

PLSC 252: Crime and Punishment
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Fools & Self-Representation: A Defense of Faretta v. California

by Daniel Cheng

After the 1963 case *Gideon v. Wainwright*, the right to counsel is a fundamental feature of contemporary US criminal trial procedure. However, after firmly establishing that all criminal defendants have the right to counsel, the Supreme Court was faced with a new question in *Faretta v. California*: should a defendant have the right to reject court-appointed counsel and represent him or herself at trial? In a six-to-three ruling, the Supreme Court held that criminal defendants have the right to reject state counsel and represent themselves in trial (known as going *pro se*). In this essay, I analyze the *Faretta* decision through three frameworks for thinking about the US adversarial justice system: the fair adversaries, due process, and equal protection standards. I apply each of these standards to the rejection of state counsel and identify the consequences of such a decision. I also take a key passage of the Supreme Court's majority opinion and extract a fourth standard, "respect for the individual." While the first three standards of fair adversaries, due process, and equal protection cannot provide a clear compelling answer on whether defendants should be able to reject state counsel, the individual respect standard provides a persuasive argument and shows that we must uphold a defendant's right to reject counsel and proceed *pro se*.

Fair Adversaries

The United States legal system is an adversarial system that protects defendants and upholds procedures that allow two competing parties to present their positions before an

impartial judge or jury. However, such a system would be flawed if one competing party were consistently stronger than the other. A key standard of a successful adversarial system is that both competing parties must have equal resources to construct their legal position and equal ability to effectively convey their position to the jury. This standard is the fair adversaries standard, which asserts that a guiding principle of the criminal justice system must be whether a procedural change such as banning self-representation will ensure equal adversaries in the system, as equal adversaries will best produce the truth.

Under the fair adversaries standard, the right to counsel is an essential right in the criminal justice system. The first reason for this claim is that the state and prosecution have key advantages that make them inherently strong in the adversarial system. Prosecutors are repeat players in the criminal justice system and have several advantages over unrepresented defendants, who are one-shot players. As Marc Galanter asserts, “RPs [repeat players], having done it before, have advance intelligence; they are able to structure the next transaction and build a record.”¹ Galanter also highlights other advantages of repeat players, including institutional memory and technical expertise. Thus, within the concept of adversarial justice, the state is an inherently strong player that enjoys an overwhelming advantage gap over the unrepresented defendant, a gap that must be bridged if we wish to satisfy the equal adversaries standard.

In the case of defendants without counsel, state-appointed or hired defense counsel would best close this gap. By vocation, lawyers in the criminal justice system undergo years of training, developing expertise on the inner processes of the criminal justice system. In addition, many lawyers have several years of experience in their field of practice, gaining intricate knowledge that only comes with trial experience. Both of these advantages are unavailable to regular

¹ Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law and Society Review* (1974): 299.

citizens and, if the defendant retains counsel, are overwhelmingly vast leaps forward towards closing the state's advantage over the defendant. Furthermore, there are documented instances in several *pro se* cases in which the defendant would have been better off if he had had access to counsel, as famously illustrated in *Gideon v Wainwright*. Despite the fact that Gideon had “conducted his defense about as well as could be expected from a layman,” the special advantages available to counsel are so necessary to an adversarial system that any person “cannot be assured a fair trial unless counsel is provided for him.”² Clarence Gideon's trial illustrates that a defendant can conduct his own trial in a passionate and adversarial way but, by lacking the advantages of counsel, remain unable to meet the standard of fair adversaries against the state.

The fair adversaries standard provides a clear resolution to *Faretta*, but this standard is just one of several that we will apply to the issue of self-representation. We have indicated that access to counsel is necessary for the fair adversaries standard to be met, but what about the rejection of counsel? I will admit that there can be certain cases where a defendant is better equipped to defend her case. What happens when a lawyer goes on trial? While such a lawyer would be wise to retain counsel, we can imagine scenarios where experienced trial lawyers would prefer to defend their own case. Similarly, we must remember that state-appointed defense counsel is a repeat-player and therefore beholden to incentives that may oppose the defendant's one-shot interests. State-appointed counsel will “play for rules as well as immediate gains,” taking extra measures to influence future litigation and develop “bargaining reputation,” potentially at the expense of a single client's interests.³ Finally, while a very rare exception, there exist instances of misconduct and incompetence of defense counsel as egregious as sleeping

² Anthony Lewis, *Gideon's Trumpet*. (New York: Vintage Books, 1964), 197-198.

³ Galanter, “Why the ‘Haves’ Come Out Ahead,” 299.

during trial.⁴ These are all compelling examples that suggest that it is at least possible for *pro se* defendants to be better equipped for trial than experienced lawyers, but they are merely an exception. Unless we find counsel to be uniformly incompetent, retaining counsel will provide a fairer adversary to the overwhelmingly strong state. The fair adversaries standard, however, represents just one approach to the issue of banning self-representation, and we must consider the due process and equal protection standards in order to reach a holistic conclusion.

Equal Protection

The equal protection standard is largely inapplicable and will provide little insight into the *Faretta* question. The equal protection standard addresses the following question: having established fairness between the defendant and the state, how can we establish fairness across defendants accused of committing a similar crime? This question captures the spirit of equal protection, rooted in the 14th Amendment phrase that “no state shall deny the equal protections of the law.” In the context of counsel, the equal protection standard has shown that the Court must not “discriminate against some convicted defendants on account of their poverty.”⁵ Regardless of resources, two men committing the same crime should have theoretically equal outcomes.

Under the equal protection standard, the core issue of *Faretta* boils down to a comparison between options of counsel for rich and poor defendants. Before *Faretta*, a rich man had two options when he went to trial: to proceed *pro se* or hire counsel. The poor man also had two options: *pro se* or state counsel.

If the dissenting opinion in *Faretta* had won, these options would be equally altered across all defendants, and thus the choices of counsel would remain equal for rich and poor. The

⁴ In the 1979 state trial of Carl Johnson, his lawyer Joe Frank Cannon was sound asleep during jury selection and portions of the trial. Johnson was executed in 1995 after an unsuccessful appeal under “ineffective assistance of counsel”. Blomberg, Thomas G. and Cohen, Stanley. *Punishment and Social Control*, 320.

⁵ *Douglas v. California*

Supreme Court would prohibit both the poor and rich man from proceeding pro se, forcing both to retain counsel. Although the rich have hired counsel and the poor have appointed counsel, both men would have the equal option of *retaining counsel* and therefore have theoretically equal outcomes. The decision to remove the right to reject counsel would apply equally, not disparately, amongst defendants and thus the equal protection standard is preserved.

Critics of this position may argue that if the dissenting opinion had won, there would be unequal protection between rich and poor defendants because hired attorneys are more capable than state-appointed counsel. However, there are several arguments for and against such a stance. Such considerations may or may not be true, but they are separate from *Faretta's* central issue and therefore irrelevant to our discussion of self-representation. Rather than relying on rare stories of incompetence within appointed counsel, the Supreme Court should instead focus on the uniform advantages that counsel, appointed or hired, provide their defendants.

Due Process

The due process standard, while fundamental to the right to counsel, will not provide a clear solution to the issue of prohibiting self-representation. The due process standard stems from key passages in the 5th and 14th Amendments, which dictate that no state may “deprive any person of life, liberty, or property, without due process of law.” The due process rationale was previously applied in *Powell v. Alabama* to assert that only under “special circumstances” such as illiteracy would the state need to provide defense counsel. This decision was overturned in *Gideon v. Wainwright*, in which the Supreme Court extended the right to counsel under due process to all criminal cases, capital and non-capital.

As the Court outlined in *Argersinger v. Hamlin*, “due process, perhaps the most fundamental concept in our law, embodies principles of fairness.” The due process standard encapsulates three principles of fairness: procedural fairness, fairness of outcome, and individual

fairness. The first principle concerns “fundamental fairness of the proceeding[s]”⁶ and addresses issues such as whether the defendant had the opportunity to hear charges and fairly present their case. Fairness of outcome examines “fairness of the result,”⁷ whether the outcome of the case was accurate given the facts presented. Individual fairness asks whether the defendant was knowledgeable of how to proceed in trial and able to “participate meaningfully in a judicial proceeding in which his liberty is at stake.”⁸ I assert that the decision to ban self-representation can be justified under fairness of procedure and outcome, but not fairness of the individual.

A paternalistic application of the procedural due process standard would justify the prohibition of self-representation. One might begin by arguing that a defendant should have the ability to waive his procedural due process rights. Any mistake in procedure would arise from proceeding *pro se* and lacking technical expertise, a fact that the rational defendant would be knowledgeable of before choosing to do so. However, this leads to the issue of paternalism: because we established that attorneys have the necessary expertise to navigate court proceedings, the Supreme Court should force defendants to retain counsel in order to realize full procedural due process. Viewing the *Faretta* question solely from the lens of procedural due process would justify a banning of self-representation.

There is, however, more at stake here. If we fully educate defendants on the realities of proceeding *pro se*, can we trust them to make a decision that is right for themselves? Will the resulting outcome be a fair one? As the due process standard is designed to benefit the defendant, perhaps the defendant should be able choose to waive this benefit. However, we must remember that due process is designed not only for the benefit of the defendant, but for the state as well.

Criminal offenses are prosecuted by the state because the state has an interest and a

⁶ *Strickland v. Washington*

⁷ *Argersinger v. Hamlin*

⁸ *Ake v. Oklahoma*

responsibility to its citizens in seeing to the rectitude of criminal proceedings and the justice of sentencing. An individual's choice to proceed *pro se* may lead to adversely unjust outcomes, and this is reason enough for the state to intervene. A variety of externalities such as loss of legitimacy can occur unfair criminal justice systems, thus the state can be justified in banning self-representation under due process of outcome. Therefore, under a paternalistic application of due process of outcome, the state should not allow the defendant to proceed *pro se*.

Finally, we expect that the individual fairness principle of due process would be unaffected by *Faretta*. The individual fairness principle is a right designed to protect the defendant; therefore he should have the right to waive it. The key factor is that if we allow the right to self-represent, the defendant will still have the option to retain counsel. As long as the court educates the defendant on the due process perils of proceeding *pro se*, we expect that the rational defendant would do so only if he were confident of his abilities. This agreement (implicit or explicit) would undermine the possibility of retroactively arguing a violation of individual fairness under due process. Whether it is possible to educate the layman on the realities of proceeding *pro se* is a separate issue, but we must assume it to be true as long as the state spends the necessary time and resources to educate the defendant.

When applied to *Faretta v. California*, the due process standard yields uncertain results. The due process standard is ill equipped to address a key aspect of the *Faretta* decision: both alternatives, allowing or rejecting the right to self-represent, still maintain the right to counsel. On the other hand, a paternalistic prohibition of the right to self-representation is justifiable in order for society to fully realize the benefits of due process. However, the analysis would be incomplete without reaching beyond the scope of due process and examining the effects of such a paternalistic action on individual autonomy.

Respect for the Individual

At this point in our argument, we have analyzed the *Faretta* question under the three fundamental standards of fair adversaries, equal protection, and due process. The fair adversaries standard highlighted the importance of defense counsel in creating fairer adversaries for unrepresented defendants. The equal protection standard was inapplicable to the *Faretta* question, as a decision against or in favor of banning self-representation would apply equally to rich and poor defendants. Finally, a state-centered paternalistic application of the due process standard would justify the prohibition on defendants going *pro se* in favor of society's interest in procedural fairness. Having examined these three standards, the last standard of individual autonomy must now be addressed. I argue that the state should respect an individual's right to choose *pro se* even when the state can rationalize that it would be to his detriment.

First, the defendant alone will bear all consequences of the trial, good and bad. In negative outcomes, criminalization is one of the most severe punishments that society may exact on the individual. If a defendant loses a trial, his lawyer may suffer a blemish on his track record from this defeat, but it is the defendant alone that directly suffers from the outcome of the trial, ranging from incarceration to capital punishment. Because the defendant suffers the consequences of a criminal trial, she should have a say in the conduct of her defense (if she chooses). Furthermore, because she suffers *all* of the consequences of the trial, she should retain the ability to have *all* of the say in her defense.

In addition, individual autonomy is a central feature of the adversarial justice system. The Anglo-American adversarial system was created as a direct reaction to the European inquisitorial system, where the court serves the interests of the state and takes a direct role in leading the investigation of evidence and proceedings of a case. To mitigate this imbalance, the adversarial system arose and enshrined procedural standards that protect citizens from a previously omnipotent state. The adversarial system is a defendant-oriented system that sidelines the court

to the role of impartial judge and referee between a competing prosecution and defense.⁹

Because the adversarial system is inherently concerned with the welfare of the defendant, a key spirit necessary for such a system is that of defendant autonomy. Rather than sideline the defendant to the legal investigations of the state, the adversarial system places key freedom on the defendant to mount a fair and adversarial argument against that of the state. Thus, it would directly contradict the spirit of the adversarial system if the state were to step in and dictate how the defendant may mount his defense by forcing the poor man to retain state-appointed counsel. Under the fair adversaries standard, the state must provide the layman with counsel to mount a fair argument, but by the spirit of the adversarial system, the state cannot force him to use it.

Furthermore, the concept of individual autonomy is encoded into our constitution and legal system. In *Adams v. United States ex rel. McCann*, the Supreme Court ruled that the Sixth Amendment right to the assistance of counsel implicitly embodies a "correlative right to dispense with a lawyer's help," writing that

“What were contrived as protections for the accused should not be turned into fetters...to deny an accused a choice of procedure in circumstances in which he, though a layman is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.”

The use of the adjective “intelligent” is key: while the Supreme Court acknowledges that lawyers are uniformly more successful in trial than *pro se* defendants, the Court identifies the decision to retain state counsel as a situation in which a fully informed and rational defendant can be trusted to make an “intelligent” choice. This places a great deal of respect upon the individual, and justifiably so. As the Supreme Court held in *Adams*, “to deny him in the exercise of his free choice the right to dispense with some of these safeguards...is to imprison a man in his privileges and call it the Constitution.” We must provide a defendant the assistance of counsel,

⁹ Gregory Huber, PLSC 252b Crime & Punishment Lecture 12: “The Defendant II.” Yale College, Feb 23 2012.

but by the spirit of the Constitution, we cannot force him to use it.

Critics of these arguments may raise the issue of irrational actors. We see that these arguments may not hold for those that are mentally ill, but the necessary measures to correct this problem are already in place within our justice system. As a minimum, our justice system assumes that defendants must have the ability to assist their attorneys (for example, by passing notes). In the case of mentally ill defendants, our current judicial discretion standard places responsibility on the court to deem defendant competency before proceeding with trial. I believe this standard to be sufficient. It is the state's duty to protect its citizens, sometimes at their expense, but that is not the case with rational actors.

What about actors who are mentally rational but ill equipped for trial, Blackmun's "fools"? To this I respond that we must let fools be fools. It must be the job of our criminal justice system to educate defendants with sufficient knowledge on the realistic perils of proceeding *pro se*. However, our system should not and cannot refuse its citizens the right to reject counsel. It is possible that forcing defendants to retain state counsel may result in a better outcome for his case, but doing so would remove with certainty a fundamental pillar of the United States justice system and its basis in the Constitution. "Respect of the individual" is truly the lifeblood of our law, and to prohibit a defendant's right to refuse counsel would be to directly contradict the essence and core of our justice system.

Conclusion

The three fundamental rationales of the fair adversaries, due process, and equal protection standards have provided a foundation for our discussion on the right to self-representation in trial but are inadequate for reaching a clear answer. However, the paternalistic urge to enforce appointed counsel for the due process purposes of the state must be reconciled by a discussion of individual rights and their role within the US adversarial justice system. While Justice Blackmun

correctly identified *pro se* defendants to be overwhelmingly “foolish”, he falls short in his failure to identify the importance and necessity of individual autonomy in the US justice system. We may wish to assist these defendants by forcing state counsel, but we must recognize the high cost to individual rights that comes with such an action. The right to refuse counsel is a key factor of individual autonomy and the refusal of such a right would be contradictory to the fundamental characteristics of our adversarial system and its basis in the Constitution.