objection of defendants, concessions without defendants' explicit consent raise serious autonomy issues. Those courts that recognize autonomy as a constitutional value and honestly assess the potential for infringement of that interest in these cases are much more likely to protect that interest when defining the parameters of constitutional rights. Thus, the determination whether autonomy is a constitutional value has great significance.[78]

---

[74] In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court held that because the decision whether to plead guilty or go to trial rests with the defendant, in order to conclude that there has been a voluntary waiver of the right to go to trial, there must be a record that the defendant "voluntarily and understandingly entered his plea[] of guilty." *Id.* at 244 (internal quotation marks omitted).

[75] *Nixon*, 543 U.S. at 185 (citing Nixon v. State, 572 So. 2d 1336, 1338-39 (Fla. 1990)).

[76] The Court emphasized that this was a bifurcated trial with separate proceedings to determine guilt and penalty. *Id.* at 190-91. Under those circumstances, the decision to concede guilt at the trial phase was reasonable even if, under ordinary circumstances, conceding guilt to all of the offenses charged in the indictment would be ineffective. *See id.* ("Although such a concession in a run-of-the-mine trial might present a closer question, the gravity of the potential sentence in a capital trial and the proceeding's two-phase structure vitally affect counsel's strategic calculus.").

[77] *Id.* at 188-89. The reasoning in *Nixon* is somewhat oblique because the Court addressed this issue in the context of determining the correct standard for assessing an ineffective assistance of counsel claim where counsel has conceded guilt at trial. *Id.* at 186-87. Nixon argued, and the Florida Supreme Court agreed, that counsel was per se ineffective, i.e., Nixon did not have to prove prejudice, because counsel's statements conceding his client's guilt were the "functional equivalent" of a guilty plea that, under *Boykin*, required express consent of the defendant. *See* Nixon v. State, 758 So. 2d 618, 624 (Fla. 2000). The Supreme Court appeared to agree that if the defendant had a constitutional right to make the concession decision, then counsel was per se ineffective for not obtaining Nixon's consent before conceding Nixon's guilt, but it ultimately concluded that Nixon had no constitutional right to make the decision. *Nixon*, 543 U.S. at 188-89.

[78] I recognize that a court's decision whether to discuss or ignore the autonomy interest may be dictated by that court's holding in the particular case, rather than the other way around. That fact notwithstanding, the strength of the autonomy interest, and in particular the extent to which the Supreme Court recognizes a robust autonomy interest, can have an impact on the outcome of these cases.

II. THE CASE FOR AUTONOMY

Because the outcome of these cases may turn on the strength of the defendant's constitutional autonomy interest, much depends on the strength of the arguments in support of it. Although *Faretta* has been the subject of both academic criticism[79] and skepticism from the Court itself,[80] its conclusion that criminal defendants have an autonomy interest that gives rise to a right of self-representation has a solid foundation in the history and text of the Sixth Amendment. History demonstrates that at the time the Sixth Amendment was ratified, criminal defendants played a much more active role in their own defenses. Indeed, the concept of governmental intervention in the defendant's case would have been entirely foreign. Finally, there is a strong jurisprudential justification for recognizing an autonomy interest in the Constitution.

A. *History of the Sixth Amendment*

The history of the Constitution, and in particular the history of the Sixth Amendment,[81] strongly suggests that the autonomy interest recognized in *Faretta* underlies many of the Constitution's criminal trial rights. To be sure, the history of the Sixth Amendment is shadowy,[82] and it is difficult to discern

---

[79] *See, e.g.*, Sabelli & Leyton, *supra* note 8, at 165 (arguing that the fair trial guarantee should override a defendant's autonomy interest); Toone, *supra* note 8, at 623 (arguing that although the freedom of criminal defendants is important to the adversarial process and to the accusatorial tradition, "*Faretta* broke sharply from these traditions by limiting the ability of courts to protect defendants from their self-destructive conduct").

[80] *See, e.g.*, Martinez v. Court of Appeal of Cal., 528 U.S. 152, 157 (2000) ("The historical evidence relied upon by *Faretta* as identifying a right of self-representation is not always useful . . . .").

[81] It appears that the constitutional trial rights of criminal defendants that appear in the Fifth and Sixth Amendments were considered together, rather than separately. For instance, the ratifying conventions of several states, including New York and Virginia, proposed amendments that contained both the right against compelled testimony, which now appears in the Fifth Amendment, and the rights now enumerated in the Sixth Amendment. *See* FRANCIS H. HELLER, THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 23, 28-29 (1951).

[82] *Id.* at 31-33 ("[When the proposed amendments concerning criminal procedure reached the Senate,] Senator Maclay of Pennsylvania, whose *Journal* is the principal source of information on the proceedings of the Senate in the First Congress, was ill during the period the amendments were debated in the Senate . . . . Any attempt to trace the exact development of the finished product, to ascribe with definitive certainty the authorship of specific words, or to place responsibility for its ultimate form and arrangement, continues to the present to be frustrated and hampered by the complete lack of information on the proceedings in the Senate."). For instance, one academic has asserted that the Confrontation Clause was debated for "a mere five minutes before its adoption." Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 332 n.181 (1981).

the precise intent of its drafters.[83] Much more, however, is known about the common law practices in England,[84] in the Colonies prior to the ratification of the Constitution, and in the states at the time the Bill of Rights took hold.[85] These sources cast light on the criminal justice system with which the drafters of the Sixth Amendment were familiar and, consequently, their likely assumptions about how the rights associated with that system would work.

Criminal trials in England during the seventeenth and eighteenth centuries looked very different than modern-day adversarial trials. Most notably, the vast majority of felony trials during the seventeenth century and into the eighteenth century proceeded without lawyers representing either the prosecutor or the defendant.[86] Until the 1730s, defendants charged with felonies were prohibited from appearing with counsel.[87] There seem to have been at least two justifications for this rule. First, the person prosecuting the case ordinarily was not represented, and thus it did not appear unfair to prohibit defendants from being represented by counsel.[88] At the time, the vast majority of crimes were viewed as private in nature, i.e., disputes between the victim and the defendant, rather than offenses against the public.[89] Although the law did not bar victims from being represented by counsel, the vast

---

[83] Although we know that most of the language of the Sixth Amendment "follows the recommendation of the ratifying convention of Virginia, which in turn was but an amplification of the corresponding section of the [Virginia] Bill of Rights drawn up by George Mason," HELLER, *supra* note 81, at 34, we know very little beyond that.

[84] The Supreme Court has relied on English common law history as a guide to the intent of the Framers. *See, e.g.*, Faretta v. California, 422 U.S. 806, 821-26 (1975) (citing the lack of any history in England of forcing counsel upon an unwilling defendant as an argument in favor of recognizing a right of self-representation in the Sixth Amendment). Some have argued that the Sixth Amendment is more accurately viewed as a rejection of the English common law. *See* Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 109 (1995) ("The Sixth Amendment, in granting a full right to counsel in all cases, was not constitutionalizing English law. It was rejecting, or at least going beyond, the existing common law."). Regardless which view one takes, it is undisputed that the history of the English common law at the very least influenced colonial law and ultimately the Sixth Amendment. *See id.* at 111-12.

[85] *See, e.g.*, WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 14-24 (1955); HELLER, *supra* note 81, at 13-34; Jonakait, *supra* note 84, at 94.

[86] *See* John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 124 (1983) (observing that lawyers appeared in only twelve out of a total of 171 Old Bailey cases from the mid-1750s that were studied).

[87] BEANEY, *supra* note 85, at 9; Jonakait, *supra* note 84, at 82-83. Interestingly, defendants were permitted to have counsel in misdemeanor cases. BEANEY, *supra* note 85, at 8; Jonakait, *supra* note 84, at 84.

[88] *See* Jonakait, *supra* note 84, at 99 ("Because the accused in England seldom faced a professional prosecuting the case, the English system might, at least on the surface have seemed fair.").

[89] *Id.* at 98. Except for cases against the Crown (such as treason) which were brought by counsel for the Crown, most crimes were prosecuted by the citizen-victim. *Id.*

majority of victims could not afford to hire counsel and therefore appeared without representation.[90] Second, the prevailing view at the time was that, at least as to matters of law, the judge should serve as de facto defense counsel, so that no other counsel was necessary.[91]

Perhaps because the prosecution was represented by public counsel in treason cases, the one exception to the ban on defense counsel in felony cases surfaced in treason prosecutions.[92] In 1696, after several innocent men were convicted in a series of political trials, the British Parliament enacted the Treason Act of 1696, which granted defendants in treason cases the right to be represented by counsel.[93] In all other felony cases, however, the ban on counsel remained in place.[94] Thus, at the beginning of the eighteenth century, felony trials for the most part did not include lawyers, and judges had primary authority to develop the facts through examination and cross-examination of the witnesses.[95]

Beginning in the 1730s, counsel for both the prosecution and the defense began to appear with more frequency in England, although in a more limited capacity than in our current system and only as a matter of judicial discretion rather than of right.[96] Counsel for the defense addressed legal questions and could cross-examine witnesses.[97] Defense counsel still could not, however, address the jury or offer a defense.[98] As a result, defendants themselves had to speak directly on all matters other than issues of law and cross-examination.[99] By the time of the American Revolution, although the appearance of counsel in England was not an anomaly, the transformation to an adversarial system with counsel for both sides undertaking all aspects of representation was far from complete.[100]

---

[90] *Id.* at 82, 102 & n.120.

[91] *See* BEANEY, *supra* note 85, at 11; J.M. Beattie, *Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries*, 9 LAW & HIST. REV. 221, 223 (1991); Jonakait, *supra* note 84, at 83; John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 307 (1978).

[92] Jonakait, *supra* note 84, at 84-85; Langbein, *supra* note 91, at 309-10.

[93] Jonakait, *supra* note 84, at 84 & n.31.

[94] *Id.* at 85.

[95] Beattie, *supra* note 91, at 221-22; Jonakait, *supra* note 84, at 86.

[96] Beattie, *supra* note 91, at 221, 223-24. The shift toward allowing defense counsel appears to have been the result of decisions by judges, rather than a statutory change. *Id.* at 224.

[97] *Id.* at 231.

[98] *Id.*; Jonakait, *supra* note 84, at 87-88.

[99] Beattie, *supra* note 91, at 231.

[100] *Id.* at 226-27. In 1780, records from Old Bailey, the court that heard cases involving the most serious crimes in London, indicated that only 3.8% of prosecutors and 7.3% of defendants were represented by counsel. *Id.* at 227 tbl.1. While these estimates likely are conservative, *see id.*, counsel still do not appear to have been used in the majority of cases.

The adversarial system developed earlier in this country than in England.[101] Most notably, the Colonies began to institute public prosecutions – that is, prosecutions instituted by public officials – as early as 1700.[102] Indeed, by the time of the Revolution, private prosecutions had become all but obsolete.[103] Not surprisingly, because prosecutions increasingly were being initiated by government lawyers, many of the colonies in their charters or by statute provided defendants with a right to be represented by counsel.[104]

Although representation by counsel had become more common by the time of the Revolution, self-representation remained the norm.[105] Indeed, many of the state charters and state constitutions that recognized a right to be heard through counsel also recognized a right to represent oneself.[106] The pervasiveness of self-representation was attributable to two factors. First, the colonists generally mistrusted lawyers, and this sentiment continued even after the Revolution.[107] The suspicion of lawyers arose at least in part from the fact that after the Revolution, there was a dearth of high quality lawyers in practice since many had returned to England or had left practice to become active in politics or to serve on the bench.[108] Second, lawyers were associated with the upper class, and those who were poor often could not afford lawyers.[109]

---

[101] Jonakait, *supra* note 84, at 97.

[102] *Id.* at 99.

[103] *Id.*

[104] *Id.* at 95; *see also, e.g.*, BEANEY, *supra* note 85, at 24. As a practical matter, there were not very many lawyers practicing in the Colonies, so it is not clear whether counsel in fact represented most criminal defendants even in those colonies where counsel were permitted. *See id.* at 14-15 (acknowledging scholarly debate regarding the use of counsel in the Colonies, and citing research showing that after "intensive examination of colonial court records in New York and Virginia . . . the right to counsel in those states was no greater in actual practice than in England").

[105] *See, e.g.*, BEANEY, *supra* note 85, at 21 ("As late as 1800 it seems probable that only in New Jersey, by statute, and in Connecticut, by practice, did the accused enjoy a full right to retain counsel, and to have counsel appointed if he were unable to afford it himself.").

[106] *See* Faretta v. California, 422 U.S. 806, 829 n.38 (1975) (listing state constitutional provisions guaranteeing right of self-representation).

[107] *See id.* at 826-27 ("The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers."); CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 212 (1911) ("Nothing in legal history is more curious than the sudden revival, after the War of the Revolution, of the old dislike and distrust of lawyers as a class.").

[108] *See* WARREN, *supra* note 107, at 214 ("[After the Revolution, many lawyers left for England, and o]f the lawyers who remained, many were either actively engaged in politics or in the army; while others had accepted positions on the bench. This left the practise [sic] of the law very largely in the hands of lawyers of a lower grade and inferior ability.").

[109] *See* BEANEY, *supra* note 85, at 21 (observing that, except in two states, defendants had a right to counsel only if they could afford to pay for it themselves); WARREN, *supra* note 107, at 214-15, 223-24 (explaining that the hostility against lawyers after the

Although twelve of the thirteen states guaranteed the right to counsel in some fashion after the Revolution, either by statute or in their constitution,[110] the majority of states did not appoint counsel in felony cases.[111] Thus, defendants were entitled to representation by counsel only if they could afford to retain someone.[112]

Even when counsel did appear for the defendant, it is not at all clear that counsel's representation was any less limited in the states than it had been in England.[113] Counsel certainly could cross-examine witnesses and could argue points of law, but it is not clear that they were permitted to argue facts to the jury in all states.[114] Perhaps most significantly for purposes of interpreting the Sixth Amendment, although Virginia permitted counsel to appear in criminal cases, it appears to have followed the English rule regarding the limited role of counsel in felony cases.[115]

Two lessons emerge from this history. First, the states, and the drafters of the Sixth Amendment, clearly rejected the idea that judges could adequately "represent" defendants in criminal cases, instead granting defendants the right to "the Assistance of Counsel for his defence."[116] This is hardly surprising. While citizens might have trusted the judiciary to remain neutral as between private individuals, the introduction of the public prosecutor raised the risk that judges would favor one side, namely the government.[117] More fundamentally,

---

Revolution was caused in part because of legal fees and the view that lawyers made themselves a privileged class).

[110] Powell v. Alabama, 287 U.S. 45, 61-63, 64-65 (1932).

[111] *See* BEANEY, *supra* note 85, at 21. It appears that at least two states had mechanisms for appointment of counsel in all felony cases, and several more provided for the appointment of counsel in capital cases, but the rest of the states do not appear to have appointed counsel. *Id.*

[112] *Id.*

[113] *See id.* at 25.

[114] *See id.* at 23-24. Some states, either by statute or by constitution, specified their rejection of the English rule that counsel was permitted only to cross-examine and address questions of law. North Carolina, for instance, enacted a statute providing that "every person accused of any crime or misdemeanor whatsoever, shall be entitled to council, in all matters which may be necessary for his defence as well as to facts as to law." *Id.* at 19 (internal quotation marks and citation omitted). And in Connecticut, sources written at the time suggest that lawyers were permitted to argue facts to the jury. *See* 2 ZEPHANIAH SWIFT, A SYSTEM OF THE LAWS OF THE STATE OF CONNECTICUT 398-99 (Arno Press 1972) (1796). Unfortunately, because not all of the counsel provisions are as explicit, it is not clear whether the states were adopting the English rule or going beyond it. *See* BEANEY, *supra* note 85, at 21-22.

[115] *See* BEANEY, *supra* note 85, at 22.

[116] U.S. CONST. amend. VI.

[117] *See* William E. Nelson, *Emerging Notions of Modern Criminal Law in the Revolutionary Era*, 42 N.Y.U. L. REV. 450, 476 (1967) ("The increased interest of the government in many cases and the increased power of the courts to affect the outcome of

the time of the Revolution and its immediate aftermath was one of deep mistrust of government generally, and of judges in particular.[118] This mistrust of the judiciary was evident in the method of guaranteeing the right to be represented by counsel in the fledgling states. While the right to be represented by counsel in England depended on the largesse of the judiciary, in this country, all of the states declined to leave the issue in the hands of judges, guaranteeing the right either by statute or constitution.[119]

This rejection of England's concept of judge as advocate for the defendant evidences the Framers' strong mistrust of paternalism.[120] In particular, those involved in drafting the Sixth Amendment were skeptical that the government would normally act in the defendant's interest.[121] Just as important, the Framers appeared to understand that the defendant's interests were best served by providing him with the tools to determine and act in his own self-interest.[122]

Second, at the time the Sixth Amendment was debated and ratified, counsel truly was an assistant rather than a master.[123] Not only was self-representation the norm, but more importantly, in many jurisdictions, counsel played a relatively limited role, primarily cross-examining witnesses and arguing legal questions.[124] In many states, the broader role of counsel would come only decades later. Thus, with the exception of relatively new developments in a few states, the entire history upon which the Framers drafted the Sixth Amendment featured the defendant as the primary decision-maker and advocate in the case. The general mistrust of lawyers reinforces the role of lawyers as advisors or assistants. Those who drafted the Sixth Amendment

---

those cases created a danger that courts might abandon their role as arbiter between government and subject, and become an oppressor of the latter.").

[118] *See* Jonakait, *supra* note 84, at 103-05 (commenting that the framers were skeptical of judges, and that fact, "coupled with the inordinate power judges had to influence the outcome of common law trials, meant to Americans that the judicial power had to be checked").

[119] BEANEY, *supra* note 85, at 25.

[120] Jonakait, *supra* note 84, at 106-08.

[121] *See* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 165 (2000) (Scalia, J., concurring) ("I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power – including judicial power – that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel *by the government* to plead a defendant's case.").

[122] *See id.*

[123] *See* Faretta v. California, 422 U.S. 806, 832 (1975) ("[T]he colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself.").

[124] *See* BEANEY, *supra* note 85, at 25.

must have been aware of that history, and the idea of counsel as the master of the defendant's case would have been inconceivable to them.[125]

Indeed, one of the primary functions of counsel, and thus one of the reasons for guaranteeing a right to counsel, was to ensure that defendants could actualize the other rights guaranteed to them. As Professor Langbein has noted, for example, the Fifth Amendment's privilege against self-incrimination could not, as a practical matter, be invoked by defendants representing themselves.[126] If a self-represented defendant tried to invoke the right against self-incrimination and refused to speak at trial, he essentially could not raise a defense.[127] Thus, a right to counsel is necessary in order to protect the defendant's privilege against self-incrimination. The role of counsel was not to supplant the defendant as the primary decision-maker but instead to ensure that the defendant could adequately assert his rights.

Both of these lessons underscore the importance of defendant autonomy to the drafters of the Bill of Rights.[128] The defendant, armed with rights granted by the Constitution, was in the best position to choose for himself the course most advantageous from his own perspective. The right to counsel, far from being seen as a means for undermining defendant autonomy, instead was intended, like the other trial guarantees in the Constitution, to provide defendants themselves with a necessary tool for making and acting upon the most well-informed decisions.

B. *Text of the Constitution*

The text of the Sixth Amendment confirms that the Framers viewed autonomy as an animating value of the criminal trial rights of defendants. As the Court observed in *Faretta*:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be "informed of the nature and cause of the accusation," who must be "confronted with the witnesses against him," and who must be accorded "compulsory process

---

[125] As the Court in *Faretta* put it, "In the heat of these sentiments the Constitution was forged." *Faretta*, 422 U.S. at 827.

[126] *See* John H. Langbein, *The Historical Origins of the Privilege Against Self-Incrimination at Common Law*, 92 MICH. L. REV. 1047, 1048 (1994).

[127] *Id.* at 1054.

[128] This is not to say that had James Madison, the primary drafter of the Sixth Amendment, been asked to name the values underlying the rights contained within that Amendment, he would have responded, "autonomy." He distinctly would not have, at least in part because autonomy is a distinctly modern term. Indeed, the Supreme Court's first use of the word autonomy in connection with individual rights did not occur until the 1970s. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 687 (1977) (discussing the "constitutional protection of individual autonomy in matters of childbearing"). Nonetheless, autonomy concepts run through the history of the Sixth Amendment rights.

> for obtaining witnesses in his favor." . . . The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant.[129]

By granting these rights directly to the defendant, the Sixth Amendment demonstrates that the Framers viewed the defendant as the master of the defense, with counsel available – as the Amendment specifically states – to provide "[a]ssistance" to the accused.[130] Although the defendant might consult counsel before making important decisions regarding his rights, ultimately those decisions are the defendant's to make.

The existence of a strong textual argument in favor of a Sixth Amendment autonomy interest contrasts with the oft-debated basis for such an argument with respect to an autonomy interest in the Due Process Clause.[131] Given that the Court has consistently recognized autonomy as a value protected by the substantive Due Process Clause despite the lack of a strong textual argument,[132] the Court should not hesitate to recognize the textually and historically supported autonomy interest of criminal defendants in controlling the course of their cases.

C. *Jurisprudential Importance of the Autonomy Interest*

In addition to the historical importance of the constitutional autonomy interest, there exists a powerful philosophical justification for broadly recognizing it. Because the trial necessarily takes place before a defendant has been found guilty – and therefore before the government is authorized to deprive a defendant of his autonomy – the defendant retains an autonomy interest during the trial proceedings.

---

[129] *Faretta*, 422 U.S. at 819-20.

[130] U.S. CONST. amend. VI.

[131] *See, e.g.*, Mark C. Niles, *Ninth Amendment Adjudication: An Alternative to Substantive Due Process Analysis of Personal Autonomy Rights*, 48 UCLA L. REV. 85, 94 (2000); Michael Stokes Paulson, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 904 (2009) ("[O]riginal-public-meaning textualism cannot yield a generic right to privacy or autonomy under any of the myriad texts invoked in support of such a right.").

[132] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 562 (2003) ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."); Thornburgh v. Am. Coll. of Obstetrics & Gynecology, 476 U.S. 747, 772 (1986) ("Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision – with the guidance of her physician and within the limits specified in *Roe* – whether to end her pregnancy."); *Carey*, 431 U.S. at 687 (discussing the "constitutional protection of individual autonomy in matters of childbearing" and concluding that restrictions on distribution of contraceptives violates the Due Process Clause).

Sentencing upon conviction of a crime has serious consequences for a defendant's autonomy.[133] The most certain result of conviction in a felony case is a sweeping reduction in the defendant's range of choices.[134] These restrictions begin with limitations on physical movement. But from the moment a defendant is sentenced, the government circumscribes his choices in many other ways as well.[135] For example, correctional officers tell an incarcerated defendant what he can do and when he can do it.[136] Indeed, one of the primary ways in which incarceration punishes is by depriving the defendant of the freedom to make choices.[137] Decisions involving otherwise constitutionally protected choices – for instance whether to have sex with one's spouse and how to interact with one's children – and decisions regarding mundane matters such as what to have for dinner and when, all are dictated by the government. Probation, while reducing autonomy less significantly than incarceration, also profoundly reduces the probationer's ability to make and act upon his own decisions.[138] For instance, probation often restricts the

---

[133] *See, e.g.*, Youngjae Lee, *Valuing Autonomy*, 75 FORDHAM L. REV. 2973, 2974-75 (2007) (arguing that an account of autonomy is incomplete without considering the "constitutional status of the institution of punishment" because our system of incarceration fundamentally deprives people of autonomy).

[134] In 2004, for instance, ninety-eight percent of defendants convicted of felonies in state courts received sentences of either incarceration or probation. *See* MATTHEW DUROSE, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2004 – STATISTICAL TABLES, at 1 tbl.1.2 (2007), http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1533.

[135] *See* David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 60 (1998) (describing the loss of control over whom you live with, where you live, what work you perform, what you wear, and what you read once incarcerated).

[136] *See, e.g.*, Craig Haney, *The Psychological Impact of Incarceration: Implications for Postprison Adjustment*, *in* PRISONERS ONCE REMOVED: THE IMPACT OF INCARCERATION AND REENTRY ON CHILDREN, FAMILIES AND COMMUNITIES 33, 40 (Jeremy Travis & Michelle Waul eds., 2003) (describing the phenomenon of institutionalization which includes the adjustment by prisoners to the requirement that they "relinquish the freedom and autonomy to make their own choices and decisions").

[137] *See, e.g.*, Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 783 (1994).

[138] Standard conditions of probation in many jurisdictions include regular reporting to a probation officer, maintaining employment, refraining from the use of drugs or alcohol, attending group meetings, and avoiding association with people with criminal records. *See, e.g.*, 18 U.S.C. § 3583(d) (2006) (requiring, among other things, that defendant cooperate in providing a DNA sample in certain instances); ALA. CODE § 15-22-52 (1975) (allowing court to include condition that probationer "[a]void injurious or vicious habits"); FLA. STAT. § 948.03 (2010) (mandating that probationer "[r]emain within a specified place"); GA. CODE ANN. § 42-8-35 (2009) (specifying that probationer allow the probation supervisor to visit the probationer's home). More specific conditions for particular types of offenses can be much more onerous. *See, e.g.*, FLA. STAT. ANN. § 948.03(k), (m) (West 2010) (requiring drug testing and limiting use of drugs to prescriptions for drug offenders); GA. CODE ANN. §

probationer's access to otherwise lawful substances like alcohol, prevents the probationer from denying probation officers access to his home, and limits the probationer's right to travel.[139]

Part of the justification for punishment – and its concomitant denial of a defendant's autonomy – is that the defendant has freely chosen to engage in unlawful conduct and therefore has earned the punishment.[140] To phrase it another way, a defendant who chooses to break the law has exercised a free and rational choice to do so, and that decision by the defendant gives society the right to punish him.[141] Society's reduction or elimination of a defendant's autonomy as punishment is acceptable in large part because the defendant has autonomously chosen to break society's rules.[142]

The justification for the autonomy deprivation that comes with punishment can be seen as moral, as utilitarian, or as both. One could justify punishment's autonomy deprivation on the grounds that the defendant has made autonomous choices and therefore has earned his just deserts.[143] However, one also could justify the reduction on the ground that punishing the wrongdoer for bad choices will result in a net benefit for society.[144] In either event, the

---

42-8-35(b) (establishing use of electronic monitoring, travel restrictions, and prohibitions on election to a school board for probationer guilty of crimes against minors).

[139] *See* sources cited *supra* note 138.

[140] *See, e.g.*, R.A. Duff, *Review Essay: Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS 51, 51 (1990); Christopher Slobogin, *A Jurisprudence of Dangerousness*, 98 NW. U. L. REV. 1, 28-29 (2003).

[141] As Professor Dubber explains, "The paradox of punishment lay in the affirmation of the offender's autonomy by his autonomous deprivation of that autonomy." Markus Dirk Dubber, *The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought*, 16 LAW & HIST. REV. 113, 118 (1998).

[142] There are interesting questions about whether those rules should be subject to substantive limitations in order to ensure that the autonomy of society members is maximized. *See, e.g.*, Lee, *supra* note 133, at 2977-79. Those questions are beyond the scope of this Article.

[143] *See, e.g.*, Michael S. Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 179-82 (Ferdinand Schoeman ed., 1987).

[144] *See, e.g.*, JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 35 (1974) (describing "general preventative effect" of punishment in deterring citizens from undesirable conduct); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 158 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1996) (1789) ("Upon the principle of utility, if [punishment] ought at all to be admitted, it ought only to be admitted in as far as it promises to exclude some greater evil."); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 320 (1984) (identifying traditional utilitarian goal of reducing the "sum of the costs of crime and crime prevention").

justification for punishment relies on a determination that the defendant has been found blameworthy.[145]

Thus, before punishment can be imposed, or autonomy deprecated, there must be a process for determining that the defendant in fact is blameworthy in a way that deserves punishment. The criminal justice system, complete with the procedural protections guaranteed by the Constitution, is designed to make that determination. Because the process itself necessarily precedes any conclusion regarding the defendant's blameworthiness, however, that process must respect or value the defendant's autonomy.[146] In other words, the process for determining whether the defendant's autonomy legitimately can be deprecated cannot itself deprive the defendant of his autonomy. For that reason, the Constitution should, at a minimum, protect a criminal defendant's autonomy interest prior to and during trial.[147]

Of course, there are many ways in which the government infringes defendants' autonomy before trial. For instance, courts incarcerate many defendants pending trial, and even if a defendant has been released, the government at the very least requires that he appear in court at certain times and often places significant restrictions on the defendant's liberty. The difference between those autonomy infringements and that stemming from denying defendants control of their cases lies in their differing justifications. Pretrial detention and other pretrial restrictions are primarily intended to ensure defendants' presence at all court proceedings,[148] a requirement for the criminal

---

[145] There is, of course, a debate regarding whether the punishment of an innocent (i.e., non-blameworthy) person can ever be justified if it deters other potential wrongdoers or otherwise benefits society. *See* BENTHAM, *supra* note 144, at 288-89; Michael M. O'Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. 407, 436 (2008). For purposes of this Article, it is unnecessary to enter that debate. Suffice it to say, utilitarians have a strong argument that conviction and punishment of innocent individuals in any great number would lead to distrust in the accuracy of the system, which in turn would lead to a reduction in deterrence. *See* Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism and Punishment of the Innocent*, 32 RUTGERS L.J. 115, 129-30 (2000) (presenting utilitarian responses to the charge of supporting punishment of the innocent). On the whole, then, society benefits from the punishment of those who are blameworthy, and not from the punishment of those who are innocent.

[146] *See* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1747-53 (1992) (arguing that "constitutional safeguards applicable in criminal cases . . . reflect the high value the Constitution places on individual autonomy").

[147] Perhaps for precisely this reason, the Court has held that the autonomy interest of criminal defendants on appeal is diminished from that of defendants before guilt is determined. *See* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 162 (2000).

[148] *See, e.g.*, 18 U.S.C. § 3142(f) (2006) (requiring a hearing to determine whether detention is the only way to "assure the appearance of [the defendant] as required and the safety of any other person and the community"); GA. CODE ANN. § 17-6-1(e) (2008) (authorizing court to release person on bail if the person is not a significant flight or safety risk, and is not a significant risk to commit a felony nor intimidate witnesses or obstruct justice).

justice process to function. Although that justification for pretrial detention has been the subject of much criticism,[149] there is no argument that there are similar justifications for denying the defendant's autonomy interest as it relates to his ability to control his case.[150] Because completely depriving the defendant of control over the case is not necessary for the criminal justice system to function, the concomitant autonomy infringement cannot be justified.

III. CRITIQUES OF THE AUTONOMY INTEREST

Why has the autonomy interest not prospered in judicial decision-making? Three reasons seem important. First, courts (and academics), all of whom are lawyers, paternalistically posit that lawyers can better make decisions leading to reliable outcomes than can defendants. Because there has been an increasing focus on reliability or accuracy as the preeminent goal of the constitutional trial rights of defendants,[151] many therefore believe that lawyers should have the authority to exercise judgment in criminal cases. Second, there is an argument that defendants who accept the appointment of counsel thereby waive their autonomy interest. Finally, the Court and commentators have expressed concern that respecting defendants' autonomy might result in significant harm to those who are mentally ill. Each of these criticisms may have intuitive appeal. None, however, withstands close scrutiny.

A. *Paternalism*

Paternalism is the predominant sentiment running through many of the autonomy critiques.[152] Two basic premises underlie this sentiment: (1) the optimal strategy for a defendant in a criminal case is one that minimizes both the risk that an innocent defendant will be found guilty and the sentence of the

---

[149] *See generally, e.g.*, Kenneth Frederick Berg, *The Bail Reform Act of 1984*, 34 EMORY L.J. 685 (1985); Michael Harwin, Note, *Detaining for Danger Under the Bail Reform Act of 1984: Paradoxes of Procedure and Proof*, 35 ARIZ. L. REV. 1091 (1993).

[150] The only potential justification for denying defendants control over their cases is that doing so might make the proceedings more reliable. As discussed below, however, there is no empirical evidence that denying defendants control results in more reliable outcomes. *See infra* Part III.A.

[151] *See, e.g.*, Akhil Reed Amar, *Sixth Amendment First Principles*, 84 GEO. L.J. 641, 642 (1996) ("The deep principles underlying the Sixth Amendment's three clusters and many clauses (and, I submit, underlying constitutional criminal procedure generally) are the protection of innocence and the pursuit of truth.").

[152] *See, e.g.*, Sabelli & Leyton, *supra* note 8, at 165 (questioning the Court's decision in *Faretta* because "the right of self representation *in practice* undermines the fairness of the criminal process"); Toone, *supra* note 8, at 628 (declaring that *Faretta* "empower[s] the self-destructive impulses of criminal defendants").

defendant in the event of a conviction;[153] and (2) lawyers are better able to make decisions that will achieve that optimal outcome than are defendants.[154] Because this view assumes the truth of both propositions, it follows that criminal defendants necessarily are better served by deferring to the judgment of their counsel. Thus, allowing criminal defendants control over their cases can only hurt them.

The predominance of paternalism over autonomy can be seen both in the Court's decisions and in the academic literature. For instance, as discussed above, in *Florida v. Nixon*,[155] the Court held that counsel has the authority to concede the defendant's guilt in the guilt/innocence phase of a death penalty trial even without receiving consent from his client.[156] The Court's decision in that case appears to have turned, in part, on its assessment that skilled criminal defense lawyers employ the strategy of conceding guilt in capital trials.[157] After all, the Court pointed out, the decision by Nixon's lawyer to concede guilt, although ultimately not successful, was a strategy once employed by none other than Clarence Darrow.[158]

Even in self-representation cases, in recent years the Court has subordinated the autonomy interest to paternalism. In *Martinez v. Court of Appeal of California*,[159] for instance, the Court considered whether there is a right of self-representation on appeal.[160] The Court appears to have acknowledged that the autonomy interest extends in some measure to appeals, observing that "the right to self-representation at trial was grounded in part in a respect for individual autonomy" and that "[t]his consideration is, of course, also applicable to an appellant seeking to manage his own case."[161] Nonetheless, the Court concluded that the autonomy interest of the defendant/appellant, which is diminished by the fact that the defendant has already been found

---

[153] *See, e.g.*, Williams, *supra* note 8, at 705 ("The right to counsel is rooted in the sovereign's overarching interest in reliable outcomes, not in vindicating some personal interest of the defendant. So, within the very structure of the Sixth Amendment there is a decided tilt towards the sovereign's independent interest in reliable outcomes.").

[154] *See, e.g.*, Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161 (2000) ("Our experience has taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.'" (quoting John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 598 (1996))).

[155] 543 U.S. 175 (2004).

[156] *Id.* at 179; *see also supra* Part I.B.

[157] *See Nixon*, 543 U.S. at 191-92.

[158] *See id.* at 192 ("Renowned advocate Clarence Darrow, we note, famously employed a similar strategy as counsel for the youthful, cold-blooded killers Richard Loeb and Nathan Leopold.").

[159] 528 U.S. 152 (2000).

[160] *Id.* at 154.

[161] *Id.* at 160.

guilty at the trial level, is outweighed by "the overriding state interest in the fair and efficient administration of justice."[162] The Court went on to opine that "[t]he requirement of representation by trained counsel implies no disrespect for the individual inasmuch as it tends to benefit the appellant as well as the court."[163] In other words, because the Court assumed that the reliability of the proceedings is enhanced by a rule requiring counsel,[164] the reliability gain more than offsets any loss of autonomy.

Academics also have expressed concern that recognizing an autonomy interest will hurt, rather than help, criminal defendants.[165] This is particularly true in the context of mitigation waiver cases.[166] The combination of the threatened death penalty and the fact that the defendant appears to be making a very unwise decision by foregoing the presentation of mitigating evidence has led some to question why the defendant's autonomy should be considered at all.[167]

There are three reasons that the paternalistic impulse of the courts and academics may be misplaced. First, there is no clear empirical evidence supporting the second proposition, namely that lawyers are better able than defendants to make decisions leading to the most beneficial outcomes. Second, elevating paternalistic impulses over autonomy contradicts the Court's earlier holdings that defendants, rather than counsel, should control decisions such as whether to go to trial or plead guilty. If one adopts the premises of paternalism, there is no reason to conclude that the decision whether to go to trial or plead guilty should rest with defendants. Finally, the emphasis on reliability takes too narrow a view of what the optimal outcome is for many criminal defendants.

First, although nearly everyone assumes the truth of the second premise of paternalism – that lawyers are better able than defendants to make decisions that will achieve optimal outcomes for defendants – that premise may not be accurate. As the Court recognized in its most recent self-representation case,

---

[162] *Id.* at 163.

[163] *Id.*

[164] The Court cited no empirical evidence for its conclusion that appellants necessarily are better off with counsel than proceeding pro se. *Cf.* Hashimoto, *supra* note 12, at 447 (concluding that there is no data proving that pro se felony defendants at the trial level have worse outcomes than represented defendants).

[165] *See, e.g.*, Johnson, *supra* note 8, at 41-42 (arguing that "nearly all decisions should be committed to the discretion of lawyers" in part because "[m]any besides the defendant suffer when courts wrongfully convict or condemn, and our adversary system relies on the presentation of the best defense to avoid those enormous, irrevocable errors").

[166] *See supra* Part I.B.1.

[167] *See, e.g.*, Casey, *supra* note 37, at 104-05 (arguing that the state's interest in a reliable penalty determination outweighs any autonomy interest of the defendant); Williams, *supra* note 8, at 698 (arguing that autonomy is more "'rhetorical flourish' . . . than meaningful notion" and that the defendant ought to have no power to veto "an effective mitigation presentation" (quoting Toone, *supra* note 8, at 623)).

Indiana v. Edwards,[168] even in self-representation cases, where counsel are least available to provide guidance to the defendant and where the paternalists would predict the worst outcomes for defendants, there is no evidence that defendants fared significantly worse than represented defendants.[169] Indeed, the data suggest that in state courts, outcomes for pro se felony defendants "were at least as good as, and perhaps even better than, the outcomes for their represented counterparts."[170] While the data are subject to limitations and therefore do not prove that pro se defendants fare better than they would have if they had been represented,[171] at the very least, it is fair to question the underlying paternalistic premise that giving lawyers control over decision-making guarantees better outcomes for defendants.

This is especially true outside of the self-representation context. After all, in cases of self-representation, the defendant makes all of the decisions in the case, for the most part without any advice of counsel.[172] In the overwhelming majority of felony cases, however, the defendant is represented by counsel.[173] There is absolutely no evidence to suggest that defendants receiving the advice of counsel are disadvantaged by having a right to make decisions about their own cases after hearing counsel's advice.[174] Absent any evidence supporting the second premise of paternalism – that counsel make better decisions than clients – the argument that paternalistic considerations should outweigh any autonomy interest appears unfounded.

Second, paternalism cannot be reconciled with the Court's conclusion that certain fundamental decisions, including the decision whether to go to trial or

---

[168] 128 S. Ct. 2379 (2008).

[169] *Id.* at 2388 (explaining that although some have expressed concern that the right of self-representation "has led to trials that are unfair . . . recent empirical research suggests that such instances are not common"); *see also* Hashimoto, *supra* note 12, at 447.

[170] Hashimoto, *supra* note 12, at 447.

[171] *See id.* at 441-46 (identifying limitations of the data, including small sample size and inability to control for strength of cases against defendants).

[172] If standby counsel is appointed, that counsel may advise the defendant. It is, however, unclear the extent to which standby counsel fulfill that role for pro se defendants. First, because the appointment of standby counsel for the most part is a discretionary decision for the trial court, there are no statistics on how often standby counsel are appointed in state cases. And although it appears that standby counsel are appointed in most *federal* felony cases, *see id.* at 485, the role of standby counsel – in particular the extent to which they are supposed to give the defendant advice – has remained undefined. *See* Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 703-05 (2000).

[173] *See* Hashimoto, *supra* note 12, at 447 (concluding that the rate of self-representation in felony cases in both state and federal cases was between 0.3% and 0.5%).

[174] As a practical matter, if counsel performs properly and ensures that the defendant understands all of the implications of a particular decision, in the vast majority of instances, the defendant probably will follow counsel's advice.

plead guilty, rest with the defendant rather than counsel.[175] After all, if paternalists are right that lawyers are better able to assess what is in a criminal defendant's best interest than the defendant, then it would appear that counsel, not the defendant, should decide whether or not to accept a plea or to go to trial. Indeed, given the importance of that decision, there is an argument that if paternalists are correct, this decision, above all others, should be entrusted to the lawyer. As the Court quite correctly has recognized, however, the defendant has the most at stake in a criminal proceeding, and the defendant therefore must personally waive the rights to trial, to confront witnesses, and against self-incrimination when pleading guilty.[176] Once one accepts the Court's holding that the decision whether to plead guilty rests with the defendant, not his lawyer, one necessarily has concluded that at least under some circumstances, autonomy is a more important value than paternalism and reliability.

Finally, the paternalistic approach takes too narrow a view of what constitutes the best interest of the defendant. In order to conclude that lawyers are more qualified than defendants to make decisions regarding the best possible result for the defendant, one must define the term "best possible result." Most lawyers calculate the best possible result by assessing the risks of going to trial and balancing those against the benefits of a plea. For example, imagine a defendant who has only a twenty percent chance of being acquitted at trial and will receive a sentence of thirty years in prison if convicted. If the prosecutor offers a plea that would result in a fifteen-year sentence, most lawyers would recommend that the defendant take that plea.[177] But different defendants have different views of the value of the twenty percent chance of being acquitted. Some defendants would value any possibility of an acquittal more than a sentence discount, particularly where the discounted sentence still is so long. Similarly, in the context of concessions to lesser-included offenses, a lawyer probably would advise a client in a death penalty case to concede guilt to a lesser-included life sentence offense if the lawyer thought it likely both that the defendant would be convicted of the lesser-included offense and that the concession would significantly diminish the likelihood of a death sentence. But for the defendant, the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence.

Indeed, because the defendant is the only person who can prioritize the various competing interests at stake – including the risks of going to trial, the

---

[175] *See, e.g.*, Brookhart v. Janis, 384 U.S. 1, 7 (1966).

[176] *See* Florida v. Nixon, 543 U.S. 175, 187 (2004) (declaring that "the high stakes for the defendant [of a guilty plea] require the utmost solicitude" to ensure that the plea is knowing and voluntary (internal quotation marks omitted)).

[177] The basic calculation would be as follows: 30 years multiplied by 0.80 (the chance of being convicted) equals 24 years, and 24 years is greater than the 15 years that the defendant definitely will get on the plea.

sentencing exposure, and other possible consequences of a guilty plea – the defendant has a significant autonomy interest in controlling the key decisions in the case. The lawyer, of course, plays a critical role in that process as an advisor regarding the potential risks and benefits of the proposed courses of action. And the defendant may defer to counsel's judgment. But once the defendant has received information on risks and benefits from counsel, the defendant should have the authority to prioritize his own interests and decide the best course of action.

B. *The* Gideon *Tradeoff*

The second argument against recognizing an autonomy interest in criminal cases (outside of the self-representation context) relies on a waiver principle. At least at the trial level,[178] the defendant has a constitutional right to proceed pro se, and if he exercises that right, he retains control over the decisions in the case and protects his autonomy interest.[179] One could argue, therefore, that defendants waive any autonomy interest they might have by accepting the assistance of counsel.[180] This is particularly so where the defendant accepts court-appointed representation,[181] and thus is receiving a benefit from the government.[182]

There are several problems with this reasoning. First, the Court has never so much as intimated that the right to counsel is conditioned upon waiver of all

---

[178] There is no constitutional right of self-representation on appeal. Martinez v. Court of Appeal of Cal., 528 U.S. 152, 154 (2000).

[179] Although a trial court can appoint standby counsel to assist the pro se defendant, even over the defendant's objection, it is clear that by proceeding pro se, the defendant retains decision-making authority in the case. *See* McKaskle v. Wiggins, 465 U.S. 168, 178 (1984) (holding that appointment of and participation by standby counsel does not violate right of self-representation as long as the defendant "preserve[s] actual control over the case he chooses to present to the jury . . . [and standby counsel does not] destroy the jury's perception that the defendant is representing himself"). It is not clear what would happen if a court concluded that a particular witness needed to testify outside of the presence of a pro se defendant. Although the Court approved such a procedure when the defendant was represented, *see* Maryland v. Craig, 497 U.S. 836, 857 (1990), it is not clear that a witness could testify outside of the presence of a pro se defendant.

[180] *See, e.g.*, Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939, 959 (2009) (observing that defendants may waive right to jury trial); Andrew E. Taslitz, *Judging Jena's D.A.: The Prosecutor and Racial Esteem*, 44 HARV. C.R.-C.L. L. REV. 393, 432 (2009) (commenting that the law often allows prosecutors to refuse to bargain with defendants that do not first waive rights to discovery, challenge the admissibility of certain evidence, claim prosecutorial misconduct, and appeal).

[181] *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[182] *Cf.* Waters v. Churchill, 511 U.S. 661, 671-73 (1994) (plurality opinion) (concluding that government may, consistent with the First Amendment, restrict the speech of its employees in ways that it could not restrict speech of the public at large in part because the employee is receiving the benefit of employment from the government).

interest in autonomy.[183] Second, conditioning the right to counsel on a waiver of any autonomy interest would be a significantly more severe penalty on the exercise of the right to counsel than any penalty the Court allows on the exercise of other rights. Indeed, such a ruling would run counter to the Court's conclusion in the Fifth Amendment context that defendants cannot be penalized for exercising their right to remain silent.[184] Finally, conditioning the right to court-appointed counsel on waiver of the defendant's autonomy interest leaves indigent defendants powerless if they doubt counsel's loyalty. Particularly given that there are legitimate reasons for defendants with court-appointed counsel to doubt the loyalty of counsel – namely that *Gideon v. Wainwright*'s[185] requirement that states appoint and compensate defense counsel for indigent defendants raises the possibility that counsel's loyalty will be divided between client and source of income[186] – the autonomy interest, which protects the defendant's right to control decisions in his case, provides a necessary tool for indigent defendants to protect themselves from counsel's built-in conflicts.

At the time *Gideon* was decided, approximately forty-three percent of felony defendants in state courts were indigent.[187] That percentage has almost doubled since then, and currently, eighty-two percent of felony defendants in state courts are represented by court-appointed counsel.[188] Although *Gideon* made clear that the state could not prosecute indigent felony defendants without providing counsel,[189] it offered no guidance on how states were to pay those lawyers. As a result, the funding mechanisms vary widely from state to

---

[183] The right to counsel, of course, is conditioned on waiver of the right of self-representation, and courts generally have held that the right of self-representation is waived by accepting counsel's representation. *See, e.g.*, United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam); United States v. Weisz, 718 F.2d 413, 426 (D.C. Cir. 1983) ("[T]he right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*."). Nothing in those rulings, however, suggests that the defendant waives all autonomy interests by accepting representation.

[184] *See, e.g.*, Griffin v. California, 380 U.S. 609, 615 (1965) (holding that prosecutor's comment on defendant's silence at trial unconstitutionally penalized defendant for invoking Fifth Amendment rights); Malloy v. Hogan, 378 U.S. 1, 12-14 (1964) (concluding that finding of contempt to penalize defendant who invoked the Fifth Amendment right to refuse to answer questions violated the defendant's Fifth Amendment rights).

[185] 372 U.S. 335 (1963).

[186] *Id.* at 344.

[187] 1 LEE SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS: A FIELD STUDY AND REPORT 7-8 (1965).

[188] *See* CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DEFENSE COUNSEL IN CRIMINAL CASES, at 1 (2000), http://bjs.ojp.usdoj.gov/content/pub/pdf/dccc.pdf.

[189] *Gideon*, 372 U.S. at 344.

state.[190] Some jurisdictions have created public defender offices that provide representation for most defendants, but in other jurisdictions, judges appoint private attorneys to provide representation.[191] In still other places, the jurisdiction enters into a flat-fee contract with a lawyer to provide representation to all indigent defendants in that jurisdiction.[192] Under all of these systems, some governmental entity, not the client, provides the funds to pay counsel.

Court-appointed attorneys, like all other attorneys, owe ethical obligations to their clients,[193] regardless who is paying for those services. The fact that counsel is being paid by the state rather than the client, however, creates an inherent potential for conflict. Indeed, the ethical rules on their face recognize the potential for a conflict of interest when a lawyer accepts compensation for representation from a person other than the client.[194] The ethical rules target a risk that the person (or entity) paying for the lawyer's service will attempt to control the lawyer or that the lawyer will feel obligated to the person (or entity) providing the compensation and that feeling of obligation will affect the lawyer's professional judgment. In spite of the requirement in the Model Rules of Professional Conduct that lawyers who receive compensation from someone other than the client obtain "informed consent" from the client,[195] there is no evidence that court-appointed lawyers regularly address the issue with clients.

The risk of a conflict of interest is exacerbated in situations where judges decide who is appointed to represent indigent defendants, and practitioners rely

---

[190] In twenty-one states, the state government paid for most or all indigent representation, in twenty states the state and county both paid, and in nine states only the county provided funding. *See* CAROL J. DEFRANCES, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 1 (2001), http://bjs.ojp.usdoj.gov/content/pub/pdf/sfids99.pdf.

[191] *Id.* (explaining that nineteen states provided funding for a public defender program, while nineteen other states used assigned counsel programs).

[192] *Id.* The use of flat-fee contracts has been intensely criticized because the "system obviously creates enormous incentives for those awarded the contract to ensure that they spend as little on each case as possible." Hashimoto, *supra* note 12, at 471; *see also* THE SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE PART I, at 37-43 (2002), http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc.

[193] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7-1.8 (2009).

[194] *See id.* R. 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."). Rule 1.8(f) recognizes that a third-party fee payment arrangement may create a "conflict of interest" within the meaning of Rule 1.7, which would then require written informed consent by the client. *See id.* R. 1.8 cmt. 12.

[195] *See id.* R. 1.8(f).

on those court appointments for their livelihood.[196] Under those circumstances, counsel has a personal interest – the viability of his practice – in assuring that the judge, rather than the client, is pleased with the representation. In jurisdictions where judges favor the resolution of cases by way of guilty plea rather than trial,[197] for instance, the lawyer has an economic incentive to encourage the defendant to accept a plea.[198] Unlike an attorney who is retained by the client and who therefore has an economic incentive to be loyal to that client and ensure that the *client* is happy with the representation, an attorney appointed by a judge has an economic incentive to ensure that the *judge* is happy with the lawyer's representation of the client.[199] This is not to suggest that all (or even most) court-appointed lawyers are more concerned about judges than they are about their clients.[200] But the incentive structure creates more than a small risk that at least some court-appointed lawyers will find themselves with mixed loyalties.

This set of circumstances suggests that the modern prevalence of state-supplied lawyers cuts strongly against limiting the principle of criminal defendant autonomy. The rationale is straightforward: if the defendant is deemed to have waived his autonomy interest by accepting court-appointed representation, he has virtually no options when appointed a lawyer whose loyalty he mistrusts.[201] Take the following example. The defendant is charged

---

[196] *See* Hashimoto, *supra* note 12, at 470 ("In jurisdictions where appointment comes at the discretion of individual judges, attorneys serve at the pleasure of judges and understand that future appointments – and the potential fiscal health of their practice – may depend on a quick and easy resolution of the case.").

[197] There certainly are some jurisdictions where judges favor appointment of lawyers who provide the best possible representation of their clients. *See, e.g.*, *Quality Representation Is Goal of Defender Services Committee*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash. D.C.), July 2001, at 9-12. There also, however, are jurisdictions where judges want to move cases quickly and are resistant to trials. *See, e.g.*, Bob Sablatura, *Study Confirms Money Counts in County Courts; Those Using Appointed Lawyers Are Twice as Likely to Serve Time*, HOUS. CHRON., Oct. 17, 1999, at A1.

[198] *See, e.g.*, Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2480 (2004) ("Judges and clerks put pressure on defense counsel (especially public defenders) to be pliable in [plea] bargaining. Repeat defense counsel often must yield to this pressure in order to avoid judicial reprisals against clients and perhaps to continue to receive court appointments.").

[199] In jurisdictions that use flat-fee contracts to provide court-appointed counsel, *see* DEFRANCES, *supra* note 190, at 9-10, the incentive structure of the lawyer is doubly skewed against the client. Not only does the lawyer have an incentive to plead cases so that the judges are happy, but he also has a personal incentive to spend as little time on each case as possible.

[200] There are many wonderful public defenders and court-appointed attorneys who are committed and loyal to their clients' interests. Particularly in systems where those lawyers are appointed by judges, however, those lawyers are committed to their clients *in spite of* the incentives to curry favor with judges rather than because those incentives do not exist.

[201] *See, e.g.*, Hashimoto, *supra* note 12, at 464-65.

with one count of first-degree murder and wants to raise an alibi defense. The lawyer, in order to curry favor with the judge who has appointed her to the case,[202] tells the defendant that he has a weak case, that it is not worth going to trial, and that he should plead guilty to second-degree murder. Counsel clearly communicates to the defendant that she does not believe he has a particularly strong alibi defense and that if he does insist upon going to trial, she is inclined to concede second-degree murder to the jury.[203] If the defendant does not want to plead guilty (and indeed even if he is not guilty), he has very few options. He can seek to have the judge appoint new counsel, but he has no constitutional right to be appointed different counsel, and the judge generally has discretion to deny such requests.[204]

At that point, in the absence of a constitutionally recognized autonomy interest, the defendant has three options: (1) to plead guilty against his will; (2) to continue to trial with counsel, where he will have to sit powerless while his lawyer fails to call his alibi witnesses and then tells the jury that, although he did not have the requisite intent for first-degree murder, he did kill the victim and the government has proven second-degree murder;[205] or (3) to represent himself and raise his alibi defense. The first two options guarantee conviction on the second-degree murder charge. Thus, a defendant who is innocent or does not want to concede his guilt may have no other choice than to self-represent at trial. But the self-representation option also may not be particularly attractive or prudent to the defendant. While there is no data establishing that self-representing felony defendants perform worse at trial than represented defendants,[206] the explanation for that may be that so few felony defendants – between 0.3% and 0.5% – actually choose to self-represent, and those who choose to do so may be more able to represent themselves than the

---

[202] The analysis set forth below would also apply to a defendant represented by an overworked attorney who was interested in having the defendant plead guilty in order to reduce her caseload. The loyalty issues, however, raise the point more forcefully.

[203] As discussed *supra* Part I.B.2, a number of courts have held that the decision to concede guilt to a lesser-included offense at trial is a strategic decision that counsel may make, even over the defendant's objection. *See, e.g.*, Haynes v. Cain, 298 F.3d 375, 383 (5th Cir. 2002) (en banc); Lingar v. Bowersox, 176 F.3d 453, 458 (8th Cir. 1999).

[204] *See, e.g.*, United States v. Iles, 906 F.2d 1122, 1130 (6th Cir. 1990).

[205] The defendant has the right to testify, and therefore could testify that he was elsewhere when the murder took place. That testimony, however, will be significantly undercut by his own counsel's assertion that he was on the scene and killed the victim. The defendant also could argue on appeal that his alibi defense was sufficiently strong that counsel's failure to raise it at trial constituted ineffective assistance of counsel. The difficulty, however, is that "[t]he Court has set the constitutional standard for effective assistance of counsel very low, or, to state it more accurately, it has set the standard for proving *in*effective assistance of counsel very high," Hashimoto, *supra* note 12, at 467, and the defendant therefore is very unlikely to prevail on this claim.

[206] *See id.* at 446-47.

average defendant.[207] For the average defendant, then, self-representation may not be a great option.

If, however, the represented defendant retains a robust autonomy interest, the decisions regarding what defense to assert at trial and whether to concede guilt[208] may well belong to the defendant rather than to counsel. In that event, the defendant could go to trial represented by counsel and contest his guilt (or require the government to prove it beyond a reasonable doubt).

Even in cases where counsel is not disloyal, the failure to recognize an autonomy interest and the concentration of power in the hands of the lawyer at the defendant's expense leads to a loss of legitimacy in the system. Clients with court-appointed counsel often perceive the perversity of the incentive structure and doubt the loyalty of the attorney.[209] Under those circumstances, telling a defendant that he is required to be represented by a lawyer, that his lawyer has the power to decide the theory of the defense, and that his lawyer has the power to concede his guilt to lesser-included offenses "can only lead [the defendant] to believe that the law contrives against him."[210]

C. *Abuse of the Autonomy Interest by the Mentally Ill*

The final argument against recognizing an autonomy interest arises from a concern that mentally ill defendants will use the autonomy interest to hurt their own interests.[211] Both in decisions of the Court and in academia, the autonomy interest of criminal defendants has become indistinguishable from self-representation. And because some of the most notorious pro se defendants

---

[207] *See id.* at 447.

[208] Although *Florida v. Nixon*, 543 U.S. 175, 187 (2004), held that counsel has the authority to concede guilt absent any contrary instruction from the client, the question whether counsel can concede guilt over the defendant's objection still is open.

[209] Although the quality of court-appointed representation was very high in the jurisdiction where I practiced as an assistant federal public defender, this perception nonetheless was quite prevalent. As an example, one of my clients once asked the judge for a continuance so that he could get money together to try to retain counsel. When the judge asked my client whether he had a particular attorney in mind whom he wanted to retain, my client responded that he wanted to retain me. He explained that he thought I was a perfectly good attorney, but he wanted me to be working for him, rather than the government. *But cf.* Martinez v. Court of Appeal of Cal., 528 U.S. 152, 161 (2000) (stating that it was "entirely unpersuaded that the risk of either disloyalty or suspicion of disloyalty [of court-appointed counsel] is a sufficient concern to conclude that a constitutional right of self-representation is a necessary component of a fair appellate proceeding").

[210] Faretta v. California, 422 U.S. 806, 834 (1975).

[211] *See, e.g.*, Indiana v. Edwards, 128 S. Ct. 2379, 2387-88 (2008). This argument overlaps with the paternalistic concerns articulated *supra* Part III.A. Because mentally ill defendants present issues distinct from those raised by defendants generally, however, I think it helpful to address those issues separately.

have been mentally ill,[212] the autonomy interest has become intertwined with issues related to mentally ill defendants.

There are several responses to this critique. First, although some of the most high-profile self-representation cases have involved mentally ill defendants, there is no evidence that most defendants who opt to self-represent are mentally ill. To the contrary, the evidence indicates that the vast majority of pro se felony defendants have not exhibited signs of mental illness.[213]

Second, even if pro se defendants do exhibit higher rates of mental illness, it is important to note that the autonomy interest of criminal defendants implicates much more than just the defendant's right of self-representation.[214] In particular, the autonomy interest plays a vital role in ensuring that defendants retain some control over decisions such as what defense to assert at trial. Of course, just as some are concerned that mentally ill defendants abuse the right of self-representation, others may worry that if given the power to assert control over their defense, mentally ill defendants will hurt their own interests.[215]

This raises a final point. To the extent that people are concerned that mentally ill defendants will misuse control over their cases to their own self-detriment, the solution is not to deny the autonomy interest of all criminal defendants. Instead, the special needs of mentally ill defendants need to be addressed narrowly. For instance, the standard for competence to stand trial may need to be higher. Currently, many mentally ill defendants are deemed competent to stand trial. Indeed, although it is estimated that roughly 4% to 5% of felony defendants receive competency evaluations per year, only about 10% to 30% of defendants referred for such evaluations are found to be incompetent.[216] Using those figures, at most only 1.5% of felony defendants are found to be incompetent to stand trial. By contrast, 56% of state prison inmates reported either a recent history or symptoms of mental illness.[217] Perhaps more disturbingly, approximately 15% of state prison inmates reported

---

[212] *See, e.g.*, BRUCE A. ARRIGO & MARK C. BARDWELL, CRIMINAL COMPETENCY ON TRIAL: THE CASE OF COLIN FERGUSON 150-59 (2002) (detailing the signs of mental illness of Colin Ferguson who was charged with killing people on the Long Island Railway and represented himself at trial).

[213] *See* Hashimoto, *supra* note 12, at 456-59 (finding that only twenty-two percent of defendants in a database tracking self-representing federal felony defendants exhibited sufficient signs of mental illness to have a court-ordered competency evaluation).

[214] *See supra* Part I.B.

[215] *See* Ross, *supra* note 8, at 1343 (arguing that defense lawyers should be able to engage in "surrogate decisionmaking" for mentally ill clients).

[216] *See* NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 50 (2002).

[217] *See* DORIS J. JAMES & LAUREN E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES, at 1 (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf. These figures exclude defendants who have been found to be incompetent to stand trial. *See id.* at 3 n.1.

experiencing symptoms within the preceding twelve months that met the criteria for a psychotic disorder, including hallucinations or delusions.[218] While it is difficult to accurately assess the occurrence of mental illness – and psychotic disorders in particular – among all criminal defendants (as opposed to prison or jail inmates),[219] these figures make clear that large numbers of felony defendants who have experienced at least one symptom of a psychotic disorder are proceeding to trial or a plea after being found competent to stand trial.

This fact results from the exceedingly high standard for establishing incompetence to stand trial. Although defendants have a constitutional right not to be tried unless they are competent,[220] the constitutional standard for competence requires only that the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and has] a rational as well as factual understanding of the proceedings against him."[221] An unmedicated schizophrenic defendant, for instance, may have a sufficiently rational and factual understanding of the criminal proceedings being brought against him and a sufficient ability to rationally consult with his lawyer such that he will be found competent to stand trial.[222]

In short, there may be legitimate reason for concern regarding the way in which seriously mentally ill defendants are processed through the criminal justice system. The solution, however, cannot be to curtail the rights of all defendants in order to protect mentally ill defendants. Instead, the Court needs to address concerns about mentally ill defendants head-on. The Court recently recognized that fact, declining to overrule the right of self-representation, but concluding that states may constitutionally deny that right to defendants who, although competent to stand trial, "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."[223] Of course, there is a palpable unfairness in telling a defendant that he is competent to stand trial but not sufficiently competent to exercise

---

[218] *See id.* at 1-2. This figure is quintuple the incidence of symptoms of a psychotic disorder in the general population, which is 3.1%. *See id.* at 3.

[219] The prevalence of a symptom of a psychotic disorder among jail inmates is even higher than that of state prison inmates. *See id.* at 1 ("An estimated 15% of State prisoners and 24% of jail inmates reported symptoms that met the criteria for a psychotic disorder."). Because these numbers measure only prison and jail inmates, however, they do not include the incidence of mental illness among those defendants who either are not convicted or are convicted but not sentenced to imprisonment.

[220] *See* Drope v. Missouri, 420 U.S. 162, 172 (1975).

[221] Dusky v. Unites States, 362 U.S. 402, 402 (1960) (per curiam) (internal quotation marks omitted) (quoting Solicitor General J. Lee Rankin).

[222] *See, e.g.*, ARRIGO & BARDWELL, *supra* note 212, at 302 (detailing the delusional ramblings of Colin Ferguson, including the following assertion made during his opening statement: "There are 93 counts in the indictment only because it matches the year 1993. Had it been 1925 it would have been 25 counts").

[223] *See* Indiana v. Edwards, 128 S. Ct. 2379, 2388 (2008).

constitutionally protected rights such as the right of self-representation, and the Court at some point may need to address this tension by revisiting the standard for competence to stand trial.[224] For now, though, even if it feels somewhat unfair to deny mentally ill defendants the rights of self-representation and to control their cases, denying those rights to mentally ill defendants is preferable to eliminating those rights for all defendants in order to protect those few defendants who are mentally ill.

CONCLUSION

In light of the strong textual, historical, and jurisprudential arguments in favor of the criminal defendant's autonomy interest, the Supreme Court should endorse and broadly apply this interest to protect the defendant's right to control the presentation of his defense. The critiques of the autonomy interest that have led courts to narrow its reach are not completely without merit. But the legitimate concerns can, and should, be addressed in ways that still respect defendants' fundamental interest in controlling their defense.

[224] In other words, if a defendant is not competent to represent himself at trial, arguably he should not be found competent to stand trial.