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ADVISING THE *PRO SE* DEFENDANT: THE TRIAL COURT'S DUTIES UNDER *FARETTA*

Myron Moskowitz*

In *Faretta v. California*,¹ the United States Supreme Court held that a defendant in a criminal trial has a constitutional right to represent himself—to act “*pro se*.” “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.”²

If a defendant chooses to represent himself, what, if anything, must the trial court do to assist him? Must the trial court advise him of his right to exercise peremptory challenges? To make evidentiary objections? To cross-examine prosecution witnesses? To subpoena his own witnesses? To testify? To *refuse* to testify?

On the one hand, the judge would not advise a lawyer of these rights, because a lawyer is expected to know them. If defendant chooses to act as his own lawyer, perhaps he should be held to the same standard of prior knowledge. But on the other hand, in the real world most *pro se* defendants know little or nothing of these rights, and a failure to inform them could reduce the trial to a farce.³

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¹ 422 U.S. 806 (1975).

² *Id.* at 819.

³ *Id.* at 833 n.43. As stated by Justice Sutherland in *Powell v. Alabama*, 287 U.S. 45, 53 (1932):

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish

This article will explore these difficult questions. As Mr. Justice Blackmun put it in his *Faretta* dissent: "Must the trial court treat the *pro se* defendant differently than it would professional counsel?"⁴

The question is important. *Faretta* has been heavily criticized as inconsistent with the constitutional right to a fair trial.⁵ The defendant who exercises his *Faretta* right to proceed to trial unassisted often finds himself overwhelmed by unfamiliar legal procedures and devoured by aggressive, knowledgeable prosecutors. If there is a way to partially alleviate this problem by advising the defendant of certain basic trial rights, this small step might help to reconcile *Faretta* with the right to a fair trial.

I. THE USUAL PRO SE DEFENDANT

First, we should consider who we are dealing with. How capable is the "competent" *pro se* criminal defendant?

In *Godinez v. Moran*, the Supreme Court considered the question of whether a defendant is competent to waive counsel.⁶ The Court held that the competency standard for waiving the right to counsel at trial is no higher than the general competency standard for standing trial, because "there is no reason to believe that the decision to waive counsel requires an appreciably higher level of mental functioning than the decision to waive other constitutional rights."⁷ That general competency standard, according to *Dusky v. United States*,⁸ is whether the defendant has "sufficient present ability to consult with

his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. at 69.

⁴ *Faretta*, 422 U.S. at 852.

⁵ See, e.g., *United States v. Farhad*, 190 F.3d 1097, 1102 (9th Cir. 1999) (Reinhardt, J. concurring); 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 (1996). The Supreme Court has acknowledged these concerns. See *Martinez v. Court of Appeal of Cal.*, 528 U.S. 152, 161 n.9, 10 (2000).

⁶ 509 U.S. 389 (1993).

⁷ *Id.* at 399.

⁸ 362 U.S. 402 (1960).

his lawyer with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of the proceedings against him."⁹

One might question whether a defendant who has no more than the limited competency described by *Dusky* is able to represent himself competently, but the *Godinez* court did not see that as the relevant issue: "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to *waive the right*, not the competence to represent himself."¹⁰ The Court also noted that in *Faretta* "we made it clear that the defendant's 'technical legal knowledge' is 'not relevant' to the determination whether he is competent to waive his right to counsel."¹¹

In his dissent, Justice Blackmun summarized the rather dismal mental condition of Moran, the defendant in the case at bench:

Just a few months after he attempted to commit suicide, Moran essentially volunteered himself for execution: He sought to waive the right to counsel, to plead guilty to capital murder, and to prevent the presentation of any mitigating evidence on his behalf. The psychiatrists' reports supplied one explanation for Moran's self-destructive behavior: his deep depression. And Moran's own testimony suggested another: the fact that he was being administered simultaneously four different prescription medications.¹²

Justice Blackmun then opined:

To try, convict, and punish one so helpless to defend himself contravenes fundamental principles of fairness and impugns the integrity of our criminal justice system. I cannot condone the decision to accept, without further

⁹ *Id.* at 402.

¹⁰ 509 U.S. at 399 (emphasis added).

¹¹ *Id.* at 400; *see also* *United States v. Arlt*, 41 F.3d 516, 518 (9th Cir. 1994) ("[T]he Supreme Court's decision in *Godinez* explicitly forbids any attempt to measure a defendant's competency to waive the right to counsel by evaluating his ability to represent himself.") In *Godinez*, Justice Blackmun dissented, contending that it takes a greater degree of "competence" to try one's own case than to assist one's counsel:

[T]he majority cannot isolate the term "competent" and apply it in a vacuum, divorced from its specific context. A person who is "competent" to play basketball is not thereby "competent" to play the violin. . . . The majority's attempt to extricate the competence to waive the right to counsel from the competence to represent oneself is unavailing, because the former decision necessarily entails the latter. It is obvious that a defendant who waives counsel must represent himself.

509 U.S. at 413, 416 (Blackmun, J. dissenting).

¹² *Id.* at 416-417 (Blackmun, J. dissenting).

inquiry, the self-destructive "choice" of a person who was so deeply medicated and who might well have been severely mentally ill.¹³

But the majority disagreed: Moran was competent to represent himself.¹⁴

Thus, we may treat Moran's rather dismal mental condition as a sort of "base-line" — he barely qualifies as competent to represent himself, but he does qualify. While some *pro se* defendants might be more stable, more educated, and more intelligent than Moran, many will be on Moran's unfortunate level.

Therefore, the issue I will address is whether the judicial system should be required to give some minimal assistance during trial to someone like Moran.

II. THE EASIER ISSUES

There are a few issues that would seem to be easily resolved. The trial court must, of course, advise the defendant personally of his right to counsel. Indeed, the defendant cannot proceed *pro se* unless the judge first obtains a "voluntary and intelligent waiver" of his right to counsel, and no such waiver could be obtained from a defendant who does not know of this right. In *Faretta*, the Court stated:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.¹⁵

Even a competent defendant (under the *Godinez/Dusky* standard of "competence") might be unable to furnish such a waiver. The Court in *Godinez* held that the question of competence is not quite the same as the question of whether the waiver is "intelligent and voluntary:"

¹³ *Id.* at 417 (Blackmun, J. dissenting).

¹⁴ *Id.* at 402.

¹⁵ *Faretta v. California*, 422 U.S. 806, 835 (1975) (emphasis added, internal citations omitted).

The focus of a competency inquiry is the defendant's mental capacity; the question is whether he has the *ability* to understand the proceedings. The purpose of the “knowing and voluntary” inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced.¹⁶

In addition to the right to counsel, there are other rights that may be waived only by the defendant himself, and not by his lawyer, even when the defendant is represented by counsel. If the *pro se* defendant wears two hats — a lawyer hat and a client hat — then the judge’s duty to advise the client of these rights still remains. These would include the right to trial (i.e., the right to plead not guilty)¹⁷ and the right to a jury trial.¹⁸ In my reading of *existing* law, the judge *must* give these advisements directly to the *represented* defendant — and therefore he must also give them to the *pro se* defendant.

There are also some advisements that the judge should *not* give the *pro se* defendant. Chief among these would be strategic advice. For example, while the judge must advise the defendant of his right to trial by jury, he need not advise him of the various pros and cons regarding whether a jury trial or bench trial is most likely to lead to an acquittal. Indeed, he probably should not give such advice, as this would seem to compromise the judge’s neutral, judicial role.¹⁹

III. THE HARDER ISSUES

A. *The Cases*

There seem to be only a handful of cases that have addressed the question of which advisements (if any) a judge must give to *pro se* defendants.

¹⁶ *Godinez*, 509 U.S. at 401, n.12 (internal citations omitted).

¹⁷ *See, e.g.*, FED. R. CRIM. P. 11(c).

¹⁸ *See, e.g.*, *People v. Holmes*, 353 P.2d 583 (1960); *cf. Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (guilty plea includes waiver of right to trial by jury).

¹⁹ But it has happened. *See United States ex rel. Smith v. Pavich*, 568 F.2d 33, 40 (7th Cir. 1978):

[T]he trial judge assisted the defendant in the proper technique to lay a foundation for a prior statement; to impeach a prior statement; and to introduce a document into evidence. The trial court also attempted to advise the defendant outside the hearing of the jury to avoid eliciting damaging evidence.

1. *Advice of the Right to Refuse to Testify*

Most of these cases involve the privilege against self-incrimination, i.e., the right of the defendant not to take the witness stand.

In *People v. Barnum*,²⁰ the court considered two prior California cases, *Killpatrick v. Superior Court*²¹ and *People v. Kramer*,²² that had held that the trial court must advise a *pro se* defendant of his right not to testify:

The *Killpatrick-Kramer* rule thus finds its rationale in protection, based on a recognition that a self-represented defendant, unlike a defendant represented by counsel, does not have counsel available to protect his or her privilege against compelled self-incrimination. The *Killpatrick-Kramer* rule places the responsibility upon the trial court to provide such protection by requiring the court to give an advisement of the privilege. In this regard, the court in *Killpatrick* reasoned: "The privilege cannot be made truly effective unless the defendant in a criminal case who is not represented by counsel is advised by the court of the existence of the privilege whenever such advice appears to be necessary."²³

While these decisions preceded *Faretta*, the court in *Barnum* held that "Although *Faretta* does not require a trial court to advise a self-represented defendant of the privilege against compelled self-incrimination, neither does it prohibit such an advisement."²⁴ Nevertheless, the court noted that "the *Killpatrick-Kramer* rule . . . does not have any counterpart in the federal courts or in the courts of the vast majority of our sister states."²⁵ The court then overruled *Killpatrick* and *Kramer*:

[W]e conclude that the *Killpatrick-Kramer* rule is unsound. That rule does not have any counterpart in the federal courts or in the courts of the vast majority of our sister states. The general rule is that a trial court ordinarily is not required to give any advisement to a self-represented defendant who chooses to represent himself or herself after knowingly, intelligently, and voluntarily forgoing the assistance of counsel. The *Killpatrick-Kramer* rule has existed for many years as a lone exception to this general rule of no mandatory advisement, requiring a trial court to advise such a defendant of

²⁰ 64 P.3d 788 (Cal. 2003).

²¹ 314 P.2d 164 (Cal. Dist. Ct. App. 1957).

²² 227 Cal. App. 2d 199 (Cal. Ct. App. 1964).

²³ *Barnum*, 64 P.3d at 794.

²⁴ *Id.* at 790-91.

²⁵ *Id.*

the privilege against compelled self-incrimination, but of no other right, no matter how important. Justification for singling out this privilege alone for such differential treatment never has been clear, and, upon full consideration, simply cannot be discerned. Indeed, since *Faretta*, the trial court has been required to make a defendant seeking to represent himself or herself aware of the dangers and disadvantages of self-representation, which include the defendant's inability to rely upon the trial court to give personal instruction on courtroom procedure or to provide the assistance that otherwise would have been rendered by counsel. Thus, a defendant who chooses to represent himself or herself after knowingly, intelligently, and voluntarily forgoing the assistance of counsel assumes the risk of his or her own ignorance, and cannot compel the trial court to make up for counsel's absence.²⁶

The court gave only the following policy reason for its holding:

We recognize that the privilege against compelled self-incrimination has been viewed as "fundamental." But other rights have been so ranked as well. The right to compulsory process is a "fundamental" right. Another "fundamental" right is the right of confrontation. Yet another "fundamental" right -- and perhaps the most significant one for present purposes -- is the right to testify.²⁷

The court failed to give any reason, however, why the trial judge should not be required to advise the *pro se* defendant of all four of these fundamental rights.

Despite its holding, the court said:

In any given case, the court remains free to provide such an advisement, so long as its words do not stray from neutrality toward favoring any one option over another. A trial court of course must proceed carefully in providing an advisement, but it may provide one if it deems it appropriate.²⁸

2. *Advice of the Right to Testify*

Even under the *Killpatrick-Kramer* regime, one California Court of Appeals case had held that even if the trial judge must advise the *pro se*

²⁶ *Id.* at 791. *But see* State v. Dwyer, 552 A.2d 200, 204 (N.J. Super. Ct. App. Div. 1989) (collecting cases requiring advice of right not to testify).

²⁷ *Barnum*, 64 P.3d at 796 (internal citations omitted).

²⁸ *Id.* at 799.

defendant of his right *not* to testify, the judge need not advise him of his right *to* testify:

The duty to give advice about the privilege against self-incrimination to a self-represented defendant who proposes to testify is a very limited exception to a general rule. The general rule is that a self-represented defendant is not entitled to any assistance or advice from the trial judge on matters of law, evidence or trial practice. There is a clear distinction between giving a warning to a self-represented defendant who is about to take the stand and possibly incriminate himself, and giving general advice or suggestions to a self-represented defendant as to presentation of a defense.²⁹

This ruling is difficult to square with some federal cases holding that a *represented* defendant's right to testify is "personal to the defendant and cannot be waived either by the trial court or by defense counsel."³⁰ If a *pro se* defendant wears a lawyer's hat and a defendant's hat, it would seem that the defendant must be advised of the right to testify, so the waiver can be obtained from the defendant personally.

In *Martin v. State*, the court held that "before permitting an unrepresented defendant to testify, the court must inform the defendant of his correlative Constitutional rights to testify or avoid the prospect of compelled self-incrimination by declining to testify."³¹ The court then addressed the trickier question of how much the judge should say:

Appellant argues that he was entitled to know that, if he testified, he "could be impeached," but what would that tell him? Counsel, of course, would presumably know of any prior inconsistent statements given by the defendant and of any criminal convictions that might be used for impeachment purposes. He would consider what the defendant would say if he testified, how he might hold up under cross-examination by the prosecutor, and the nature and extent of any inconsistency between the expected testimony of the defendant and other evidence in the case, and develop some approximation of

²⁹ *People v. Jones*, 3 Cal. Rptr. 2d 602, 606 (Cal. Ct. App. 1992) (internal citations omitted).

³⁰ *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.1992); *see also Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir. 1992). *But see United States v. Pennycooke*, 65 F.3d 9 (3d Cir. 1995); *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989) (vacated on other grounds at 928 F.2d 1470 (9th Cir. 1991)), (holding that a represented defendant need not be personally advised of his right to testify.)

³¹ 535 A.2d 951, 954 (Md. Ct. Spec. App. 1988); *see also Morales v. State*, 600 A.2d 851, 853-54 (Md. 1992).

his overall credibility. From all of this, counsel could gauge the prospect of impeachment in a meaningful way, weigh it against the effect of leaving the State's evidence unrebutted by the defendant's testimony, and advise the defendant accordingly. The trial judge obviously cannot be expected to do all that. Absent that kind of analysis, however, a simple warning of "impeachment" will, at best, be meaningless and might well prove to be misleading or threatening. Laying out in any significant detail the range of hazards faced by a defendant who subjects himself to cross-examination by a skillful prosecutor can very easily chill a defendant's desire to tell his side of the story; too brief a summary, conversely, can lure a defendant into dreadful self-incrimination.³²

3. Other Advisements

Other advisement issues have arisen less frequently.

In *People v. Partee*,³³ the court held that the trial judge need not advise the *pro se* defendant of his right to exercise peremptory challenges:

A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course. Thus, it is clear that a court need not inform a *pro se* defendant of the number of challenges to which he is entitled. In short, the court owed no duty to inform defendant of the number of challenges he had.³⁴

In *United States v. Pinkey*,³⁵ the court held that the trial judge has no obligation to advise a *pro se* defendant regarding the rules of evidence.

The hazards which beset a layman when he seeks to represent himself are obvious. He who proceeds *pro se* with full knowledge and understanding of the risks does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an "advocate" for or to assist and guide the *pro se* layman through the trial thicket.³⁶

³² *Id.*

³³ 511 N.E.2d 1165 (Ill. App. Ct. 1987).

³⁴ *Id.* at 1184 (internal citations omitted).

³⁵ 548 F.2d 305 (10th Cir. 1977).

³⁶ *Id.* at 311 (internal citations omitted).

B. *The Relevant Interests*

On the whole, the analyses presented by the above cases tend to be conclusory, and they do not do a good job of identifying and balancing the various interests that bear on the question of whether and which advisements the trial judge should give the *pro se* defendant. Here are the interests I've identified (in no particular order).

First, efficiency. The time taken by such advisements should be minimal, the number of trial interruptions needed to give such advisements should be minimized, and the likelihood of erroneous advisements (which could lead to mistrials, reversals, and retrials) should be limited.

Second, judicial impartiality. The judge should not be required to give the defendant any advisements that are (or appear to be) strategic in nature, because this would tend to compromise the judge's duty to sit impartially.³⁷ In addition, giving such advice would be time-consuming.

Third, a fair trial. "The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause."³⁸ If this is the underlying purpose of the Counsel Clause,³⁹ then a

³⁷ See, e.g., *United States ex rel. Smith v. Pavich*, 568 F.2d 33, 40 (7th Cir. 1978) ("While the trial judge has a broad discretion with respect to his interrogation of witnesses, he must always be sensitive to his role as judge and the fact that in the eyes of the jury he 'occupies a position of preeminence and special persuasiveness' and accordingly 'be assiduous in performing his function as governor of the trial dispassionately, fairly and impartially.'") In *Pavich*, the trial judge did in fact try to help the defendant by giving him strategic advice: "[T]he trial judge assisted the defendant in the proper technique to lay a foundation for a prior statement; to impeach a prior statement; and to introduce a document into evidence. The trial court also attempted to advise the defendant outside the hearing of the jury to avoid eliciting damaging evidence." *Id.* at 40 (internal citations omitted).

³⁸ *Strickland v. Washington*, 466 U.S. 668, 684-685 (1984); see also *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) ("Whether the trial be federal or state, the concern of due process is with the fair administration of justice"); *Estes v. Texas*, 381 U.S. 532, 540 (1965) (the right to a fair trial is "the most fundamental of all freedoms").

Implementing this right may impose certain affirmative obligations on the trial judge. In *United States v. Pinkey*, 548 F.2d 305 (10th Cir. 1977), the court stated:

In the administration of the criminal justice system, the trial judge has the obligation of safeguarding the rights of the accused while at the same time protecting the interests of society. The adversary nature of criminal proceedings does not prohibit the trial judge from taking proper steps to aid and assist the jury in the truth finding quest leading to the proper determination of guilt or innocence. In the promotion of this goal, the trial judge has an obligation, on his own initiative, at

defendant who waives counsel should be given some minimal advice regarding the particular rights that counsel might have asserted on his behalf, so he might exercise these rights and obtain a fair trial. Trial of a *pro se* defendant is especially susceptible to unfairness, because (under *Godinez*) the *pro se* defendant might have only the minimal mental ability of one who meets the rather low *Dusky* test for competence to stand trial.

Also, this interest in a fair trial might impose a special obligation on the trial court to protect a *pro se* defendant from an overreaching prosecutor who tries to take advantage of defendant's lack of legal knowledge, particularly the rules of evidence.⁴⁰

Implicit in the right to a fair trial is the main purpose of any trial: to determine historical facts accurately. As the Supreme Court has stated, "In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."⁴¹ If the *pro se* defendant fails through ignorance to

proper times and in a dignified, and impartial manner, to inject certain matters into the trial which he deems important in the search for truth.

Id. at 308.

Defendant, of course, has an interest in a fair trial — but so does society and the court itself. "Federal courts have an independent interest in ensuring that ... legal proceedings appear fair to all who observe them." *Wheat v. United States*, 486 U.S. 153, 160 (1988).

³⁹ In defining the purpose of the Counsel Clause the Supreme Court has commented, "In giving meaning to the requirement [effective assistance of counsel], however, we must take its purpose--to ensure a fair trial--as the guide." *Strickland*, 466 U.S. at 686.

⁴⁰ *See, e.g., Commonwealth v. Sapoznik*, 549 N.E.2d 116, 120 n.4 (Mass. App. Ct. 1990):

We are not ruling that a judge must become a lawyer for an unrepresented defendant. In this case, however, the judge should have recognized very early in the trial that the prosecutor was engaging in improper tactics and taking advantage of the defendant's unrepresented status. The judge should have promptly intervened, not to be of assistance to the defendant, but to assert a judge's traditional role of making sure that all the parties receive a fair trial.

See also People v. Barnum, 64 P.3d 788, 799 n.4 (Cal. 2003):

The issues on which we granted review in this case do not include the question whether a prosecutor would commit misconduct in violation of a defendant's privilege against compelled self-incrimination under the Fifth Amendment by calling the defendant as a witness in the People's *case-in-chief*. In the present case, the prosecutor did not call defendant as a witness in the People's *case-in-chief*, but only in their rebuttal, and then only for what in effect was reopened cross-examination or recross-examination. We therefore leave this question of potential prosecutorial misconduct to a case in which it is presented.

⁴¹ *Strickland*, 466 U.S. at 696; *see also id.* at 685: "[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined

exercise the right to cross-examine accusers, the right to subpoena defense witnesses, and the right of the defendant himself to tell the fact-finder his version of what happened, he might fail to present evidence showing that he is in fact innocent. This is the worst result possible. Convicting an innocent man is a failure of our system at its most basic level. It might happen only rarely, but we should take at least minimal steps to prevent it. I find it interesting that the most famous involuntary *pro se* defendant in American law — Clarence Earl Gideon — was ultimately acquitted.⁴²

Finally, the need to protect and support a constitutional right: the right of self-representation established by *Faretta*. People opposed to *Faretta* might find this interest hard to swallow. Why support a bad rule? Why encourage a defendant to exercise a right that can only hurt him, make the trial judge's job more difficult, and, perhaps, make the judicial system look unseemly? The answer, I suppose, is that the Supreme Court (in its infinite wisdom) has interpreted the Sixth Amendment to include a right of self-representation, and as so interpreted, we should support the Sixth Amendment just as we support other provisions that often lead to unpleasant results. Supporting the First Amendment leads to Nazi parades and flag-burning, supporting the Fourth Amendment leads to the release of criminals, and supporting the Fifth Amendment allows criminals to refuse to provide useful information. If we accept the rule of law, the supremacy of the Constitution, and the Supreme Court's role as the final arbiter of the meaning of the Constitution, we must support — not undermine — all its provisions, even those that make us squirm. *Faretta* might be overruled some day, but until it is, we should try in good faith to implement it. And we should not take our displeasure out on the poor wretch who unwisely chooses to exercise a right bestowed on him by a Court we disagree with.

in advance of the proceeding.”

⁴² Gideon represented himself at his first trial, and was convicted of burglary. The Supreme Court reversed, holding that a state must provide counsel at trial of all indigent felony defendants. *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963). On retrial, Gideon's lawyer effectively cross-examined two key prosecution witnesses. The jury acquitted Gideon. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 249 (Vintage Books 1964); Anthony Lewis, *The Silencing of Gideon's Trumpet*, *NEW YORK TIMES MAGAZINE*, Apr. 20, 2003, at 50-51. I don't mean to suggest that if Gideon had been advised at his first trial of his right to cross-examine he would have done as good a job as his lawyer in the second trial did. But who knows? He might have done a bit of research or inquiry about cross-examination before trial began and raised enough questions to obtain at least a hung jury, if not an acquittal.

IV. A PROPOSAL

I propose that these interests can best be balanced by interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments to require trial judges to read to *pro se* defendants a List of Trial Rights. The list might include the following:

1. The right to appear at trial in civilian clothing;⁴³
2. The right of access to legal materials (to the extent allowed by the jurisdiction);⁴⁴
3. The right to pretrial discovery (if allowed by the jurisdiction),⁴⁵

⁴³ *Cf.* *United States v. Pina*, 844 F.2d 1, 7-8 (1st Cir. 1988) (“Neither was a mistrial required due to the defendant’s attire at trial, which consisted of “prison regulation” shirt, jeans, and sneakers. A defendant has a constitutional right not to be *compelled* to appear in court in identifiable prison garb. There is no claim that appellant was required to wear the prison clothing or that he ever requested alternative attire.”) (quoting *Estelle v. Williams*, 425 U.S. 501, 503-06 (1976)).

⁴⁴ In *People v. Carter*, 66 Cal. 2d 666 (Cal. 1967), the court held that:

[A] prisoner awaiting trial who wishes to represent himself should likewise, at a minimum, be allowed reasonable access to such legal materials as are available at the facility in which he is confined. Having thus stated the minimum requirements, we leave to the sound discretion of the trial judge the implementation of the rule, noting only that in many felony cases the minimum may not be sufficient. (citing *In Re Allison*, 425 P.2d 193 (Cal. 1967).

Id. at 671-72. But in *United States v. Robinson*, 913 F.2d 712 (9th Cir. 1990), the court held that:

[T]here is nothing constitutionally offensive about requiring a defendant to choose between appointed counsel and access to legal materials; the sixth amendment is satisfied by the offer of professional representation alone. Somewhat more generous than other courts which have addressed this issue, this court has declared that “the rights to notice, confrontation, and compulsory process recognized in *Faretta* mean, at a minimum, that time to prepare and *some access* to materials and witnesses are fundamental to a meaningful right of self representation.” (emphasis added). A *pro se* defendant’s right of “some access” to resources to aid the preparation of his defense must, however, be balanced against security considerations and the limitations of the penal system.

Id. at 717; see also *United States v. Pina*, 844 F.2d 1, 5 n.1 (1st Cir. 1988) (“When a defendant refuses assistance of appointed counsel, he has no right to unqualified access to a law library or the materials therein.”). Other authorities on this issue are collected at Darrin Hurwitz & Sarah K. Eddy, *Right to Counsel*, 90 GEO. L.J. 1579 (2002).

⁴⁵ I am not inclined to require the judge to state which discovery devices are available, as this would take time and border on strategic advice. But I have no strong objection to the inclusion of such detail.

4. The right to jury trial;
5. The right to ask questions to prospective jurors (to the extent voir dire by parties is allowed by the jurisdiction);
6. The right to exercise challenges for cause and a specified number of peremptory challenges;
7. The right to present an opening statement;
8. The right to object to prosecution evidence, based on rules of evidence;
9. The right to cross-examine prosecution witnesses, in compliance with the rules of evidence;⁴⁶
10. The right to subpoena witnesses for the defense;
11. The right not to testify;
12. The right to testify, with a warning that the prosecutor will have the right to cross-examine⁴⁷;
13. The right to present a closing argument; and
14. The right to appeal.⁴⁸

⁴⁶ Cf. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (holding that a guilty plea includes a waiver of “the right to confront one’s accusers.”)

⁴⁷ While *Martin v. State*, 535 A.2d 951 (Md. Ct. Spec. App. 1988) suggested that giving this warning in the middle of trial might tend to mislead a defendant, reading the warning at the outset of trial might alert the defendant to the need to learn more of its legal and tactical significance, before he must make the decision re whether to testify. I do not intend to include a warning that defendant might be impeached by evidence of prior convictions. See *Morales v. State*, 600 A.2d 851 (Md. 1992), where the court held that even though the judge is required to advise the defendant of his right to testify, he need not advise the defendant of the possibility of impeachment with prior convictions. The *Morales* court commented:

It would be extremely difficult for the judge to give an unrepresented defendant a meaningful summary of the general law of impeachment by prior convictions and the trial judge should not be in a position of having to inquire about the defendant’s prior convictions in order to give advice about potential impeachment. If the trial judge assumes the responsibility of giving such advice, the judge in effect becomes the defendant’s lawyer. A defendant is not entitled to have the trial judge act as his or her attorney.

Id. at 854.

⁴⁸ Even where the defendant is represented by counsel, it is important for the court to advise him directly of the right to appeal. As the Supreme Court explained in *Peguero v. United States*, 526 U.S. 23 (1999):

The requirement of Federal Rule of Criminal Procedure 32(c) that the district

The list⁴⁹ should conclude with a statement that it is not exclusive — the jurisdiction might provide additional rights not specifically mentioned — and the judge will not assist the defendant with additional information about these rights or advice about how to exercise them. The judge should state the list to the defendant orally, on the record, at the outset of trial, and should also give the defendant a written statement of these rights; to help him remember them. Such a requirement would not conflict with the interest in efficiency. Reading the list should not take more than a few minutes — not as long as takes the judge to engage in a plea colloquy⁵⁰ or the colloquy needed to obtain a waiver of the right to counsel. Unlike those colloquies, reading the list would not be interactive. The judge should ensure that the defendant heard the advisements in a language he understands, but need not ensure that he understood their import or intelligently waived any right (except the right to jury trial).

Reading from a carefully-drafted list will minimize the possibility of an erroneous statement of a right, which might cause a mistrial or reversal.⁵¹

court inform a defendant of his right to appeal serves important functions. It will often be the case that, as soon as sentence is imposed, the defendant will be taken into custody and transported elsewhere, making it difficult for the defendant to maintain contact with his attorney. The relationship between the defendant and the attorney may also be strained after sentencing, in any event, because of the defendant's disappointment over the outcome of the case or the terms of the sentence. The attorney, moreover, concentrating on other matters, may fail to tell the defendant of the right to appeal, though months later the attorney may think that he in fact gave the advice because it was standard practice to do so. In addition, if the defendant is advised of the right by the judge who imposes sentence, the defendant will realize that the appeal may be taken as of right and without affront to the trial judge, who may later rule upon a motion to modify or reduce the sentence. *See* FED. R. CRIM. P. 35. Advising the defendant of his right at sentencing also gives him a clear opportunity to announce his intention to appeal and request the court clerk to file the notice of appeal, well before the 10-day filing period runs.

Id. at 26-7.

⁴⁹ I considered including the right to speedy trial and the right to public trial in the list. These are important constitutional rights, but they rarely arise once the trial begins. I have no strong objection to including them, but I omitted them due to concerns that some judges might have about the length of the list.

⁵⁰ *See* FED. R. CRIM. P. 11(c); *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969).

⁵¹ *See* *Morales v. State*, 600 A.2d 851 (Md. 1992), where the trial judge extemporaneously advised a *pro se* defendant of his right to testify, warning him that “if you take the stand and testify and you have been convicted of a crime before, they may ask you, they meaning the State may ask you about that.” *Id.* at 853. Defendant then declined to testify. The appellate court reversed, because the judge’s advice was not necessarily correct as applied to Morales’s former convictions: “Morales should not have been led to believe that conviction would be automatically admitted to impeach him.” *Id.* at 855.

Indeed, a printed form used throughout the jurisdiction would probably best serve this purpose.⁵² And the form could simply be handed to the defendant

⁵² An excellent example of the contents of such a form can be found in *State v. Christensen*, 698 P.2d 1069 (Wash. Ct. App. 1985). The trial judge in that case used a pre-printed colloquy for *pro se* defendants that read as follows:

An accused has a constitutional right to represent himself if he chooses to do so. A defendant's waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards that he faces and the disadvantages of self-representation.

When a defendant states that he wishes to represent himself, you should therefore ask questions similar to the following:

1. Have you ever studied law?
2. Have you ever represented yourself or any other defendant in a criminal action?
3. You realize, do you not, that you are charged with these crimes: (Here state the crimes with which the defendant is charged.)
4. You realize, do you not, that if you are found guilty of the crime charged in Count I the Court could sentence you to as much as _____ years in prison and fine you as much as \$ _____? (Then ask him a similar question with respect to each other crime with which he may be charged in the indictment or information.)
5. You realize, do you not, that if you are found guilty of more than one of those crimes this Court can order that the sentences be served consecutively, that is one after another?
6. You realize, do you not, that if you represent yourself, you are on your own? I cannot tell you how you should try your case or even advise you as to how to try your case. (Admonish on the complexity of jury selection also.)
7. Are you familiar with the ... Rules of Evidence?
8. You realize, do you not, that the ... Rules of Evidence govern what evidence may or may not be introduced at trial and, in representing yourself, you must abide by those rules?
9. Are you familiar with the ... Rules of Criminal Procedure?
10. You realize, do you not, that those rules govern the way in which a criminal action is tried in [superior] court?
11. You realize, do you not, that if you decide to take the witness stand, you must present your testimony by asking questions of yourself? You cannot just take the stand and tell your story. You must proceed question by question through your testimony.
12. Ask the defendant why he does not want an attorney.
13. Ask defendant if any threats or promises have been made to induce him to waive his right to counsel.
14. (Then say to the defendant something to this effect.) I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent

after it is read to him.⁵³ This will give the defendant a chance to study the form and find a way to obtain more detailed information about the rights before or during trial.

In the normal course of a trial, some of these advisements will probably be repeated. After the prosecutor finishes examining a witness, for example, the judge will usually turn to defense counsel and ask if she wishes to cross-examine. The same courtesy should be extended to the *pro se* defendant.

Reading the list furthers the interest in providing a fair trial. Judge Reinhardt believes that this right cannot be reconciled with *Faretta*, and therefore *Faretta* should be overruled. "Where the right to self-representation conflicts with the paramount Fifth Amendment right to a fair and reliable trial, I believe that the former, and not the latter, must yield."⁵⁴ Perhaps he is right, at

yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself. (This could be expanded and repeated.)

15. Now, in light of the penalty that you might suffer if you are found guilty and in light of all of the difficulties of representing yourself, is it still your desire to represent yourself and to give up your right to be represented by a lawyer?
16. Is your decision entirely voluntary on your part?
17. If the answers to the two preceding questions are in the affirmative, you should then say something to the following effect: "I find that the defendant has knowingly and voluntarily waived his right to counsel. I will therefore permit him to represent himself."
18. If you have approved defendant's election to represent himself, you should consider the appointment of standby counsel with whom the defendant may confer before and during trial.

Id. at 1073 n.2.

⁵³ The judge might also, if she chooses, read the list to the defendant during the colloquy for obtaining the defendant's waiver of his right to counsel. (An example of such a colloquy appears in *Johnson v. State*, 507 A.2d 1134, 1141-44 (1986).) The judge might then say, "You will be expected to protect these rights as well as you can on your own. I will give you no further help during trial. Are you sure you want to proceed to trial without counsel?" The reading of the list and this warning might help the defendant realize the enormity of his decision. This is suggested by *Faretta*, where the Court stated that before the trial court may find a valid waiver of the right to counsel, the defendant "should be made aware of the dangers and disadvantages of self-representation." *Faretta v. California*, 422 U.S. 806, 835 (1975). But the defendant's inability to understand the rights in the List might not be a proper ground to find the waiver invalid. "[H]is technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Id.* at 836.

⁵⁴ *United States v. Farhad*, 190 F.3d 1097, 1102 (9th Cir. 1999).

least in some cases, but reading the above list of trial rights to the defendant could be a significant step towards such reconciliation.

And finally, reading the List to the defendant furthers his *Faretta*-based right of self-representation. There is a rough analog to this proposal: the *Miranda*⁵⁵ warning. The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself,”⁵⁶ but does not say that the police must advise a suspect of a right not to speak to the police. Nevertheless, the Supreme Court held in *Miranda* that such a “prophylactic” requirement is implicit in the Constitutional language, in order to make its intent effective in the real world.⁵⁷ The same might be said here.⁵⁸ Implicit in the Constitutional rights to a fair trial and self-representation is a requirement that the judge take minimal steps to ensure that the defendant is aware of the basic rights he may exercise in his effort to represent himself at trial.

But hasn't the *pro se* defendant, by waiving his right to counsel, impliedly acknowledged that he *already* knows enough about trial procedure to represent himself? There is a plethora of real world experience to the contrary, of course. Also, note that while the *Miranda* warning includes the right to counsel before and during interrogation to assist the suspect in deciding whether to exercise his substantive right to remain silent, even if the suspect waives this right, *Miranda* bars interrogation unless the police *also* advise the suspect of *the substantive right itself*: the right to remain silent.⁵⁹ Likewise, the defendant who has waived his right to a lawyer at trial to help him exercise substantive rights should also be advised of substantive trial rights. Note also that while *Miranda* requires the police to give the suspect what seems to be *strategic* advice — “anything you say can and will be used against you”⁶⁰ — my proposal does not.

Reading the list might take only a minute or two longer than the *Miranda* warning, which isn't much. It does not require the judge to compromise her impartiality. It protects not just one right (the right to remain silent), but several. And it protects rights that are not *preliminary* to the right to fair trial (the right to remain silent during interrogation), but central to the trial itself.

⁵⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁵⁶ U.S. CONST. amend. V.

⁵⁷ *Miranda*, 384 U.S. at 468-69.

⁵⁸ Indeed, in *People v. Barnum*, the court said that the former rule requiring trial judges to advise defendants of their right not to testify “merely is a judge-made, prophylactic rule of procedure.” 64 P.3d 788, 793 (Cal. 2003).

⁵⁹ *Miranda*, 384 U.S. at 468.

⁶⁰ *Id.* at 469.

Reading the list might encourage some defendants to *exercise* rights they might have overlooked, and this exercise might inconvenience (and annoy) trial judges and prosecutors. But the possibility that a defendant might assert rights that the law bestows on him cannot be a legitimate objection. Note that assertion of these rights is unlikely to lead to the release of a guilty defendant, while *Miranda* warnings might have just this effect. If we require the one, we should require the other.

There is, however, one situation where my proposal would seem superfluous: where the defendant has accepted “advisory” (sometimes called “standby”) counsel⁶¹ who would be expected to advise the defendant of his trial rights. In *Faretta*, the Court said: “a State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant’s self-representation is necessary.”⁶²

However, *Faretta* did not require states to appoint advisory counsel, and whether to do so is in the trial judge’s discretion, according to numerous courts.⁶³ If the defendant willingly accepts advisory counsel, and if we assume

⁶¹ While the two terms (“standby” and “advisory”) are often used interchangeably, the court in *People v. Kurbegovic*, 138 Cal. App. 3d 731, 757-58 (Cal. Ct. App. 1982) distinguished between them as follows: “[T]he term ‘standby’ counsel generally relates to an attorney’s being present to step in and represent an individual no longer able to represent himself ‘Advisory’ counsel, however, generally refers to an attorney who *assists* a litigant representing himself in a variety of ways” Also see *People v. Doane*, 246 Cal. Rptr. 366, 370, n.2 (Cal. Ct. App. 1988), as well as the concurring opinion in *Chaleff v. Superior Court*, 138 Cal. Rptr. 735, 742 nn.6-7 (Cal. Ct. App. 1977) where Justice Hanson construed “advisory counsel” to mean an attorney who is present in the courtroom at the defendant’s side, does not speak for him, and does not participate in the conduct of the trial but only gives him legal advice and construed “standby counsel” to mean an attorney who is present in the courtroom and follows the evidence and proceedings but does not give legal advice to the defendant. He “stands by” in the event it is necessary for the trial court to revoke defendant’s *in propria persona* status or even remove the defendant from the courtroom because of disruptive tactics so the case may proceed in an orderly manner to verdict. *Id.*

⁶² *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

⁶³ See, e.g., *Downey v. People*, 25 P.3d 1200, 1203 (Colo. 2001) (“Although a *pro se* defendant has no constitutional right to advisory counsel, a trial court may, nonetheless, permit a defendant the assistance of some type of advisory counsel.”); *People v. Bloom*, 774 P.2d 698, 712 (Cal. 1989):

[N]one of the ‘hybrid’ forms of representation, whether labeled ‘co-counsel,’ ‘advisory counsel,’ or ‘standby counsel,’ is in any sense constitutionally guaranteed. . . . [A] self-represented defendant who wishes to obtain the assistance of an attorney in an advisory or other limited capacity, but without surrendering effective control over

that advisory counsel must meet some minimal level of competency, then we might expect advisory counsel to advise defendant of the rights described above, and also offer strategic advice. In this event, it would seem less important that the judge give defendant the advice suggested above.

If, however, the judge appoints advisory counsel “over objection by the accused” (as *Faretta* appears to permit⁶⁴), then we cannot expect the defendant to accept any advice from advisory counsel — or even listen to her. In this event, the judge should give the advice I suggest above.

V. CONCLUSION

Faretta has not been warmly received — neither the judiciary nor the academic community seems enamored by it.⁶⁵ Nevertheless, it is the law. If the Supreme Court made a mistake, we should not take it out on the *pro se* defendant by making it unnecessarily difficult for him to exercise his rights at trial. Reading him a list of rights would give him at least minimal protections, with only a minimal burden on the system.

Concerns that the right to self-representation might conflict with the right to fair trial (at least in particular cases) are real. The need to choose one over the other might be obviated by a modest requirement that the trial court simply read and hand a List of Rights to the *pro se* defendant.

presentation of the defense case, may do so only with the court's permission and upon a proper showing.

See also *Tate v. Wood*, 963 F.2d 20, 26 (2d Cir. 1992); *Locks v. Sumner*, 703 F.2d 403, 407-08 (9th Cir. 1983); *United States v. Gigax*, 605 F.2d 507, 516-17 (10th Cir. 1979).

⁶⁴ 422 U.S. at 834 n.46 (“Of course, a State may—even over objection by the accused—appoint a ‘standby counsel’ to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary.) However, advisory counsel may not interfere with defendant's right to control the presentation of the defense. See *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

⁶⁵ See, e.g., *United States v. Farhad*, 190 F.3d 1097, 1102 (9th Cir. 1999) (Reinhardt, J. concurring); *People v. Dent*, 65 P.3d 1286 (Cal. 2003) (Chin, J., concurring) (“There is much to be said for modifying *Faretta*, at least in capital cases, to give the trial court discretion to deny a request for self-representation when no good ground exists for the request and the defendant is not capable of effective self-representation.”); see also 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 (1996); Tracy L. Meares, *What's Wrong With Gideon*, 70 U. CHI. L. REV. 215 (2003).