

Winter 2011

Autonomy and "Gray Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom

Jona Goldschmidt

Recommended Citation

Jona Goldschmidt, *Autonomy and "Gray Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 Nw. J. L. & Soc. Pol'y. 130 (2011).
<http://scholarlycommons.law.northwestern.edu/njlsp/vol6/iss1/4>

This Article is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized administrator of Northwestern University School of Law Scholarly Commons.

Autonomy and “Gray-Area” *Pro Se* Defendants: Ensuring Competence to Guarantee Freedom

Jona Goldschmidt*

I. INTRODUCTION

¶1 One of the fundamental questions facing American criminal courts is: what should be done with those persons who are legally competent to stand trial and who assert their constitutional right to represent themselves, but who have both a lack of legal knowledge and skill, and mental or emotional problems that limit their ability to represent themselves? These are the so-called “gray-area” defendants, a characterization coined by Justice Breyer in a recent majority opinion in *Indiana v. Edwards*.¹ In *Edwards*, the Supreme Court held that in such circumstances a trial court has discretion to impose unwanted counsel on the defendant in order to ensure that the defendant does not make a “spectacle” of himself, thus fulfilling the court’s duty to ensure a fair trial.²

¶2 This decision is not unexpected, given the all-or-nothing model of representation present under current American law. Our legal system fails to provide any alternative forms of representation to the two extremes of self-representation or representation by counsel. In this context, the Supreme Court predictably gave greater weight to the state’s interest in maintaining the appearance of a “fair trial”—understood as a matter of avoiding a “spectacle”—than the defendant’s right to dignity and autonomy, which are fulfilled by permitting him to present his own defense without unwanted counsel. In striking the balance that it did, the Court, I argue, improperly uses such defendants for its own ends of maintaining the courts’ image of institutional legitimacy for the sake of the *appearance* rather than the *reality* of fairness.

¶3 I argue that a different result would have been obtained if the American legal system recognized a variety of alternative methods of what is not really representation so much as assistance. Such legal assistance methods are currently in use in Canadian courts, and others have previously met bench or bar resistance in the United States. If adopted by American courts, these methods would provide assistance to “gray-area” defendants short of full representation, and preserve the dignity and autonomy to which all persons are entitled under a system of equal justice.

¶4 Which of the following three scenarios is best: (1) allowing a “gray-area” *pro se* defendant to flounder in making his or her defense *without meaningful assistance*; (2) forcing an unwanted attorney on such a defendant, resulting in the defendant’s repeated objections and differences with counsel regarding the defense; or (3) adopting innovative court policies and practices that permit such defendants to have the assistance they need

* Associate Professor, Department of Criminal Justice, Loyola University Chicago. J.D., DePaul University; Ph.D., Arizona State University. I wish to thank Professor Vincent Samar of IIT-Chicago Kent College of Law for his valuable comments and guidance on this Article.

¹ *Indiana v. Edwards*, 554 U.S. 164, 172–173 (2008); *see* discussion *infra* Part V.

² *Id.* at 176, 178.

to adequately present their defenses, short of full representation? I argue that providing alternative methods of limited representation and assistance to “gray-area” defendants would make the third option a reality. Additionally, it would avoid what the Court in *Edwards* called the “spectacle” of option 1, and also what I call the “travesty of justice” of option 2, thus restoring the court’s protection of the human dignity and autonomy interests previously recognized in *Faretta v. California*.³

¶15 Part I of this Article begins with a description of the facts and holding in *Indiana v. Edwards*. This is followed by a description of the autonomy-fair trial debate engaged in by the majority and dissenters in *Faretta*, the decision first recognizing the constitutional right of self-representation. The Court continued this same debate in *Edwards*. This Part concludes with a review of the governing rules regarding self-representation which, on the one hand, require that *pro se* defendants follow the same procedural and substantive rules as represented parties, and on the other hand, preclude the court or any other person from assisting the defendant during the course of a trial.

¶16 Part II of this Article begins with a discussion of the meaning of dignity, autonomy, and personhood before the law, terms repeatedly used by the Supreme Court as the foundation for the right of self-representation. This Part reviews the history, meaning, evolution, and interchangeability of the terms. A typology is then presented of the legal usage of these ideas in American, Canadian, and international law.

¶17 In Part III, I argue that the state must do more than give lip service to the fundamental, individual interests in autonomy by recognizing them as they did in *Faretta* and its progeny. The state must create conditions for fulfillment of the individual right of autonomy if that right is to have any salience in American law. Here, I present the justification for such a duty and Supreme Court decisions bearing on the subject.

¶18 Part IV presents a number of alternative forms of assistance and limited representation that may prove useful to American courts in addressing the “gray-area” defendants. Use of these methods will enable these defendants to present the defense of their choice in the manner they choose, thus maximizing their dignity and autonomy, while avoiding the unfairness of a spectacle that might otherwise result.

¶19 I conclude with a call for adoption of these or other innovative forms of assistance to “gray-area” defendants, and *pro se* litigants generally, to better protect the bedrock values of individual dignity and autonomy that are the foundation of any system of equal justice under law.

³ *Faretta v. California*, 422 U.S. 806, 832 (1975). The *Faretta* Court noted that:

In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the 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. The Framers selected in the Sixth Amendment a form of words that necessarily implies the right of self-representation. That conclusion is supported by centuries of consistent history.

Id.

II. INDIANA V. EDWARDS: PLACING LIMITS ON DIGNITY AND AUTONOMY

A. *Facts and Holding*

¶10 The U.S. Supreme Court recently addressed the question of whether a court may deny the right of self-representation and impose unwanted counsel on a criminal defendant who is competent to stand trial, but nevertheless has mental problems that may interfere with his ability to defend himself.⁴ In *Indiana v. Edwards*, the defendant was charged with attempted murder and other charges in connection with the shooting of a store security guard.⁵ He had received three mental competency hearings and made two self-representation requests.⁶

¶11 In the first competency hearing⁷ he was found unfit for trial.⁸ In the second, he was found competent to assist his attorneys in his defense and to stand trial, despite evidence establishing that he was suffering from mental illness.⁹ At a third pre-trial competency hearing, the court found that he was not then competent to stand trial.¹⁰ The evidence showed that he suffered from “serious thinking difficulties and delusions,” and although the testifying psychiatrist indicated he could understand the charges against him, he also testified that Edwards was unable to cooperate with counsel because he suffered from schizophrenia.¹¹

¶12 Eight months after his civil commitment, hospital authorities reported that Edwards was competent to stand trial, and about a year later, his trial was set.¹² Shortly before trial, the defendant requested a continuance and the right to represent himself. Both motions were denied.¹³ He proceeded to trial with court-appointed counsel and was found guilty of criminal recklessness and theft, but the jury failed to reach a verdict on the attempted murder charge.¹⁴ Before his second trial, Edwards renewed his request to self-represent.¹⁵ The trial judge denied the request again, finding that he still suffered from schizophrenia, saying that “he’s competent to stand trial, but I’m not going to find he’s competent to defend himself.”¹⁶ Edwards was found guilty of the remaining counts, and appealed on grounds that his right to self-representation was unconstitutionally denied.¹⁷

¶13 The Indiana Court of Appeals agreed with Edwards and reversed the trial court, a ruling thereafter affirmed by the Indiana Supreme Court based upon the *Faretta* and

⁴ *Edwards*, 554 U.S. at 167.

⁵ *Id.*

⁶ *Id.*

⁷ A competency hearing may be ordered “If at any time before the final submission of any criminal case to the court or the jury trying the case, the court has reasonable grounds for believing that the defendant lacks the ability to understand the proceedings and assist in the preparation of a defense” IND. CODE § 35-36-3-1(a) (2009).

⁸ *Edwards*, 554 U.S. at 167.

⁹ *Id.* at 168.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 169.

¹⁵ *Id.*

¹⁶ *Id.* at 169 (internal quotation marks omitted).

¹⁷ *Id.*

Godinez precedents.¹⁸ The United States Supreme Court vacated and remanded the decision of the Indiana Supreme Court for a new trial.¹⁹

¶14

In its decision, the Court noted that the standards for competence to stand trial enunciated in *Dusky v. United States*²⁰ and *Drope v. Missouri*²¹ did not consider “the mental competency issue presented here, namely, the relation of the mental competence standard to the right of self-representation.”²² The court went on to note, “[A]n instance in which a defendant who would choose to forgo counsel at trial presents a very different set of circumstances, which in [the Court’s] view calls for a different standard.”²³ The State argued that a *Faretta* hearing should be used “to determine if the defendant has the minimal skills to communicate coherently with the court and the jury in a narrative fashion.”²⁴ The Supreme Court, however, held that the State may constitutionally limit a defendant’s right of self-representation by insisting upon representation by counsel at trial “on the ground that the defendant lacks the mental capacity to conduct his trial defense unless represented.”²⁵ This is because the *Dusky* and *Drope* standards assume representation by—and emphasize the importance of—counsel.²⁶

¹⁸ See *infra* Part II.B.

¹⁹ *Edwards*, 554 U.S. at 179.

²⁰ *Dusky v. United States*, 362 U.S. 402 (1960) (*per curiam*) (holding that competency to stand trial means that a defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him”).

²¹ See *Drope v. Missouri*, 420 U.S. 162, 180–81 (1975) (defendants are presumed fit to stand trial unless a question regarding the defendant’s competency arises before or during the trial).

²² *Edwards*, 554 U.S. at 170.

²³ *Id.* at 174–175. The court referred to sixteen state cases that it previously cited in *Faretta* for the proposition that there is an implicit competency limitation on the right of self-representation that arises where defendants are shown to be mentally defective. *Id.* at 175.

²⁴ Brief for Petitioner at 43 *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-208_Petitioner.pdf.

²⁵ *Edwards*, 554 U.S. at 174.

²⁶ The amicus brief of the National Association of Criminal Defense Lawyers in Support of Neither Party suggested the Court should return to the common law competency standard which did not assume counsel would be available:

Unlike the *Dusky* standard, which inquires into defendant’s ‘ability to consult with his lawyer’ in order to ‘assist counsel,’ . . . the competency standard at common law focused entirely on defendant’s capacity to present his *own* defense. It was long the rule at British common law that ‘if, after he has pleaded, [a] prisoner becomes mad, he shall not be tried; for how can he make his defence?’ . . . As explained by New York’s high court in 1847:

[T]he humanity of the law of England had prescribed that no man should be called upon to make his defense at a time when his mind was in such a situation that he appeared incapable of doing so; that however guilty he might be, the trial must be postponed to a time when, by collecting together his intellects, and having them entire, he should be able so to model his defense, if he had one, as to ward off the punishment of the law * * *.

Thus, as recounted by [the Supreme] Court:

Beginning with the earliest cases, the issue at a sanity or competency hearing has been ‘whether the prisoner has sufficient understanding to comprehend the nature of this trial, *so as to make a proper defence to the charge.*’

Brief for. of Nat’l Ass’n of Criminal Def. Lawyers as Amicus Curiae Supporting Neither Party at 7–8, *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208), available at http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-208_NeutralAmCuNACDL.pdf (citations omitted).

¶15 The majority also noted that mental illness varies in degree and over time, and interferes with an individual in different ways at different times.²⁷ In some cases, a defendant may well be able to assist counsel in his defense, but “may be unable to carry out the basic tasks needed to present his own defense without the help of counsel.”²⁸ The Court referred to mental conditions that fall “in a gray area between *Dusky*’s minimal constitutional requirement that measures a defendant’s ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose,” referring to such defendants as “gray-area defendants.”²⁹

¶16 Finally, the Court held that the right of self-representation will not affirm the dignity of a defendant who lacks the mental capacity to conduct his own defense without the assistance of counsel.³⁰ The Court found that fair trials trump autonomy and dignity.³¹ By doing so, the Court elevated the trial court’s institutional legitimacy over the dignity and autonomy of the defendant.³² This is not the first time that the Court sought to balance autonomy and the judicial duty to ensure fairness.

B. *The Autonomy-Fair Trial Debate*

¶17 In *Faretta*, the dissenters voiced concern over the potentially harsh results of recognizing a constitutional right to self-representation in criminal cases. Chief Justice Burger, joined by Justices Blackmun and Rehnquist, argued that judicial discretion and state law—not the Constitution—should determine whether and under what circumstances self-representation should be permitted.³³ He saw “nothing desirable or useful in permitting every accused” to conduct his own criminal defense, predicting that to do so will in almost all cases result in the defendant losing whatever defense he may have had.³⁴ Burger argued that this result would likely hurt public confidence in the courts.³⁵

¶18 Justice Blackmun, dissenting separately, and joined by Chief Justice Burger and Justice Rehnquist, wrote that he not only could find “no textual support for this conclusion [of a constitutional right of self-representation] in the language of the Sixth Amendment,” but that the right would breach the state’s interest in a criminal prosecution “‘. . . not that it shall win a case, but that justice shall be done’ . . . I do not believe that any amount of pro se pleading can cure the injury to society of an unjust result.”³⁶ He

²⁷ *Edwards*, 554 U.S. at 175.

²⁸ *Id.* at 175–76.

²⁹ *Id.* at 172–73.

³⁰ *Id.* at 176.

³¹ *Id.* at 176–77.

³² The Court specifically noted its concern about the “appearance” of fairness to all who might observe the proceedings were *Edwards* permitted to represent himself:

[P]roceedings must not only be fair, they must ‘appear fair to all who observe them.’ An *amicus* brief reports one psychiatrist’s reaction to having observed a patient (a patient who had satisfied *Dusky*) try to conduct his own defense: ‘[H]ow in the world can our legal system allow an insane man to defend himself?’

Id. at 177 (citations omitted).

³³ *Faretta*, 422 U.S. at 840 (Burger, J., dissenting).

³⁴ *Id.* at 836.

³⁵ *Id.* at 839–40.

³⁶ *Id.* at 846–49 (citations omitted). Justice Blackmun makes the not uncommon mistake of equating self-representation with frivolousness: “I cannot agree that there is anything in the Due Process Clause or the

prophetically identified the key procedural problem that would arise from the majority's opinion: "Must the trial court treat the *pro se* defendant differently than it would professional counsel?"³⁷ Justice Blackmun ended his dissent: "If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself."³⁸

¶19

The issue arose again in *Godinez v. Moran*,³⁹ where the Court upheld a guilty plea of a "gray area" defendant.⁴⁰ In *Godinez v. Moran*, the Supreme Court addressed the question of whether the test for competence to stand trial, in other words, whether the defendant has a "rational understanding"⁴¹ of the proceedings, includes a capacity for "reasoned choice" among the alternatives available to him.⁴² The trial court had found that defendant Moran was competent to stand trial, and that he had knowingly, voluntarily, and intelligently waived his rights to counsel and trial. The court, thereupon, accepted his guilty plea. Moran subsequently filed an unsuccessful state post-conviction petition and an appeal to the state supreme court, claiming the trial judged erred by

Sixth Amendment that requires the States to subordinate the solemn business of conducting a criminal prosecution to the whimsical—albeit voluntary—caprice of every accused who wishes to use his trial as a vehicle for personal or political self-gratification." *Id.* at 849. *Faretta* was decided in 1975, not long after courts had experienced defendants, such as the "Chicago Eight," who used their trials as anti-war political platforms, some of which became disruptive. See Joel M. Flaum & James R. Thompson, *The Case of the Disruptive Defendant: Illinois v. Allen*, 61 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 327 (1970) (discussing when a disruptive defendant does not have a right to be present at the trial). In 1970, *Time* reported that one bar committee "is investigating the use of glass isolation booths in which a defendant can hear the proceedings but not be heard himself. . . . [as] was employed in the 1961 trial of Adolph Eichman." *The Law: How to Control the Court*, TIME, March 9, 1970, available at <http://www.time.com/time/printout/0,8816,878786,00.html>.

³⁷ *Faretta*, 422 U.S. at 852.

³⁸ *Id.*

³⁹ *Godinez v. Moran*, 509 U.S. 389 (1993).

⁴⁰ Mental condition is obviously not the only factor affecting a defendant's capability of self-representation. One would think that, given the labyrinth of procedural and evidentiary rules in any litigation, and given the government's interest in assuring a fair trial, that there would be some minimum standard by which courts should measure a party's capacity to self-represent. As the U.S. Supreme Court once stated in *Wade v. Mayo*, a case involving an eighteen year old burglary defendant who was forced to represent himself when his motion for counsel was denied:

[T]hough not wholly a stranger to the Court Room, having been convicted of prior offenses, [the defendant] was still an inexperienced youth unfamiliar with Court procedure, and not capable of adequately representing himself.

. . . .

There are some individuals who, by reason of age, ignorance or mental capacity, are incapable of representing themselves adequately in a prosecution of a relatively simple nature. This incapacity is purely personal and can be determined only by an examination and observation of the individual. Where such incapacity is present, the refusal to appoint counsel is a denial of due process of law under the Fourteenth Amendment.

334 U.S. 672, 683–84 (1948). In *Wade v. Mayo*, a case decided fifteen years before the Supreme Court recognized a right to counsel in criminal cases in *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Court recognized that factors other than mental capacity could constitute barriers to due process for a *pro se* defendant, justifying innovative methods of *pro se* assistance as I propose here.

⁴¹ *Dusky v. United States*, 362 U.S. 402, 402 (1960) (*per curiam*).

⁴² *Godinez*, 509 U.S. at 397. The Court noted a split in the circuits and among state supreme courts on the issue of whether the competency standard for pleading guilty or waiving the right to counsel is higher than the competency standard for standing trial. *Id.* at 395 n.5.

failing to conduct a competency hearing regarding his mental incompetency to represent himself.⁴³ His federal habeas petition was also denied, but the Ninth Circuit reversed.⁴⁴

¶20 The Court of Appeals held that the District Court erred in not determining that the defendant was “mentally capable of the reasoned choice required for a valid waiver of constitutional rights.”⁴⁵ The Ninth Circuit relied on facts showing the defendant had attempted suicide, had desired to discharge his attorney so as to prevent the introduction of mitigating evidence at sentencing, had responded with monosyllabic answers to the court’s questions, and was on medication at the time he sought to waive his right to counsel and plead guilty.⁴⁶

¶21 In reversing the Court of Appeals, the Supreme Court noted that it had “never expressly articulated a standard for competence to plead guilty or to waive the right to the assistance of counsel.”⁴⁷ The Court first questioned whether there was any real difference between the “reasoned choice” standard and the “rational understanding” of the proceedings standard.⁴⁸ The Court then held that even if there was, “we reject the notion that competence to plead guilty or to waive the right to counsel must be measured by a standard that is higher than (or even different from) the *Dusky* standard.”⁴⁹ The Court noted that while defendants who stand trial and defendants who plead guilty make important decisions after charges are brought, there was no basis for demanding a higher level of competence for those who choose to plead guilty.⁵⁰

¶22 In ruling that the standard is the same for permitting *pro se* defendants either to plead guilty or to go to trial, the Court first recalled the language in *Faretta* to the effect that judges must make sure the defendant requesting to self-represent must do so “competently and intelligently.”⁵¹ “Technical legal knowledge” was said to be “not relevant” to the issue of competence to waive the right to counsel.⁵²

¶23 Then, the Court returned to the autonomy rationale of *Faretta*, where it “emphasized that although the defendant ‘may conduct his own defense ultimately to his own detriment, his choice must be honored.’”⁵³ The Court added that, in addition to determining whether a defendant is fit to stand trial, courts must also determine that the waiver of constitutional rights (i.e. rights to counsel, trial, privilege against self-incrimination, and confrontation of accusers) is knowing and voluntary: “In this sense there is a ‘heightened’ standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*.”⁵⁴ In other words, more constitutional

⁴³ *Id.* at 393.

⁴⁴ *Id.*

⁴⁵ *Id.* at 394 (quoting *Moran v. Godinez*, 972 F.2d 263, 267 (9th Cir. 1992), *rev’d*, 509 U.S. 389 (1993)).

⁴⁶ *Moran*, 972 F.2d at 265.

⁴⁷ *Godinez*, 509 U.S. at 396.

⁴⁸ *Id.* at 397–98.

⁴⁹ *Id.* at 398.

⁵⁰ *Id.* at 399.

⁵¹ *Id.* at 399–400.

⁵² *Id.*

⁵³ *Id.* at 399–400 (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)). The Court stated, that “while ‘[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel’s guidance than by their own unskilled efforts,’ . . . a criminal defendant’s ability to represent himself has no bearing upon his competence to *choose* self-representation.” *Id.* (citation omitted).

⁵⁴ *Id.* at 400–01; *see* *Shafer v. Bowersox*, 329 F.3d 637, 650 (8th Cir. 2003) (“The [State] supreme court declined to consider evidence of Shafer’s mental condition before concluding that his waivers and pleas had

rights available at trial are being lost as a consequence of a waiver of the right to trial (through a guilty plea) than when the defendant requests to proceed to trial *pro se*, and only loses the right to assistance of counsel.

¶24

Joined by Justice Stevens, Justice Blackmun dissented, arguing that prior cases had indeed noted that competency must be determined in the context of the nature of the proceedings, which would include the defendant's personal competence (or capacity) for self-representation.⁵⁵ Their concern was the fact that the defendant in *Godinez* discharged counsel for the purpose of proceeding *pro se*, so that the existing test for competency—measured by a defendant's ability to consult with counsel and assist in preparing his defense, under *Dusky*—was neither relevant nor reliable:

The question is no longer whether the defendant can proceed with an attorney, but whether he can proceed alone and uncounseled. I do not believe we place an excessive burden upon a trial court requiring it to conduct a specific inquiry into that at the juncture when a defendant whose competency already has been questioned seeks to waive counsel and represent himself.⁵⁶

¶25

Justice Blackmun went on to criticize the majority's reliance upon *Faretta* by first pointing out the difference in the characteristics of the defendants in *Faretta* and *Godinez*. In the former, the defendant was "literate, competent, and understanding" and the record showed "he was voluntarily exercising his informed free will."⁵⁷ In contrast, in *Godinez*, the trial court had "grave doubts" regarding defendant Moran's "ability to discharge counsel and represent himself."⁵⁸ A defendant "who is utterly incapable of conducting his own defense cannot be considered to be 'competent' to make such a

been knowing, voluntary, and intelligent because it believed that reference to that condition was 'tantamount to a claim that he was not competent to waive counsel.')

The *Godinez* Court also noted that, "[w]hile psychiatrists and scholars may find it useful to classify the various kinds and degrees of competence, and while States are free to adopt competency standards that are more elaborate than the *Dusky* formulation, the Due Process Clause does not impose these additional requirements." *Godinez*, 509 U.S. at 402; see *Medina v. California*, 505 U.S. 437, 446–53 (1992) (state's allocation of burden of proof to defendant and requiring that unfitness be established by a preponderance of the evidence was held not to violate Due Process Clause).

⁵⁵ *Godinez*, 509 U.S. at 413. See *Drope v. Missouri*, 420 U.S. 162, 176 (1975) ("[A] defendant's mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies."); *Rees v. Peyton*, 384 U.S. 312, 314 (1966) (stating trial court should "determine [petitioner's] mental competence in the present posture of things"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (holding that the "person charged by a State with criminal offense who is committed solely on account of their incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that they will attain that capacity in the foreseeable future").

⁵⁶ *Godinez*, 509 U.S. at 413. "[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 monolithic approach to competency is true to neither life nor the law. Competency for one purpose does not necessarily translate to competency for another purpose." *Id.* (emphasis added).

⁵⁷ *Id.* at 416 (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)).

⁵⁸ *Id.*

decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered ‘competent’ to make such a choice.”⁵⁹

¶26 Justice Blackmun’s dissent concludes with the following declaration:

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 inquiry, the self-destructive “choice” of a person who was so deeply medicated and who might well have been mentally ill. I dissent.⁶⁰

¶27 Thus, in both *Faretta* and *Godinez*, the majority found that the defendants’ autonomy and dignity was inherent in the right to self-representation and trumped the state’s interest in ensuring what it considered a fair trial. This position *was then reversed in Indiana v. Edwards*. The majority in *Edwards* in effect adopted Justice Burger’s dissenting opinion in *Faretta*, in which Justice Burger had warned that recognizing a constitutional right to self-representation could result in *individuals with various levels of incompetence* (however defined) making a spectacle of themselves and *giving* the proceedings an appearance of unfairness.⁶¹ The *Edwards* court concluded that a state may insist upon representation by counsel for those competent to stand trial under *Dusky*, “but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.”⁶²

⁵⁹ *Id.* The dissenters pointed to the fact that Moran had attempted suicide after his arrest. He was being administered four different prescription medications with their accompanying side effects when he made the decision to plead guilty and waive submission of evidence in mitigation. *Id.* at 416–17. By doing so, he “essentially volunteered himself for execution.” *Id.* at 417. Justice Blackmun found that, “Upon this evidence, there can be no doubt that the trial judge should have conducted another competency evaluation to determine Moran’s capacity to waive the right to counsel and represent himself, instead of relying upon the psychiatrists’ reports that he was able to stand trial with the assistance of counsel.” *Id.* at 417; *see Riggins v. Nevada*, 504 U.S. 127, 142, (1992) (Kennedy, J., concurring) (“[Drugs may] compromise the right of a medicated criminal defendant to receive a fair trial . . . by rendering him unable or unwilling to assist counsel.”).

⁶⁰ *Id.* at 417. Following the majority opinion in *Godinez*, but before the 2008 decision in *Indiana v. Edwards*, state and federal courts considered a number of cases involving competent *pro se* defendants with varying mental conditions and abilities, not all of which necessitated imposition of unwanted counsel. *See, e.g., People v. Redd*, where the Illinois Supreme Court stated:

We also reject defendant’s allegation that the numerous rambling motions he filed during the three year pretrial period should have caused the court to question his mental competency to waive counsel. Our review of the record indicates that defendant’s motions arguably exhibit a lack of comprehensive knowledge of the law and principles of criminal procedure. Nonetheless, neither the written motions nor the record of defendant’s defense of the motions demonstrates irrationality. Defendant’s ability to articulate his case and to precisely motion the court are merely measures of his proficiency or lack thereof as a lawyer. His ability to represent himself is not indicative of his competence to choose self-representation.

670 N.E.2d 583, 594 (Ill. 1996).

⁶¹ *Indiana v. Edwards*, 554 U.S. 164, 176–77 (2008).

⁶² *Id.* at 178. One commentator notes that the Supreme Court in *Edwards* failed to establish any standards to guide judges in future cases, thus making the matter solely one of judicial discretion. Alexander B. Feinberg, *Casnote: Constitutional Law—Competency and Self-representation—Constitution Permits States to Limit a Defendant’s Self-representation Right by Insisting Upon Representation by Counsel for*

¶28 The Court made two additional important rulings in *Edwards*. First, it expressly rejected as the standard for competence to proceed *pro se* proposed by the State of Indiana. Indiana’s proposal was that there be no right to self-representation where a defendant “cannot communicate coherently with the court or a jury.”⁶³ The majority was “sufficiently uncertain” as to how that standard would work in practice.⁶⁴

¶29 Second, the Court rejected the State’s call for a reversal of *Faretta*:

We recognize that judges have sometimes expressed concern that *Faretta*, contrary to its intent, has led to trials that are unfair. . . . But recent empirical research suggests that such instances are not common. . . . [I]nstances in which the trial’s fairness is in doubt may well be concentrated in the 20 percent or so of self-representation cases where the mental competence of the defendant is also at issue. . . . If so, today’s opinion, assuring trial judges the authority to deal appropriately with cases in the latter category, may well alleviate those fair trial concerns.⁶⁵

¶30 Justice Scalia, joined by Justice Thomas, dissented. After citing *Faretta* and *Godinez*, Scalia wrote:

The Court today concludes that a state may nonetheless strip a mentally ill defendant of the right to represent himself when that would be fairer. In my view, the Constitution does not permit a State to substitute its own perception of fairness for the defendant’s right to make his own case before the jury—a specific right long understood as essential to a fair trial.⁶⁶

¶31 Scalia noted that defendant Edwards’ condition had fluctuated over the years, sometimes improving with antipsychotic medication, during which times he was found competent to stand trial.⁶⁷ While he filed certain incoherent pleadings, others that he filed were quite intelligible; also, his courtroom arguments were more intelligible than his written pleadings.⁶⁸ Before his first trial, Edwards also answered most of the trial judge’s questioning about state law and trial procedures when the judge was considering his first

Defendant Lacking Mental Competency, *Indiana v. Edwards*, 128 S. Ct. 2379 (2008), 39. CUMB. L. REV. 567, 579 (2009).

⁶³ *Edwards*, 554 U.S. at 178. Interestingly, during oral argument, Justice Scalia added some levity and generated laughter by pointing out that, “I sometimes think that the lawyers cannot communicate coherently.” Transcript of Oral Argument at 7, *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-208.pdf; Oral Argument, *Indiana v. Edwards*, 554 U.S. 164 (2008) (No. 07-208), available at http://www.oyez.org/cases/2000-2009/2007/2007_07_208.

⁶⁴ *Edwards*, 554 U.S. at 178.

⁶⁵ *Id.* at 178–79 (emphasis added) (citations omitted). Scalia cites Professor Hashimoto, who notes that 0.3–0.5 percent of all state felony defendants who chose to self-represent achieved a higher acquittal rate than their represented counterparts. *Id.* at 178 (citing Erica Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro se Felony Defendant*, 85 N.C. L. REV. 423 (2007)).

⁶⁶ *Edwards*, 554 U.S. at 180 (Scalia, J., dissenting).

⁶⁷ *Id.*

⁶⁸ *Id.* at 181.

Faretta request.⁶⁹ The request was denied “because Edwards acknowledged he would need a continuance.”⁷⁰ The trial judge again denied his request to proceed *pro se* before his second trial, this time because Edwards was not competent to represent himself, without explaining precisely what abilities Edwards lacked.⁷¹

¶32 Scalia reviewed the multiple rationales of *Faretta*, i.e., the long history of the right of self-representation, the basic principle that counsel cannot under our system of justice be forced upon a defendant, and the principle that courts must honor an individual’s choice of self-representation as a matter of “respect for the individual which is the lifeblood of the law.”⁷² He reminded the majority that *Godinez* was decided in part on its acknowledgement in *Faretta* that the Sixth Amendment protected the defendant’s right “to conduct a defense to his disadvantage.”⁷³

¶33 Scalia argued that a State’s view of fairness or other values does not permit it to strip a defendant’s constitutional right to self-representation.⁷⁴ The question, he noted, is not whether one constitutional right must yield to another in case of conflict.⁷⁵ While the purpose of the Sixth Amendment is to ensure a fair trial, it does not follow that constitutional rights can be disregarded as “long as the trial is, on the whole, fair.”⁷⁶ Scalia reminded the majority that the “dignity” of the individual *Faretta* intended to protect “is *not* the defendant’s making a fool of himself by presenting an amateurish or even incoherent defense. Rather, 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.”⁷⁷ He cited language in *McKaskle v. Wiggins* to the effect that a *pro se* defendant “must be allowed to control the organization and content of his own defense, to make

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 181–82.

⁷² *Id.* at 182–83 (quoting *Faretta v. California*, 422 U.S. 806, 834 (1975)). Scalia remarked that:

What the Constitution requires is not that a State’s case be subject to the most rigorous adversarial testing possible—after all, it permits a defendant to eliminate *all* adversarial testing by pleading guilty. What the Constitution requires is that a defendant be given the right to challenge the State’s case against him using the arguments *he* sees fit.

Id. at 184.

⁷³ *Id.* at 184 (citing *Godinez v. Moran*, 509 U.S. 389, 399–400 (1993)).

⁷⁴ *Id.* at 185.

⁷⁵ *Id.* at 184–85.

⁷⁶ *Id.* at 185 (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145 (2006) (where defendant was denied counsel of his choice, his Sixth Amendment right was violated)); see *Crawford v. Washington*, 541 U.S. 36 (2004) (states may not provide for uncontroverted testimony to be used at trial so long as it is reliable). At oral argument, Scalia addressed the claim that observers of a *pro se* mentally-ill defendant’s trial would not see it as being fair by stating:

How fair does a trial seem to the public where the defendant stands up and says, Your Honor, I want to represent myself? I do not want this attorney. I want to defend myself. And the judge said, sit down, we have a psychological evaluation of you. You can’t represent yourself. How fair does that seem to the public?

Transcript of Oral Argument, *supra* note 63, at 57–58.

Justice Scalia noted that the only ground upon which constitutional trial rights have been limited in the past is the case of disruptive defendants, which was not relevant to Edwards because he “was not even allowed to begin to represent himself, and because he was respectful and compliant and did not provide a basis to conclude a trial could not have gone forward had he been allowed to press his own claims.” *Edwards*, 554 U.S. at 185–86.

⁷⁷ *Edwards*, 554 U.S. at 186–87 (Scalia, J., dissenting).

motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial.”⁷⁸

¶34 Justice Scalia further noted that, while the right of self-representation is not expressly contained in the Constitution, it provides the defendant—not his attorney—the right to call witnesses, the right to confront witnesses against him, and the right to the assistance of counsel in “*his defence*.”⁷⁹ Here, Edwards wanted to present a defense of self-defense, while his attorney wanted to present a defense focusing on lack of intent. For the State to deprive him of his right to make his own defense simply because his court-appointed attorney makes a different legal argument is, quoting Justice Frankfurter, to “imprison a man in his privileges and call it the Constitution.”⁸⁰

¶35 Continuing his attack on the majority’s opinion, Scalia challenged the notion that the public’s perception of fairness should trump the defendant’s choice to represent himself:

A further purpose that the Court finds is advanced by denial of the right of self-representation is the purpose of assuring that trials ‘appear fair to all who observe them.’ . . . To my knowledge we have never denied a defendant a right simply on the ground that it would make his trial appear less ‘fair’ to outside observers, and I would not inaugurate that principle here. But were I to do so, I would not apply it to deny a defendant the right to represent himself when he knowingly and voluntarily waives counsel. When Edwards stood to say that ‘I have a defense that I would like to represent or present to the Judge,’ . . . it seems to me the epitome of both actual and apparent unfairness for the judge to say, I have heard ‘your desire to proceed by yourself and I’ve denied your request, so your attorney will speak for you from now on.’⁸¹

¶36 Lastly, Justice Scalia concluded by calling the majority’s decision “extraordinarily vague” insofar as it permits a lack of mental competence under some circumstances to form a basis for denial of the right of self-representation: “[T]he indeterminacy makes a bad holding worse. Once the right of self-representation for the mentally ill is a sometime thing, trial judges will have every incentive to make their lives easier—to avoid the painful necessity of deciphering occasional pleadings . . . —by appointing knowledgeable and literate counsel.”⁸²

¶37 Significantly, one of Justice Scalia’s comments during oral argument in *Edwards* addressed the implications of the State of Indiana’s argument that if the State can deprive mentally ill persons of their right of self-representation because of their inability to represent themselves, then the same can be said of most *pro se* defendants:

But surely his total ignorance of all the trial rules, the hearsay rule and the other details of conducting a trial, is a great disadvantage. But we allow him to toss that away so long as he knows he’s tossing it away. . . .

⁷⁸ *Id.* at 186 (citing *McKaskle v. Wiggins*, 465 U.S. 168, 174 (1984)).

⁷⁹ *Id.* at 188 (quoting U.S. CONST. amend. VI).

⁸⁰ *Id.* at 189 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942)).

⁸¹ *Id.* at 187–88.

⁸² *Id.* at 189.

Why can't we say the same thing about his supposed inability to communicate effectively, unless and until he turns the trial into a farce?⁸³

¶38 To summarize, the dissenters in *Faretta*, in opposing recognition of the constitutional right to self-representation, invoked (1) the potential harm to the integrity of the justice system; (2) the loss of public confidence in the courts from unjust results that might obtain; and (3) the state's obligation to produce results that are just and appear so. In *Godinez*, the dissenters, in arguing that gray-area defendants should not be permitted to plead guilty *pro se*, argued that allowing them to do so contravenes the "fundamental principles of fairness" and "impugns the integrity of our criminal justice system." These views recently became those of the majority in *Edwards*, which justified its denial of the right to self-representation for mentally challenged defendants on the same rationales: (1) the potential "spectacle" of a "gray area" defendant defending himself; (2) the potential of improper convictions; and (3) the importance of the state's interest in providing a trial that is fair in both appearance and in fact. Justice Scalia, joined by Justice Clarence Thomas, staunchly advocated for the rights of mentally challenged *pro se* defendants. They argued that personal dignity and autonomy trump the state's interests in ensuring a fair trial and preserving the court's legitimacy.

C. The American Same-Rules and No-Assistance Doctrines

¶39 Individuals without training face significant obstacles to successfully navigating the American legal system. No one disagrees that the system is difficult to navigate, even for attorneys. But the barriers facing gray-area defendants, like other *pro se* litigants, go beyond lack of legal knowledge and skill. Two additional barriers were created by the U.S. Supreme Court. While the Court is commonly viewed as a court of last resort, correcting injustices of the legal system and promoting access to justice, it also established the two greatest access-to-justice barriers for *pro se* defendants: the same-rules and the no-assistance doctrines.

¶40 The U.S. Supreme Court's 1975 decision in *Faretta v. California* is the source of the same-rules doctrine. The Court noted that the right to self-representation did not mean a *pro se* defendant would be allowed to disrupt the court, nor did it provide "a license not to comply with relevant rules of procedural and substantive law."⁸⁴ The latter statement, as well as the Court's holding that the defendant's "technical legal knowledge" was not relevant to his knowing exercise of the right,⁸⁵ signaled that courts could hold *pro se* litigants to the same laws, rules, and practice standards as attorneys (the same-rules doctrine).

⁸³ Transcript of Oral Argument, *supra* note 63, at 10–11.

⁸⁴ *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). Interestingly, the majority uses dignity in two senses on the same page: (1) dignity in the older usage of the social rank or importance of the court as an institution, i.e., the "dignity of the courtroom," and (2) in the sense of the right of persons before the court to the individual dignity that is at the foundation of the right to self-representation, i.e., "that respect for the individual which is the lifeblood of the law" *Id.* at 834 n.46 (quoting *Illinois v. Allen*, 397 U.S. 337 350–51 (1970) (Brennan, J., concurring)); see discussion *infra* Part III.A.

⁸⁵ *Id.* at 836.

¶41 Thereafter, in *McNeil v. United States*,⁸⁶ the Court extended the same-rules doctrine to civil cases. The Court affirmed the dismissal of a prisoner’s civil action under the Federal Tort Claims Act for failure to exhaust administrative remedies, where he had first filed suit, and four months later initiated the required administrative remedy.⁸⁷ The Court proclaimed it had “never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.”⁸⁸

¶42 Then, in *McKaskle v. Wiggins*,⁸⁹ the Court upheld a trial judge’s power to impose standby counsel to assist the *pro se* defendant in a robbery case.⁹⁰ The Court reiterated the same-rules doctrine first announced in *Faretta* and held that “[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.”⁹¹

¶43 The aforementioned precedents, which make no distinction between civil and criminal cases, form the basis of numerous state and federal court decisions holding *pro se* defendants to the same laws and rules that must be followed by attorneys,⁹² and refusing to provide them with judicial assistance.⁹³ Liberality and solicitude, however,

⁸⁶ *McNeil v. United States*, 508 U.S. 106 (1993).

⁸⁷ *Id.* at 108.

⁸⁸ *Id.* at 113; *see* *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980) (affirming a district court’s dismissal of a race discrimination complaint because of a late filing of an EEOC charge which was a prerequisite to the suit).

⁸⁹ *McKaskle v. Wiggins*, 465 U.S. 168 (1984).

⁹⁰ *Id.* at 176.

⁹¹ *Id.* at 183–84.

⁹² Many federal decisions uphold the same-rules doctrine. *See, e.g.*, *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (“[T]his court has repeatedly insisted that *pro se* parties follow the same rules of procedure that govern other litigants.”); *United States v. Merrill*, 746 F.2d 458, 465 (9th Cir. 1984) (“A *pro se* defendant is subject to the same rules of procedure and evidence as defendants who are represented by counsel.”); *Birl v. Estelle*, 660 F.2d 592, 593 (5th Cir.1981) (“The right of self-representation does not exempt a party from compliance with relevant rules of procedural and substantive law.”).

Many state cases uphold the same-rules doctrine. *See, e.g.*, *People v. Romero*, 694 P.2d 1256, 1266 (Colo. 1985) (“By electing to represent himself the defendant subjected himself to the same rules, procedures, and substantive law applicable to a licensed attorney.”); *Grandison v. State*, 670 A.2d 398, 408 (Md. 1995) (“We note preliminarily that we have long held that a defendant in a criminal case who chooses to represent himself is subject to the same rules regarding reviewability and waiver of questions not raised at trial as one who is represented by counsel.”); *Commonwealth v. Abu-Jamal*, 555 A.2d 846, 852 (Pa. 1989), *cert. denied*, 498 U.S. 881 (1990) (noting that a *pro se* defendant “subject to the same rules of procedure as is a counseled defendant”).

⁹³ *Martinez v. Court of Appeal of California*, 528 U.S. 152, 162 (2000) (“[T]he trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal ‘chores’ for the defendant that counsel would normally carry out.”); *Pliier v. Ford*, 542 U.S. 225, 231 (2004) (“[D]istrict judges have no obligation to act as counsel or paralegal to *pro se* litigants.”); *United States v. Turner*, 287 F.3d 980, 984 (10th Cir. 2002) (noting that the trial court “explained to Mr. Turner that he would be required to follow court rules without any assistance from the judge. We are satisfied that the district court provided Mr. Turner with enough information to make an informed, knowing, and thus legally intelligent decision whether to waive his right to counsel.”); *United States v. Hayes*, 231 F.3d 1132, 1139 n.4 (9th Cir. 2000) (“[T]he defendant will have to abide by the same rules as lawyers and will get no assistance from the judge”) (quoting CALIFORNIA JUDGES BENCHBOOK: CRIMINAL PRETRIAL PROCEEDINGS (1991)).

are sometimes required when considering the merits of *pro se* pleadings⁹⁴ and in overlooking some technical defaults in areas of civil procedural complexity.⁹⁵ Judges may ethically provide “reasonable accommodations” to *pro se* defendants (or *pro se* litigants, generally) at their discretion.⁹⁶ And, while some decisions establish a few limited, affirmative judicial duties to assist, such as providing civil *pro se* litigants “fair notice” of the complex rules for summary judgment,⁹⁷ and identifying and assisting in service of summons upon the proper adverse parties,⁹⁸ no court has recognized a general judicial duty of assistance to *pro se* defendants or litigants.⁹⁹

⁹⁴ See *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (“[W]e hold [*pro se* pleadings] to less stringent standards than formal pleadings drafted by lawyers . . .”).

⁹⁵ See, e.g., *Breck v. Ulmer*, 745 P.2d 66, 75 (Alaska 1987) (“[T]he trial judge should inform a *pro se* litigant of the proper procedure for the action he or she is obviously attempting to accomplish . . .”); *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) (noting that *pro se* litigant “should be accorded every consideration that may reasonably be indulged”) (quoting *Heathman v. Hatch*, 372 P.2d , 990, 991 (1962)); *Brooks v. Tradesmen Int’l, Inc.*, 883 So. 2d 444, 447 (La. Ct. App. 2004) (noting that *pro se* workers’ compensation claimant “should be allotted more latitude than those plaintiffs represented by counsel”); *City of New Haven v. Bonner*, 863 A.2d 680, 685 (Conn. 2005) (“[I]t is the established policy of the Connecticut courts to be solicitous of *pro se* litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the *pro se* party.”) (quoting *Vanguard Engineering, Inc. v. Anderson*, 848 A.2d 545, 548 (2004)).

⁹⁶ See MODEL CODE OF JUDICIAL CONDUCT, R. 2.2, cmt. 4 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/judicialethics/ABA_MCJC_approved.authcheckdam.pdf (“[I]t is not a violation of this Rule [requiring judges to act “fairly and impartially”] for a judge to make reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”). Only one reported judicial ethics opinion authorizes judicial assistance, albeit in default cases only. The Indiana Commission on Judicial Qualifications states in an ethics opinion that:

[N]ormally a judge should not “try a case” for a litigant who is wholly failing to accomplish the task. However, on the occasion where a[n] [unrepresented] citizen has the simplest kind of matter [e.g., uncontested divorce, name change petition] to bring before the court, with no adversarial context, and no indication of any untoward motive or disrespect for the court, the judge has a duty and responsibility to not simply turn that citizen away on the basis of a minor failure to establish every pertinent detail. A judge’s ethical obligation to treat all litigants fairly obligates the judge to ensure that a *pro se* litigant in a non-adversarial setting is not denied the relief sought only on the basis of minor or easily established deficiency in the litigant’s presentation or pleadings.

Indiana Commission on Judicial Qualifications, Adv. Op. 1-97, available at <http://www.in.gov/judiciary/jud-qual/opinions.html> (follow “1-97” hyperlink).

⁹⁷ See Joseph M. McLaughlin, Note, *An Extension of the Right of Access: The Pro Se Litigant's Right to Notification of the Requirements of the Summary Judgment Rule*, 55 *FORDHAM L. REV.* 1109 (1987). At least six of the twelve federal circuits require the trial judge to provide *pro se* litigants with some form of fair notice of Rule 56 requirements. See *Rand v. Rowland*, 154 F. 3d 952, 960–61 (9th Cir. 1998) (*en banc*); *Graham v. Lewinski*, 848 F. 2d 342, 344 (2d Cir. 1988); *Klinge v. Elkenberry*, 849 F.2d 409, 411 (9th Cir. 1988); *United States v. One Colt Python .357 Caliber Revolver*, 845 F.2d 287, 289 (11th Cir. 1988); *Jaxon v. Circle K Corp.*, 773 F.2d 1138, 1140 (10th Cir. 1985); *Lewis v. Faulkner*, 689 F.2d 100, 102 (7th Cir. 1982); *Roseboro v. Garrison*, 528 F.2d 309, 310 (4th Cir. 1975). *But see* *McDaniels v. McKinna*, 96 Fed. Appx. 575, 578 (10th Cir. 2004) (“There is no such requirement in this Circuit. While we construe pleadings filed by a *pro se* litigant liberally, the courts do not serve as the *pro se* litigant’s advocate, and *pro se* litigants are expected to follow the Federal Rules of Civil Procedure, as all litigants must.”). No such “fair notice” rule has been generally adopted by state courts.

⁹⁸ See, e.g., *Pettus v. Deputy Bartlett*, No. 04-CV-6260FE, 2004 WL 1429908 (W.D.N.Y. June 24, 2004) (holding that the court will assist *pro se* prisoner plaintiff by ordering prematurely-filed interrogatories to be served upon named defendants, along with non-frivolous complaint allegations); *Garrett v. Miller*, No. 02 C 5437, 2003 WL 1790954, at *3–4 (N.D. Ill. April 1, 2003) (holding that non-prisoner *pro se* plaintiff is entitled to assistance from the court in ascertaining proper defendants and obtaining proper service, by

¶44 Thus, the Court’s ruling in *Indiana v. Edwards* that unwanted counsel could be imposed upon a “gray area” defendant arose in the context of a set of previous decisions holding that human dignity and autonomy require constitutional recognition of the right to self-representation; that *pro se* litigants are required to comply with all legal rules; and that they are entitled to no assistance from the court. But, to ensure a fair trial, *and in the absence of any other alternative form of assistance or representation*, the *Edwards* Court held that “gray-area” defendants do not have an absolute right to represent themselves, and that the “spectacle” in their cases may be avoided by the imposition of counsel. This requires a closer examination of the notions of dignity, autonomy, and personhood before the law.

III. DIGNITY, AUTONOMY, AND PERSONHOOD BEFORE THE LAW

¶45 In this Part, I will describe the interrelationship between dignity, autonomy, and personhood before the law and individual freedom. The Framers of the Constitution and the authors of the Declaration of Independence sought to protect freedom of all kinds: The self-evident truth was that all men and women were created equal in dignity, the dignity that implies autonomy and self-government and certain unalienable rights.¹⁰⁰ Most relevant here are (1) freedom of choice, (2) freedom as protection of basic rights relating to the justice system, and (3) freedom as moral constraint.¹⁰¹ While freedom has multiple meanings, all of its forms include the element of the absence of constraint or coercion:

[A] man is said to be free to the extent that he can choose his own goals or course of conduct, can choose between alternatives available to him, and is not compelled to act as he would not himself choose to act, or prevented from acting as he would otherwise choose to act, by the will of another man, of the state, or of any other authority.¹⁰²

¶46 The first refers to the relationship between an actor and a series of potential actions.¹⁰³ The second refers to the classical liberal thought of Locke and others who advocated that the government ought to restrict a person’s freedom only when necessary

ordering attorneys for defendants to provide plaintiff with their addresses); *Valentin v. Dinkins*, 121 F.3d 72, 76 (2d Cir. 1998) (noting that the district court must assist *pro se* prisoners with their inquiry into the identities of unknown defendants); *Meckley v. United States*, 1992 U.S. App. LEXIS 9033, *4 n.3 (4th Cir. 1992) (“[T]he district court has some responsibility to assist pro se litigants who are unable to identify the proper defendant.”).

⁹⁹ However, Canadian law imposes a duty of reasonable judicial assistance to *pro se* civil litigants and criminal case defendants. Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT’L L. 601, 605 (2009).

¹⁰⁰ Louis Henkin, *Human Dignity and Constitutional Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES* 210, 213 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter *Constitutional Rights*].

¹⁰¹ Felix E. Oppenheim, *Freedom*, in 5 INT’L ENCYCLOPEDIA OF THE SOC. SCIS. 554, 558–559 (David L. Sills ed. 1968).

¹⁰² P. H. Partridge, 3 *THE ENCYCLOPEDIA OF PHILOSOPHY* 221, 222 (Paul Edwards ed., 1967) [hereinafter Partridge] (defining “freedom”).

¹⁰³ See Partridge, *supra* note 102, at 222.

to protect another's basic rights.¹⁰⁴ The third refers to valuational meanings of freedom and its defining expression: "[A] person is often said to be free, not if he acts freely or develops his capacities, but if he realizes his 'best' or 'essential' self."¹⁰⁵

¶47 These concepts arose during the Enlightenment in the 17th and 18th centuries and became the cornerstone of modern liberalism and our constitutional democracy.¹⁰⁶ Inexorably linked to these concepts are the concepts of human dignity, autonomy, and personhood before the law.

A. *Merging and Evolving Meanings*

¶48 The Supreme Court's decision in *Faretta v. California* and its progeny contain repeated references to the concepts of dignity, autonomy, and personhood before the law as the sources and justifications for the right to self-representation. The meaning of these terms has evolved over time, and the shift in usage of dignity in particular is reflected in North American jurisprudence. Courts sometimes use the terms dignity, autonomy, and personhood interchangeably when resolving issues relating to self-representation, but these terms do not carry identical meanings.

¶49 Dignity originally referred to a person's social rank.¹⁰⁷ This was the meaning of the term as used in early American¹⁰⁸ and Canadian¹⁰⁹ decisions. The word dignity in its modern meaning has its origins in the Enlightenment. The word then came to have other meanings, such as political and economic independence,¹¹⁰ the intrinsic worth of human

¹⁰⁴ See Oppenheim, *supra* note 101, at 556–57.

¹⁰⁵ *Id.* at 558.

¹⁰⁶ "From the idea of the sanctity of the individual human soul, there emerged the conception of the liberties of the individual and the rights of man." Milton Katz, *Government Under Law and the Individual* 2 (1957), reprinted in J. C. Smith & David N. Weisstub, *THE WESTERN IDEA OF LAW* 465, 465 (1983). As Justice Brandeis put it, "What are American ideals? They are the development of the individual for his own and the common good; the development of the individual through liberty, and the attainment of the common good through democracy and social justice." LOUIS B. BRANDEIS, *American Ideals*, in *THE BRANDEIS GUIDE TO THE MODERN WORLD* 3, 3–4 (Alfred Lief ed., 1941).

¹⁰⁷ Michael J. Meyer, *Introduction*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AM. VALUES* 1, 4–5 (Michael J. Meyer & William A. Parent eds., 1992) (noting that in their famous debate regarding the French Revolution, Edmund Burke used dignity to refer to the dignity of the nobility and the King, whereas Thomas Paine used the word to refer to the "natural dignity of man," a status enjoyed by all people).

¹⁰⁸ See, e.g., *Bell v. Hearne*, 60 U.S. 252, 256 (1856) (noting that English King's great seal is the "emblem of his royal authority and dignity"); *Mississippi v. Johnson*, 71 U.S. 475, 485 (1866) ("[Respondent Johnson] is bound to take care of the dignity, the rights, and the prerogatives that belong to him as President.").

¹⁰⁹ See, e.g., *Re Holman and Rea* [1912], 27 O.L.R. 432 (referring to "judicial dignity"); *In re Queen's Counsel*, [1896] 13 O.L.R. 792 (referring to "sergeants-at-law, judges, knights, baronets, and other superior titles of dignity and honour"); *Regina v. Howland*, [1887] O.J. No. 17, 14 O.A.R. 184, at ¶ 29 (administration of justice "is entitled to be surrounded with a dignity appropriate to its place in the constitution"); *McDougall v. Campbell*, [1877] O.J. No. 100, 41 U.C.R. 332, at ¶ 49 (referring to lawyers' "dignity or from the honour of their profession"); see generally R. James Fyfe, *Dignity as Theory: Competing Conceptions of Human Dignity at the Supreme Court of Canada*, 70 SASK. L. REV. 1 (2007) [hereinafter *Dignity as Theory*] (discussing the concept of human dignity as it is used in Canadian law).

¹¹⁰ William A. Parent, *Constitutional Values and Human Dignity*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AM. VALUES* 47, 50–51 (Michael J. Meyer & William A. Parent eds., 1992) [hereinafter *Constitutional Values*].

beings,¹¹¹ and freedom from (mis)treatment such as racial segregation, torture, or other human injustices.¹¹² These additional meanings were a product of the influential philosophical thought of Immanuel Kant and the Enlightenment rejection of hierarchical valuations of human worth.¹¹³ This Enlightenment vision of dignity was “tied inextricably to the human capacity and inclination for self-government.”¹¹⁴

¶50

Scholars suggest several ways of organizing the multiple meanings of dignity.¹¹⁵ The modern essence of dignity of the person supervenes autonomy,¹¹⁶ a subject of great interest to philosophers since the Enlightenment.¹¹⁷ It has been defined as “the capacity for self-government”¹¹⁸ in political philosophy, but it has additional meanings in Kantian moral theory and applied ethics.

¹¹¹ *Furman v. Georgia*, 408 U.S. 238, 270 (1972) (Brennan, J., concurring) (arguing a “cruel and unusual” punishment is one that does not comport with human dignity).

¹¹² *Constitutional Values*, *supra* note 110, at 59. Parent’s argument is that “moral dignity” underlies all meanings of dignity, and means that “people suffer a grievous personal wrong when they are devalued for irrelevant reasons and that we have a valid moral claim, therefore, not to be disparaged.” *Id.* at 63. This conception of dignity “clarifies the important and intimate conceptual relation between the ideas of worth and respect. It focuses attention on the significant connection between preserving one’s worth and condemning unjust personal debasement.” *Id.* at 64.

¹¹³ Meyer, *supra* note 107, at 7.

¹¹⁴ *Id.*

¹¹⁵ Alan Gewirth suggests an “empirical” dignity in which dignity as adjective refers to a kind of “gravity or decorum,” where someone can be said to have “behaved with great dignity,” and “inherent” dignity, a kind of “intrinsic worth that belongs equally to all human beings” as such, and the “familiar and plausible” definition of dignity as the recognizable capacity to assert rights and make moral claims. Alan Gewirth, *Human Dignity as the Basis of Rights*, in *THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AM. VALUES* 10, 11–13 (Michael J. Meyer & William A. Parent eds., 1992). Professor Brownsword argues for “dignity-as-liberty” and “dignity-as-constraint,” where the former refers to those forms of dignity which relate to the view that human beings have inherent value and inalienable human rights, such as human autonomy and the freedom to make important life choices, and the latter as the dignity that is affected by governmental constraints because they relate to the community’s idea of civilized life and what is distinctly valued about human existence, such as the legally constrained activities of human organ commerce, prostitution, commercial surrogacy, and gene patenting. Roger Brownsword, *Bioethics Today, Bioethics Tomorrow: Stem Cell Research and the “Dignitarian Alliance,”* 17 *NOTRE DAME. J.L. ETHICS & PUB. POL’Y* 15 (2003); Roger Brownsword, *An Interest in Human Dignity as the Basis for Genomic Torts*, 42 *WASHBURN L.J.* 413 (2003). On this account, such activities compromise the actor’s dignity. Also, Professor Fyfe argues for a new conception of dignity, one that protects the vulnerability of individuals and groups, which he views as a preferred purpose of § 3 of the Canadian *Charter of Rights and Freedoms*. *Dignity as Theory*, *supra* note 109, at 22. That section provides: “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” *Charter of Rights and Freedoms, Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c. 11 (U.K.)*.

¹¹⁶ Supervenience is a dependence relationship between properties or facts of one type, and properties or facts of another type. *OXFORD COMPANION TO PHILOSOPHY* 860 (Ted Honderich ed., 1995). Gewirth describes the relationship as residing between dignity and rights: “[A] person[] has human rights *because* they have inherent human dignity.” *GEWIRTH, SELF-FULFILLMENT* 163 (1998). Here the relevant concept of rights is normative, not positive. *Id.* at 168–69.

¹¹⁷ See generally LAWRENCE HAWORTH, *AUTONOMY: AN ESSAY IN PHILOSOPHICAL PSYCHOLOGY AND ETHICS* (1986) [hereinafter *AUTONOMY*]; GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988); RICHARD LINDLEY, *AUTONOMY* (1986); *FREE WILL* (Gary Watson ed., 2d ed. 2003).

¹¹⁸ SIMON BLACKBURN, *THE OXFORD DICTIONARY OF PHILOSOPHY* 31 (1994) (defining autonomy/heteronomy). Professor Allen Wood summarizes the principle this way:

¶51

Kant developed his understanding of autonomy in relation to the question of which acts have moral worth.¹¹⁹ He viewed autonomy as the ability to know what morality requires of us, which functions not as freedom to pursue our ends, but as the power of an agent to act on objective and universally valid rules of conduct, certified by reason alone.¹²⁰ This rests on the notion that the “dignity of mankind consists in this capacity of making general laws, [and] always provides that it is itself subject to these laws.”¹²¹ To Kant, autonomy is the “innate power of reason, the capacity of each individual to think and choose, not only to shape his or her own life but also to protect and promote reciprocal respect by enacting laws that can form the legal structure of life for everyone.”¹²² This power and responsibility is autonomy, and the power of autonomy is what gives every person moral authority and status against the “might of the state.”¹²³

The fundamental egalitarianism built into the idea of human dignity can be understood as the most direct basis of many modern political and legal conceptions and principles. These include that governmental authority ought properly to exist and be exercised only with the consent of the governed, that political power should be based on the rule of law, not the arbitrary power of individuals or groups, and that everyone falling under such a system should have the right to participate in the decisions that determine what these laws are and who should be granted the authority to enforce them.

Allen Wood, *Human Dignity, Right and the Realm of Ends*, in *Dignity Freedom and the Post-Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackermann* (Jaco Bernard-Naude, Francois du Bois & Drucilla Cornell eds., 2009).

¹¹⁹ “Stated simply, [Kant’s moral philosophy is that] our actions are of moral worth when we do the right thing because it is right, and not for what benefit we can get out of it. Despite his sometimes difficult technical vocabulary, Kant’s theory of ethics is simple, direct, and in many ways in accord with the ethics of common sense.” JOSEPH G. BRENNAN, *FOUNDATIONS OF MORAL OBLIGATION: A PRACTICAL GUIDE TO ETHICS AND MORALITY* 87–88 (1992).

¹²⁰ BLACKBURN, *supra* note 118, at 31. In contrast to autonomy, Kant posited “heteronomy,” which he defined as “the condition of acting on desires, which are not legislated by reason.” *Id.* A recent extension of the Kantian conception of autonomy in applied ethics is assisted suicide. It has been argued that to deprive one of life is to violate their autonomy, which implies that the moral prohibition against taking a life doesn’t apply to a case of someone wishing to end his or her life. Autonomy is also used in medical ethics as the basis for informed consent, and in political philosophy where the idea of persons as autonomous agents underlies liberal theories of justice. A new conception of autonomy, however, has begun to emerge, one involving more than the capacity to act on particular desires and choices: “It suggests a moral general capacity to be self-determining, to be in control of one’s own life.” *THE OXFORD COMPANION TO PHILOSOPHY* 70 (Ted Honderich ed., 1995). The self-representation movement may be, *inter alia*, a manifestation of this expanded view of autonomy.

¹²¹ Immanuel Kant, *Metaphysical Foundations of Morals*, in *THE PHILOSOPHY OF KANT: IMMANUEL KANT’S MORAL AND POLITICAL WRITINGS* 154, 206 (Carl J. Friedrich ed., 1993). Kant’s Universal Principle of Justice says that only those civil arrangements that allow the most freedom for everyone alike are just, which is stated in an imperative for citizens: “Behave in such a way that your choices are compatible with the greatest amount of external freedom for everyone.” ROGER J. SULLIVAN, *AN INTRODUCTION TO KANT’S ETHICS* 12 (1994) (internal quotation marks omitted). Kant’s categorical imperative is a declaration, with three formulations and a few paraphrases, which states the moral law to guide the autonomous person in a free society. *Id.* at 29. The general statement, or first variation, is: “I ought never to act in such a way that I could not also will that my maxim should be a universal law.” *Id.*

¹²² Sullivan, *supra* note 121, at 15. To Kant, the responsible man is “autonomous” in that he arrives at moral decisions which he expresses to himself in the form of imperatives; “he gives laws to himself, or is self-legislating.” ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* (1970), *reprinted in* SMITH & WEISSTUB, *supra* note 106, at 469, 470–71.

¹²³ *Id.* To Kant, a state can be based on (1) force, (2) arbitrary desires of a despot, or (3) on the rule of law based on respect for every citizen and on the rational ability of each person to take responsibility for

Man's responsibility for his own actions through self-legislation is a consequence of his capacity for choice.¹²⁴

¶152 The second important Kantian principle relevant to the state's treatment of a *pro se* defendant is his notion of respect-for-persons: "Man, and generally every rational being, exists as an end in himself, not merely as a means for the arbitrary use of this or that will; he must always be regarded as an end in all his actions whether aimed at himself or at other rational beings."¹²⁵ Kant's "second formulation" of his categorical imperative reflecting this idea is: "Act so as to treat man, in your own person as well as in that of anyone else, always as an end, never merely as a means."¹²⁶ To Kant, one of the worst forms of immorality is "to use a person as an instrument, while making the person believe that you are doing good to him or her for that person's own sweet sake."¹²⁷

¶153 Finally, "personhood" before the law is not a philosophical but a legal term.¹²⁸ It is one the Supreme Court has used on several occasions to refer to the amalgam of an individual's rights to both dignity and autonomy. As discussed later,¹²⁹ there are eight categories of constitutional claims that are linked to dignity and autonomy where the Court has either held that its decision is made to advance human dignity, or has rejected claims based on dignity concerns in favor of a compelling state interest.¹³⁰

¶154 Thus, we see how the philosophical conceptions of autonomy, the dignity of the individual, and freedom are closely intertwined, and how the Supreme Court in *Fareta* properly found that the right to self-representation was based on their foundation. Before turning to the application of these concepts to *Indiana v. Edwards*, I will briefly review the manner in which dignity and autonomy have been applied in American, Canadian, and international jurisprudence.

himself or herself. Sullivan, *supra* note 121, at 13. Kant's laws of "natural justice" prohibit behavior that would (1) infringe on the person of others, (2) on their status of equality, (3) on their ability to be self-determining, and (4) to function responsibly and with dignity, or (5) on anything to which they have title, such as property, and (6) legislating the obligation of parents to care for their children. *Id.* at 14.

¹²⁴ Wolff, *supra* note 122, at 471.

¹²⁵ Kant, *supra* note 121, at 194; see NORMAN, *supra* note 121, at 102.

¹²⁶ Kant, *supra* note 121, at 195.

¹²⁷ Brennan, *supra* note 119, at 92; see also AUTONOMY, *supra* note 117, at 1–8. Haworth's dichotomy is similar to the Professor Brownsord's dignity-as-liberty and dignity-as-restraint typology. Professor Haworth categorizes autonomy into descriptive and normative definitions; the former referring to, for example, personal characteristics including being in charge of one's life and self-control, and the latter referring to the case of one who complains of interference from others, whereby a claim of right to autonomy is made.

¹²⁸ The word "personhood" does not appear in standard philosophy dictionaries, which instead contains references to "persons," "personal identity," and "personalism," none of which relate directly to our discussion of dignity and autonomy. See, e.g. THE OXFORD COMPANION TO PHILOSOPHY 654–55 (Ted Honderich ed., 1995); Peter A. Angeles, DICTIONARY OF PHILOSOPHY 208 (1981).

¹²⁹ See *infra* notes 157–159 and accompanying text.

¹³⁰ Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 757–59 (2003) [hereinafter *Human Dignity*].

B. Legal Usage

1. American Usage

¶155 To the drafters of the Declaration of Independence and the Framers of the Constitution, “the self-evident truth was that all men and women were created equal in human dignity, the dignity that implies autonomy and self-government and certain unalienable rights.”¹³¹ The Framers designed the federal government’s structure on a political theory rooted in rights.¹³² The right to self-representation was not explicitly included in the text of the U.S. Constitution or in the Bill of Rights, but has been recognized since 1948 in a federal statute that provides: “In all courts of the United States, the parties may plead and conduct their own cases personally or by counsel”¹³³ The statutes and constitutions of thirty six states also provide for the right of self-representation.¹³⁴

¶156 Through the various interpretations of the due process clause that have sought to protect liberty, one finds the groundwork supporting individual autonomy.¹³⁵ Yet, while scholars assert that the use of human dignity in constitutional jurisprudence is “episodic and underdeveloped,”¹³⁶ the Supreme Court continues to embed dignity in its constitutional decisions.¹³⁷

¹³¹ *Constitutional Rights*, *supra* note 100, at 214.

¹³² See THE DECLARATION OF INDEPENDENCE preamble (U.S. 1776) (“WE hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed”).

¹³³ 28 U.S.C. § 1654 (2006).

¹³⁴ See *Faretta v. California*, 422 U.S. 806, 813 n. 10 (1975) (noting that states differ in their grant to an accused of the right to proceed *pro se* in person and by counsel and either by himself or herself, by counsel, or both). Some scholars argue that the Founders assumed rather than articulated rights based on their view that the Founders believed that the rights explicitly protected by contemporaneous state constitutions would serve as more important protections than the Constitution. *Constitutional Rights*, *supra* note 131, at 213–14.

¹³⁵ See, e.g., *Constitutional Rights*, *supra* note 131, at 221.

Liberty includes autonomy in intimate matters—to marry or not to marry, to practice contraception, to have an abortion

By interpreting the constitutional powers of Congress broadly, the courts have unleashed and encouraged Congress to expand individual rights and promote dignity—by the New Deal and the Great Society; by comprehensive civil rights legislation outlawing private as well as official invasions; by a Freedom of Information Act opening government to the scrutiny of the governed.

Id. at 223.

¹³⁶ Vickie C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Discourse*, 65 MONT. L. REV. 15, 17 (2004).

¹³⁷ See Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1926 (2003); see also *Human Dignity*, *supra* note 130, at 743, 789 (describing the Supreme Court’s use of dignity since the 1940’s as a “constitutional value” underlying, or giving meaning to, many constitutional rights and guarantees); Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 HOW. L. J. 145, 181 (1984) (noting that dignity has been used by the Supreme Court in the interpretation of the First, Fourth, Fifth, Sixth, Eighth, Ninth, and Fourteenth amendments).

[T]he concept of dignity is extremely broad. It has been used, perhaps as it always should, as an open-ended and dynamic constitutional precept that is often interdependent

¶57 Dignity in its modern sense was first used during and after World War II. In *Korematsu v. U.S.*, the Supreme Court upheld a wartime evacuation and internment order of persons of Japanese descent on the West Coast.¹³⁸ Writing in dissent, Justice Murphy described discriminatory government action against Japanese-Americans as “destroy[ing] the dignity of the individual.”¹³⁹

¶58 In the Supreme Court’s modern jurisprudence, human dignity generally trumps state interests where those interests involve Fourteenth Amendment liberty¹⁴⁰ and equal protection claims;¹⁴¹ the Fifth Amendment right to be free from self-incrimination;¹⁴² the Fourth Amendment right to be free from unreasonable searches and seizure;¹⁴³ and the Eighth Amendment right to be free from cruel and unusual punishment.¹⁴⁴ The Court,

with most of our constitutional rights and a fundamental belief in the inherent dignity and worth of every human person.

. . . Nevertheless, no organizing jurisprudence is yet discernible. . . . [I]t is ultimately intertwined with much of our juristic thinking about civil and political rights and freedom

Id. at 149. Canadian scholars have also found that the use of dignity by Canadian courts is inconsistent and its meaning has been “under-analyzed.” *Dignity as Theory*, *supra* note 109, at 6. Dignity, according to Professor Fyfe, has become “at times an empty but rhetorically powerful vessel into which any variety of normative ingredients can be placed.” *Id.* at 9.

¹³⁸ *Korematsu v. United States*, 323 U.S. 214 (1944).

¹³⁹ *Id.* at 240. Professor Paust erroneously cites Justice Murphy’s dissent in *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting) as when the word dignity in its current usage was first inaugurated. Paust, *supra* note 137, at 151. Two years earlier the Court decided another case in which dignity was used in a way that combined both its earlier meaning referring to high social standing and its modern meaning referring to the essence of being human. *See Stark v. Wickard*, 321 U.S. 288, 304 (1944) (discussing the complainant’s interest as needing to “rise to the dignity of an interest personal to him and not possessed by the people generally”).

¹⁴⁰ *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 562 (2003) (holding that “[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct”). Justice Kennedy also noted that human dignity permits one to make personal choices in the context of intimate relationships; it permits persons in their private homes and lives to “retain their dignity as free persons.” *Id.* at 567.

¹⁴¹ *See, e.g., Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 494 (1954) (emphasizing the demeaning impact on black children of separate but equal education); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964) (reasoning that the fundamental object of Title II of the Civil Rights Act of 1964 was to vindicate the personal dignity accompanying denials of public access to public establishments); *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (upholding a gender anti-discrimination statute because deprivation of personal dignity suffered by race discrimination victims was “surely felt as strongly” by those discriminated upon on the basis of sex).

¹⁴² *Miranda v. Arizona*, 384 U.S. 436, 457 (1966) (reasoning that certain inherently coercive interrogation environment can be destructive of human dignity).

¹⁴³ *City of Ontario, California v. Quon*, 130 S. Ct. 2619, 2627 (2010) (citing *Skinner v. Ry. Labor Excs. Ass’n*, 489 U.S. 602, 613–14 (1989)) (noting that the Fourth Amendment guarantees, *inter alia*, the dignity of persons against certain arbitrary acts by governmental officials without regard to whether the government actor is investigating crime or performing another function).

¹⁴⁴ *Trop v. Dulles*, 356 U.S. 86, 100 (1958). Professor Goodman notes that Fourth and Eighth Amendment decisions are “inconsistent and sporadic” in terms of their use of human dignity:

[T]he decisions “are inconsistent with the Court’s strong rhetoric regarding human dignity and sporadic in that the Court appeared to follow public opinion and/or the executive branch’s agenda in deciding the strength to give human dignity as a value in its decision-making, rather than treating dignity as invariant, an independent constitutional precept that should be factored into its decision-making regardless of public opinion.

Human Dignity, *supra* note 130, at 757–58.

however, sets limits on this theory, ruling in favor of state interests over dignity interests in some Fourteenth Amendment cases. For example, state interests trump human dignity concerns where cases involve a person's ability under the Fourteenth Amendment Due Process Clause to choose how and when to die when near death;¹⁴⁵ claims under the Due Process and Equal Protection Clauses for economic assistance from the government;¹⁴⁶ and First Amendment claims to freedom of expression when balanced against the opposing right of an individual to his public image¹⁴⁷

¶159 In the economic rights realm, *Goldberg v. Kelly*¹⁴⁸ upheld the right to a pre-termination hearing for public welfare benefits reductions based in part on Justice Brennan's linking of the constitutional claim for a means of survival, pending the benefit decision, to dignity, that is, "the Nation's basic commitment . . . to foster the dignity and well-being of all persons within its borders."¹⁴⁹ Unfortunately, as Professor Goodman notes: "[T]he Court's willingness to advance human dignity in welfare rights cases faltered" in later cases.¹⁵⁰ Also, despite holding that human dignity requires protection of a woman's right to choose, "human dignity was outweighed when the government had to get involved by paying for that freedom."¹⁵¹

¶160 A similar trend has been observed in the case of individual autonomy. Professor Erica Hashimoto gives the following appraisal of its recent application by courts: "[T]he autonomy interest of criminal defendants is under [an] all-out siege . . . [and] most commentators have either expressed little concern or offered endorsement" of the trend that is increasingly restrictive of individual autonomy as reflected, for example, in court rulings dealing with the authority of lawyers to overrule their clients' preferences regarding trial strategies.¹⁵² The decision in *Indiana v. Edwards* appears to have been a product of these recent trends.

¶161 Recall that the Court's primary concern in *Edwards* was with the "fairness" of the proceedings from the perspective of an observer. This position reflects another parallel

¹⁴⁵ Goodman notes that in right-to-die and physician-assisted suicide cases, the court acknowledged human dignity concerns, but determined that they are outweighed by state interests. *Human Dignity*, *supra* note 130, at 758.

¹⁴⁶ These include cases where the state's lack of involvement is challenged, for example the state's failure to provide economic assistance via waiver of an administrative fee, or failure to provide financial assistance equally. *Id.* "Human dignity has routinely failed to defeat competing state concerns in these cases." *Id.*

¹⁴⁷ These claims consist of competing dignity claims of freedom of speech and the interest in preserving one's reputation as a different form of dignity. They involve not only "conduct that demeans or humiliates as a result of private, rather than state, action[.]" but also the interest in dignity as free speech as a means of preserving the political system and producing a more capable citizenry. *Id.* at 758–59.

¹⁴⁸ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁴⁹ *Id.* at 264–65.

¹⁵⁰ *Human Dignity*, *supra* note 130, at 784. Professor Goodman cites a number of cases. *Dandridge v. Williams* rejected an equal protection challenge to a state cap on welfare benefits regardless of number of children. *Dandridge v. Williams*, 397 U.S. 471 (1970). *United States v. Kras* held that a fee for access to bankruptcy court despite indigency was not a denial of equal protection because, unlike the fundamental interest in marriage and the court as an exclusive place for its dissolution – where the filing fee must be waived for indigents – there is no fundamental right to bankruptcy. *United States v. Kras*, 409 U.S. 434 (1973). Finally, *Harris v. McRae* held that there is no due process right to federally-funded, but constitutionally protected, abortion. *Harris v. McRae*, 448 U.S. 297 (1980).

¹⁵¹ *Human Dignity*, *supra* note 130, at 785.

¹⁵² Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1149–50 (2010).

shift in the court's reasoning. In the pre-*Faretta* case of *Adams v. U.S. ex rel. McCann*,¹⁵³ the Court held that a felony defendant could personally waive his right to a jury trial without first having unwanted counsel imposed upon him when he makes a "free and intelligent choice" to waive both of these rights.¹⁵⁴ In its reasoning, the Court noted: "Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open."¹⁵⁵ The Court, however, did not engage in any search for the historical or philosophical roots of the right to self-representation other than to say that it was protected by the Bill of Rights generally.¹⁵⁶

¶62 Prior to *Adams*, federal courts differed on whether the right was of constitutional dimension or statutorily based.¹⁵⁷ The Supreme Court in *Faretta v. California*¹⁵⁸ resolved

¹⁵³ *Adams v. U.S. ex rel. McCann*, 317 U.S. 269 (1942).

¹⁵⁴ *Id.* at 275.

¹⁵⁵ *Id.* at 279 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In *Johnson*, the Court remanded a *habeas corpus* case to the trial court to determine whether the defendant had made an "intelligent waiver" of his Sixth Amendment right to counsel, and held that the waiver "must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson*, 304 U.S. at 464. It is interesting to note that *Johnson*, a case involving a defendant who sought and did not receive counsel, is precedent for *McCann*, a case involving a defendant forced to have counsel over his demand to be self-represented.

¹⁵⁶ The Court in *Adams* reasoned:

[T]he procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in states deemed otherwise enlightened merely because in their courts the vast majority of criminal cases are tried before a judge without a jury. 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.

317 U.S. at 279–80. Noteworthy, however, in this first Supreme Court opinion dealing with the right of self-representation are the following comments regarding application of the rules of evidence and procedure on *pro se* cases, which would later be disavowed in a line of cases beginning with *Faretta v. California*, *see infra* Part I.B.:

The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

Id. at 279.

¹⁵⁷ *See, e.g., United States ex rel. Soto v. United States*, 504 F.2d 1339, 1343 (3d Cir. 1974) (holding that the Sixth Amendment right to counsel was a constitutional requirement, and thus directly inconsistent with any right to self-representation); *Bayless v. United States*, 381 F.2d 67, 71 (9th Cir. 1967) (holding the right was constitutionally protected); *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969). *But see Brown v. United States*, 264 F.2d 363, 365–66 (D.C. Cir. 1959) (holding in a plurality opinion that right is no more than statutory in nature).

the dispute and held that the right was indeed constitutionally protected, and that the right was violated by a California court's ruling that forced the criminal defendant in that case to accept appointment of a public defender against his will. The court extensively reviewed the history of self-representation in England and the United States, finding that, "The Founders believed that self-representation was a basic right of free people. Underlying this belief was not only the antilawyer sentiment of the populace, but also the 'natural law' thinking that characterized the revolution's spokesmen."¹⁵⁹

¶63 Recognizing that a defendant who conducts his own defense may do so to his own detriment, the Court held that "his choice must be honored out of 'that respect for the individual which is the lifeblood of the law.'"¹⁶⁰ The Court concluded that "[u]nless the accused has acquiesced in [representation through counsel], the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense."¹⁶¹

2. Canadian Usage

¶64 Despite the claim of some that foreign and international law are irrelevant to constitutional interpretation,¹⁶² it can prove instructive by providing judges with alternative approaches to common challenges, such as the growth of *pro se* litigation and the problem of "gray area" *pro se* defendants.¹⁶³ In Canadian jurisprudence, for example, we see commonality in the evolution of courts' use of dignity in the context of self-representation. The meaning of dignity changed—as it did in American law—from a

¹⁵⁸ *Faretta v. California*, 422 U.S. 806, 836 (1975).

¹⁵⁹ *Id.* at 830, n.39 (citations omitted).

¹⁶⁰ *Id.* at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)). Justice Brennan's view was that human dignity is the fundamental value affirmed by the Constitution of the U.S. and the Bill of Rights. William Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 43 GUILD PRAC. 1 (1986); Meyer, *supra* note 107, at 1.

¹⁶¹ *Faretta*, 422 U.S. at 821. The defendant's dignity in making the choice to defend himself was not the only dignity referred to in *Faretta*. The court also referred to the need to preserve the court's own dignity: "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." *Id.* at 834 n.46.

The Court also suggested that in future cases standby counsel could be appointed as a third option in addition to the defendant proceeding *pro se* and the appointment of counsel: "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." *Id.*

¹⁶² See, e.g., Justice Antonin Scalia, Remarks at U.S. Association of Constitutional Law Discussion, *Constitutional Relevance of Foreign Court Decisions*, American University, Washington College of Law (Jan. 13, 2005) ("[I]f you talk about using it constitutional law, you know, you talk about it's nice to know that, you know, that we're on the right track, that we have a same moral and legal framework as the rest of the world. But we don't have the same moral and legal framework as the rest of the world, and never have."). *Contra* GERALF L. NEUMAN, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177, 189 (2006) ("The [U.S.] is a nation of immigrants, and it has always had the good sense to borrow sound ideas . . . from abroad. That has been true in . . . constitutional law. We rightly take pride in our national accomplishments, but the pragmatic assimilation of new perspectives is one of our national virtues.").

¹⁶³ Comparative constitutional law is "an important tool for understanding one's own legal system," and "can be an important stimulus to legal self-reflection." Sujit Choudhry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 IND. L.J. 819, 835–36 (1999).

focus on social standing, reputation, and image,¹⁶⁴ to a reference to the dignity that is the essence of persons, especially persons before the law. Canadian courts, like U.S. courts, historically and presently view the right to self-representation as a given. Canadian courts have traced the source of the right of self-representation to “traditional common law rules which have become so firmly imbedded in our judicial system that a conviction is very difficult to sustain on appeal if they are not observed.”¹⁶⁵ Most cases, however, simply refer to the right as “a right” without further explication or discussion.¹⁶⁶ Interestingly, the principal American (*Faretta v. California*¹⁶⁷) and Canadian (*Vescio v. The King*¹⁶⁸) decisions recognizing the right to self-representation cite to a common English decision (*Rex v. Woodward*¹⁶⁹). The language in *Vescio* cited most often by courts is:

It is a fundamental principle of our criminal law that the choice of counsel is the choice of the accused himself, that no person charged with a criminal offence can have counsel forced upon him against his will, and that it is the paramount right of the accused to make his own case to the

¹⁶⁴ See cases cited *supra* Part III.B.1.

¹⁶⁵ As noted in *Darlyn*:

There are two. The first is, that if the accused is without counsel, the court shall extend its helping hand to guide him throughout the trial in such a way that his defence, or any defence the proceedings may disclose, is brought out to the jury with its full force and effect. The second is, that it is not enough that the verdict in itself appears to be correct, if the course of the trial has been unfair to the accused. An accused is deemed to be innocent, it is in point to emphasize, not until he is found guilty, but until he is found guilty according to law.

R. v. Darlyn, (1946), 88 C.C.C. 269, 271–72 (B.C. C.A.).

¹⁶⁶ See, e.g., *R. v. McGibbon*, 1988 CanLII 149 (ON. C.A.) (upholding its earlier statement that “An accused . . . has the right to defend himself and no one has the right to force counsel on him against his wishes”).

¹⁶⁷ As noted in *Faretta*:

In more recent years, Parliament has provided for court appointment of counsel in serious criminal cases, but only at the accused's request. . . . At no point in this process of reform in England was counsel ever forced upon the defendant. The common-law rule, succinctly stated in *R. v. Woodward*, [1944] K.B. 118, 119, [1944] 1 All E.R. 159, 160, has evidently always been that “no person charged with a criminal offence can have counsel forced upon him against his will.

Faretta v. California, 422 U.S. 806, 825–26 (1975) (citation omitted).

¹⁶⁸ *Vescio v. The King*. [1949] S.C.R. 139 (S.C.C.). In *Vescio*, the attorney for the defendant, charged with murder, withdrew from the case. *Id.* at 141. The court then appointed counsel for the defendant. *Id.* at 142. At the eleventh hour before trial, a partner of defendant’s first counsel attempted to request an adjournment of the trial so that his partner who had previously withdrawn could re-enter the case at a later date; the court, however, refused to hear the application, which became one of his issues on appeal. *Id.* at 143. The defendant argued that his right to make a full answer and defense to the charges against him was infringed because he was denied his right to his counsel of choice. *Id.* In rejecting the defendant’s argument, the Supreme Court of Canada noted that the defendant neither objected to the appointment of counsel, nor demanded to represent himself. *Id.* at 143. Therefore, the appeal was dismissed, affirming the conviction. *Id.* at 156. Thus, it could be argued that any language in *Vescio* pertaining to the self-representation is dicta, because self-representation was not an issue in the case.

¹⁶⁹ [1944] 1 All ER 159.

jury if he so wishes, instead of having it made for him by counsel (*Rex v. Woodward*).¹⁷⁰

¶165 In *Woodward*, after the court appointed counsel for the defendant based upon his indigence, the defendant objected to the appointment, stating that he ought to be allowed to conduct his own defense. Despite additional protestations during the trial, the trial judge did not allow the defendant to represent himself. The Court of Criminal Appeal of England held: “We think that no person charged with a criminal offence can have counsel forced upon him against his will,”¹⁷¹ without invoking the philosophical concepts of dignity and autonomy. Rather, the right was taken as a given.

¶166 While autonomy is not mentioned in *Woodward*, later decisions would include statements such as that of Justice Hill in *R. v. Romanowicz*, where the court denied the *pro se* defendant’s appeal in which he claimed that his non-lawyer representative failed to provide him with effective assistance of counsel:

The accused has a right to self-representation. . . The court cannot, from a paternalistic perspective, force counsel upon an unwilling accused . . . an accused person has control over the decision of whether to have counsel . .

..
....

An accused who has not been found unfit to stand trial must be permitted to conduct his own defence, even if this means that the accused may act to his own detriment in doing so. The autonomy of the accused in the adversarial system requires that the accused should be able to make such fundamental decisions and assume the risks involved.

....

Where an accused, knowledgeable of the right to have counsel, chooses not to be represented by a lawyer, the trial judge must act with heightened vigilance in furtherance of the overarching obligation to ensure the accused has a fair trial.¹⁷²

¹⁷⁰ *Vescio v. The King*, [1949] S.C.R. 139, 142. Justice Rand’s additional (concurring) opinion in *Vescio* contains two other oft-cited passages touching upon the right of self-representation. First, commenting on a judge forcing counsel upon the defendant, Justice Rand wrote that a judge doing so “might be authorizing a defence which the prisoner himself would never have made and yet for which he must be responsible.” *Id.* He also noted that there is no rule “that defence by counsel is a necessary part of the machinery of trial.” *Id.*

¹⁷¹ *Id.* at 160–61.

¹⁷² 1998 CanLII 14957, para. 30, 33 (Can. On. S.C.) (citations omitted) (internal quotation marks omitted) (holding no right to effective assistance of counsel from paid non-lawyer agent). Interestingly, the Supreme Court of Canada has held, in the context of an interpretation of § 7 of the *Charter* (preventing denials of rights to life, liberty, and security of the person inconsistent with principles of “fundamental justice”), that respect for human dignity is *not* protected. The court held that respect for human dignity, while one of the underlying principles upon which our society is based, is not a principle of fundamental justice within the meaning of that section. *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 (Can.) (upholding law prohibiting assisted suicide). The court also noted that a mere common law rule does not *ipso facto* constitute a principle of fundamental justice. *Id.*

¶67 The court in *Romanowicz* was not addressing the case of a “gray-area” *pro se* defendant as was the case in *Edwards*. However, in *R. Swain*,¹⁷³ the Supreme Court of Canada addressed a challenge to a common law rule allowing the Crown to present evidence of the defendant’s insanity over his objection. In striking down the rule in the context of a “gray-area” defendant because it violated certain provisions of the Canadian *Charter of Rights and Freedoms*, the court first noted that “principles of fundamental justice contemplate an accusatorial and adversarial system of criminal justice which is founded on respect for the autonomy and dignity of the person. These principles require that an accused person have the right to control his or her own defence.”¹⁷⁴ The court justified its decision to strike down the rule by pointing out that it,

denies the mentally disabled, a group in our society which has been negatively stereotyped and historically disadvantaged, the control over their defences reposed in other accused persons and does so in a way which is discriminatory. In denying the mentally disabled personal autonomy in decision-making it reinforces the stereotype that they are incapable of rational thought and the ability to look after their own interests.¹⁷⁵

¶68 A case more comparable to *Edwards* is *R. v. Peepeetch*.¹⁷⁶ There, the defendant was charged with the first-degree murder and mutilation of his estranged common-law wife and her lover.¹⁷⁷ After being charged, the defendant was examined by two psychiatrists. One found that the defendant at times was coherent, while at other times excitable, prone to going off on tangents, and unable to focus on the matters at hand, causing impairment of his ability to communicate with counsel.¹⁷⁸ The second expert found that the defendant was fit to stand trial, though he was deliberately uncooperative and unresponsive, always reverting back to claims and allegations against others.¹⁷⁹ The defendant was ultimately found fit to stand trial, and—after numerous adjournments necessitated by his discharge of several attorneys—he was forced to represent himself and was found guilty.¹⁸⁰

¶69 In his appeal to the Saskatchewan Court of Appeal, the defendant argued that he was unfit to stand trial, his waiver of counsel was invalid, and that the trial court erred in allowing him to represent himself because he lacked the capacity to do so.¹⁸¹ The case, therefore, differs slightly from *Edwards* in that the defendant there was denied the right to self-representation based on his lack of mental competence, while the defendant in

¹⁷³ 1 S.C.R. 933 (Can).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* The court fashioned a new procedure allowing the prosecution to raise insanity at the conclusion of the guilt or innocence phase of the case. *Id.*

¹⁷⁶ (2003) 238 Sask. R. 14 (Can.).

¹⁷⁷ *Id.* at paras. 22–27.

¹⁷⁸ *Id.* at para. 37.

¹⁷⁹ *Id.* at para. 38.

¹⁸⁰ *Id.* at paras. 39–40. The court noted that his last attorney, who had been appointed *amicus curiae*, had “valiantly attempted to assist the appellant as a friend of the court,” until released from that obligation by the court. *Id.* at para. 40.

¹⁸¹ *Id.* at para. 41.

Peepeetch argued that he was forced to proceed *pro se* despite his lack of mental competence.¹⁸²

¶70 The *Peepeetch* court rejected the defendant's claim that his right of self-representation is not absolute, but rather is qualified by the mental disorder from which he suffered.¹⁸³ The court found that the defendant was able to understand complex legal issues, such as *voir dire*.¹⁸⁴ Noting that the court in *R. v. Whittle*, following *Godinez*, had held that the standard for determining whether an accused could represent himself is not higher than the standard for waiver of the right to counsel, the *Peepeetch* court ruled that "by choosing to represent himself, which is a constitutionally protected right, the appellant effectively gave up the right to effective assistance of counsel."¹⁸⁵ Significantly, the court noted the manner in which the trial judge followed the "overriding and overarching principle that the accused is entitled to a fair trial" by providing assistance to him in a variety of ways.¹⁸⁶ "The trial judge attempted, without descending from the bench and becoming the accused's counsel, to ensure the proper conduct of the defence and to guide him through the trial so that his defence could be

¹⁸² There were, however, a number of similarities between the cases. The court first discussed the American case *Godinez v. Moran*, and its Canadian counterpart *R. v. Whittle*, as well as other Canadian authorities recognizing the "right of the accused to control his defence." *Id.* at paras. 50–56. The court then rejected a higher standard of fitness that includes a "best interests" component because it would derogate "from the fundamental principle that an accused is entitled to choose his own defence and to present it as he chooses." *Id.* at para. 53.

¹⁸³ *Id.* at para. 66.

¹⁸⁴ *Id.* at para. 63.

¹⁸⁵ *Id.* at para. 66. "He cannot demand the right to represent himself and at the same time demand the right to effective assistance of counsel. Having decided to represent himself he must live with the consequences and cannot later complain that his conduct of the trial did not reach the level of a competent lawyer." *Id.*; see also *R. v. Gordon*, 2003 CanLII 17221 (Can. Ont. C.A.) (noting that cases dealing with ineffective assistance of counsel have no application to cases in which a defendant represents himself); *R. v. Romanowicz*, 1999 CanLII 1315 (Can. Ont. C.A.) (noting that respect for individual autonomy in the adversarial system requires that no person can be compelled to be represented, but the self-represented accused then assumes the risks and disadvantages of appearing without counsel); see also *R. v. Fabrikant*, 1995 CanLII 5384 (Can. Q.C. C.A.) (noting that accused who chooses to self-represent enjoys no special privileges and gains no special right to proceed by different fundamental rules by renouncing the right to assistance of counsel). The rule in the United States is the same. See *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975) ("[A] defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'").

¹⁸⁶ *R. v. Peepeetch*, (2003) 238 Sask. R. 14, para. 69. The trial judge had "carefully explained the law and procedures" to the defendant; provided him with counsel (against his wishes) "to assist him in identifying relevant issues," directed that "prospective jurors should be questioned" regarding possible bias against aboriginals; "repeatedly explained the purpose of cross-examination," and ordered the defendant be given written instructions regarding the manner of conducting cross-examination; "explained the burden of proof," and ordered that defendant "be given an up-to-date copy of the *Criminal Code*;" explained "the normal conduct of a defence" after the Crown rested its case against him; adjourned the proceedings to allow him sufficient time to review his notes or the evidence or to order production of requested transcripts; assisted defendant in making sure all defense witnesses he wished to call were present to testify; called an expert for the defendant on the effects of alcohol and drugs after ordering the expert to attend the trial and gain a full understanding of the facts of the case; offered "advocacy tips and tactical advice"; explained the purpose of *voir dire*; and engaged in a "tactical discussion" concerning the relative advantages and disadvantages of addressing the jury last. *Id.* at paras. 69–71.

placed before the jury. In this respect he complied with the duty of a trial judge faced with these difficult circumstances”¹⁸⁷

¶71

Another example of the Canadian approach to ascertaining capacity to self-represent is *R. v. B.K.S.*,¹⁸⁸ which, like *Peepeetch*, involved a self-represented defendant’s claim on appeal of insufficient judicial assistance by the trial judge. In *B.K.S.*, the defendant, an accused rapist, was not a “gray-area” defendant, as he was found by two psychiatrists and the court to be fit to stand trial.¹⁸⁹ But, after insisting on representing himself and being convicted, he appealed on grounds, *inter alia*, that the trial court erred in permitting him to represent himself.¹⁹⁰ The British Columbia Court of Appeal found the capacity finding was not in error, noting that “it is not a prerequisite” for a fitness finding that the defendant “be capable of exercising analytical reasoning in making a choice to accept the advice of counsel, or in coming to a decision that best serves her interests.”¹⁹¹ The question is, “Did the accused possess an operating mind. *It goes no further and no inquiry is necessary as to whether the accused is capable of making a good or wise choice or one that is in his or her interest.*”¹⁹²

¹⁸⁷ *Id.* at para. 73. Given the general rule of non-assistance with which they are familiar, American jurists would probably say that the trial judge in *Peepeetch* did indeed “descend from the bench” and become the defendant’s advocate. Canadian judges, in contrast, see these accommodations as the means of ensuring a fair trial.

¹⁸⁸ *R. v. B.K.S.* 1998 CanLII 14980 (Can. B.C. C.A.).

¹⁸⁹ *See Id.* at para. 2.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at para. 19 (citing *R. v. Whittle*, [1994] 2 S.C.R. 914 (Can.)).

¹⁹² *Id.* (emphasis added) (emphasis omitted). The court noted that the trial judge had assisted the defendant in the following ways:

‘[O]bjecting’ to Crown counsel questioning the complainant about occasions where she had disclosed to others the assaults upon her by the appellant out of concern that inadmissible recent complaint evidence would be led; ascertaining from Crown counsel that the allegations of misconduct, both past and present, by the appellant towards his sisters other than the complainant was ‘something [the trial judge] should not be hearing about’ and that the trial judge would ignore any such reference in the evidence;

canvassing with the appellant whether he wished to cross-examine the complainant and then explaining to the complainant that he will give the appellant a chance to do so at a later time which would necessitate her being recalled should the need arise;

advising the appellant that he will have an opportunity to cross-examine his other sisters;

‘objecting’ to Crown counsel eliciting hearsay evidence from S.S.;

inviting the appellant to cross-examine his sister, S.S.;

‘objecting’ to Crown counsel asking R.S. about sexual abuse she suffered at the hands of her other brothers;

explaining the amendment to the information, confirming his satisfaction that the appellant has a defence to give, explaining how the appellant can testify if he chooses to, that the appellant has the right to remain silent and need not testify, that by doing so he will expose himself to cross-examination;

conducting the direct examination of the appellant, eliciting both general and specific denials to the Crown’s allegations;

giving the appellant advice on dealing with cross-examination;

ensuring that the Crown’s cross-examination of the appellant on his criminal record is proper;

not permitting Crown counsel to cross-examine the appellant on his unsworn statements made the previous day;

¶72 The foregoing Canadian authorities recognize that the right to self-representation rests on the defendant's interest in his dignity and autonomy before the law, and balance these against the judge's duty to assure a process that is both fair in appearance and in fact. The defendant's dignity and autonomy trumped the state's interest in avoiding a "spectacle," that is, an *appearance* of unfairness, because fairness was considered from the defendant's perspective, reflecting a greater concern for fairness *in fact*. Despite the defendants' "gray-area" mental competency and lack of legal skill and knowledge in the Canadian cases, the courts create conditions fulfilling "gray-area" defendants' rights to dignity and autonomy by the use of various forms of reasonable judicial assistance.

3. International Court Usage

¶73 Human rights to dignity and autonomy are fundamental not only in Western philosophy and adversarial justice systems. Numerous international and regional conventions recognize the right of self-representation, as do the charters of every international criminal tribunal. Such widespread recognition of the rights to dignity and autonomy makes these rights part of customary international law.¹⁹³

¶74 The *Charter of the United Nations* provides in its Preamble that the "Peoples of the United Nations" were, in creating the U.N., determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."¹⁹⁴ The Preamble of the U.N. *Universal Declaration of Human Rights (Declaration)* states: "Recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."¹⁹⁵ The *Declaration* also creates a right to recognition as a "person before the law,"¹⁹⁶ and a right to an "effective remedy"

reminding the appellant that he will have an opportunity to add anything he may have forgotten to say in evidence;

giving the appellant a chance to do exactly that;

asking the appellant if he has any other witnesses to call and explaining how the appellant has an opportunity to make a closing argument;

asking Crown counsel to assess the evidence objectively; and giving the appellant a final opportunity to make submissions.

The trial judge extended an appropriate amount of assistance in this case. To contend, as the appellant does, that the trial judge should have cross-examined the Crown witnesses for him effectively requires the trial judge to become an advocate for an unrepresented accused. To do so, clearly extends beyond offering assistance and ensuring that a fair trial is held[,] duties which, in my opinion, the trial judge properly discharged in these circumstances.

Id. at paras. 27–28. *B.K.S.* and *Peepeetch* each illustrate the breadth of what Canadian courts consider reasonable judicial assistance that does *not* cross the line into advocacy.

¹⁹³ "[W]here there is no treaty and no controlling or executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations . . ." *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹⁹⁴ U.N. Charter preamble, available at <http://www.un.org/en/documents/charter/preamble.shtml>.

¹⁹⁵ G.A. Res. 217A, U.N. Doc. A/810, at 71 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> [hereinafter *Universal Declaration of Human Rights*]; see generally Haim H. Cohn, *On the Meaning of Human Dignity in 13 ISR. YEARBOOK ON HUMAN RIGHTS* 226, 226–51 (1983) (discussing human dignity in international instruments).

¹⁹⁶ *Universal Declaration of Human Rights*, *supra* note 195, at art. 6.

for acts violating the “fundamental rights” granted every person by the constitution or by law.¹⁹⁷

¶75

International protection of the rights to dignity and autonomy is also reflected in the recognition of the right to self-representation in the *International Covenant on Civil and Political Rights* (ICCPR).¹⁹⁸ The same or similar language in the ICCPR appears in the *Statute of the International Criminal Tribunal for the Former Yugoslavia*,¹⁹⁹ the *Statute of the International Criminal Tribunal for Rwanda*,²⁰⁰ the *Statute of the Special Court for Sierra Leone*,²⁰¹ and the *Rome Statute of the International Criminal Court*.²⁰² No international tribunal, however, has yet faced the autonomy-fair trial issue in the case of a “gray-area” *pro se* defendant.

¹⁹⁷ *Id.* at art. 8.

¹⁹⁸ Giving the accused the right to:

[D]efend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

International Covenant on Civil and Political Rights art. 14(3)(d), Dec. 19, 1966, 999 U.N.T.S. 171.

¹⁹⁹ Giving the accused the right:

[T]o defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

Statute of the International Criminal Tribunal for the Former Yugoslavia art. 21(4)(d), May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY].

In the case of the late Slobodan Milosevic, on trial for crimes against humanity, the defendant himself provided the tribunal with a copy of the U.S. Supreme Court’s decision in *Faretta* as he argued against the compelled imposition of counsel. *Prosecutor v. Milosevic*, Case No. IT-02-54 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 11, 2002), *available at*

http://www.icty.org/x/cases/slobodan_milosevic/trans/en/021111ED.htm. There are other cases of *pro se* defendants in the ICTY. *See, e.g.*, *Prosecutor v. Krajisnik*, Case No. IT-00-39 (Int’l Crim. Trib. for the Former Yugoslavia June 3, 2005), *available at*

<http://www.icty.org/x/cases/krajisnik/trans/en/050603IT.htm>; *Prosecutor v. Seselj*, Case No. IT-03-67-PT, Decision on Prosecution’s Motion for Order Appointing Counsel to Assist Vojislav Seselj with his Defence (Int’l Crim. Trib. for the Former Yugoslavia May 9, 2003), *available at* <http://www.icty.org/x/cases/seselj/tdec/en/030509.htm>.

²⁰⁰ Giving the accused the right:

[T]o defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

Statute of the International Criminal Tribunal of Rwanda art. 20(4)(d), Nov. 8, 1994, 33 I.L.M. 1602.

²⁰¹ Giving the accused the right:

[T]to defend himself or herself in person or through legal assistance of his or her own choosing; to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

Rome Statute of the Special Court for Sierra Leone art. 17(4)(d), Jan. 16, 2002, 2178 U.N.T.S. 145.

²⁰² *Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC] (giving the accused the right “to conduct the defence in person or through legal assistance of the accused’s choosing, . . . and to have legal assistance assigned by the Court in any case where the interests of justice so require”).

¶76 This review of dignity, autonomy, and personhood in philosophy and the law in the United States, Canada, and international law establishes the highest importance of these rights. They are beyond fundamental; they are foundational to self-government and justice under the rule of law. Given the prominence of human dignity in international law and Western philosophy and its support for the right to self-representation, is it enough to acknowledge that a self-representation right exists, as the Supreme Court did in *Faretta v. California*? Or do courts have an obligation to ensure that self-representation is not merely a hollow right by affirmatively providing the conditions for the flourishing of dignity and autonomy in the justice system?

IV. THE STATE'S OBLIGATION TO CREATE CONDITIONS FOR FULFILLMENT OF DIGNITY AND AUTONOMY

¶77 Given the foundational significance of autonomy of the individual, it should have trumped the state's interest in *Edwards* in avoiding the appearance of a "spectacle." To give greater weight to the court's image and institutional legitimacy than the "gray-area" *pro se* defendant's rights to autonomy and dignity negates the freedom of the individual and his right to present his own defense that the Founders and the majority in *Faretta* sought to protect. Furthermore, the decision in *Edwards* reflects the Court's elevation of the older meaning of dignity, which referred to high social standing, as in the "dignity of the court,"²⁰³ over the modern meaning referring to the essence of being human and a person before the law.

¶78 Moreover, contrary to the Kantian principles discussed above,²⁰⁴ it is not difficult to imagine the defendant feeling that he was being used as a means to the court's end of ensuring its own view of fairness.²⁰⁵ The *Edwards* majority, by permitting the imposition of unwanted counsel, was therefore not guaranteeing to the defendant real autonomy, but rather was protecting his *apparent* autonomy from the perspective of court observers. In so doing, the Court improperly used the defendant to protect its own institutional legitimacy.

¶79 Rather than imposing unwanted counsel, the justice system needs to provide or permit alternative forms of assistance to *pro se* defendants. Surely the fairness in the appearance of a trial in which an individual assists the "gray-area" defendant in making his or her defense is greater than that of a trial in which a defendant repeatedly objects to unwanted counsel. The court itself in *Faretta* noted that "unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction."²⁰⁶ Unless the

²⁰³ See *supra* note 161 and accompanying text.

²⁰⁴ See *supra* notes 119–127 and accompanying text.

²⁰⁵ Ironically, the court in *Faretta*, in enumerating some limitations upon the right to self-representation, noted that a *pro se* defendant has no right "to abuse the dignity of the courtroom." *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975). This use of dignity, which is more closely tied to the original conception referring to high social standing, shows how two different conceptions of dignity (i.e., the dignity of the tribunal versus the personal dignity of the defendant) came in direct conflict in the same case, and *Edwards* shows how the Court's dated conception trumped the modern conception focusing on the dignity and autonomy necessary for self-government and the rule of law. *Indiana v. Edwards*, 544 U.S. 164 (2008).

²⁰⁶ *Faretta*, 422 U.S. at 821.

accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in every real sense, it is not his defense.”²⁰⁷

¶180 Autonomy is in effect an elaboration of a view of human nature, one version of which is the view of psychologists that humans possess a “central tendency to grow” and reach “competence.”²⁰⁸ As Professor Haworth argues, autonomy is “arrived at as the outcome of a developmental process. Being natural, its development depends on the presence of nurturing conditions. The fact that our world makes achievement of autonomy of action a struggle implies that these nurturing conditions are not present in sufficient numbers, or that they are neutralized by other conditions that inhibit autonomy.”²⁰⁹ Since autonomy is natural, it needn’t be taught; people “need only an environment that offers facilitating, nurturing conditions and that lacks autonomy-inhibiting conditions.”²¹⁰ In the context of gray-area *pro se* defendants, I argue that it is the state’s obligation to provide alternative forms of assistance to establish these “nurturing conditions,” which will enhance these defendants’ competence and autonomy at trial. Likewise, *pro se* defendants need legal knowledge and other information and assistance in order to ensure their freedom to choose self-representation and carry it out in their own way.

¶181 Professor Gewirth sought to establish that “[t]he necessary conditions of human action provide the justifying grounds for the universal ascription of human dignity, and this in turn serves to justify the principle of human rights.”²¹¹ His reference to the necessary conditions of human action refers to two “generic features” of all actions: (1) freedom or voluntariness, and (2) well-being, which together constitute what he views as the “procedural” and “substantive necessary conditions of action.”²¹² He defines freedom as “controlling one’s behavior by one’s unforced choice while having knowledge of relevant circumstances.”²¹³ Well-being is “having the abilities and conditions needed for fulfilling one’s various purposes.”²¹⁴

¶182 Professor Haworth, like Gewirth, argues that certain conditions are necessary in order to be fully autonomous:

Since a certain level of education and health is necessary if one is to become able to live autonomously, one also has autonomy-based rights to access the complex institutional arrangements set up to provide the

²⁰⁷ *Id.*

²⁰⁸ AUTONOMY, *supra* note 117, at 2.

²⁰⁹ *Id.* at 8; *see also* Partridge, *supra* note 102, at 224 (“[W]e cannot truly be said to be free to choose some preferred alternative unless we have the means or the power to achieve it, and thus the absence of means or power to do X is equivalent to absence of freedom to do it.”).

²¹⁰ *Id.* at 189; *see also* Paust, *supra* note 137, at 2 (“[A] person strives to become able to produce intended effects, and to expand the repertoire of skills that underlies that ability. Competence is the foundation of autonomy.”).

²¹¹ Gewirth, *supra* note 116, at 28.

²¹² *Id.* at 19.

²¹³ *Id.*

²¹⁴ *Id.* at 20. Well-being on Gewirth’s account requires three kinds of action-related goods: “(1) general preconditions (life and physical integrity); (2) undiminished retention of one’s purpose fulfillment and one’s capability for practical action, such as the non-subtractive well-being of not being lied to, stolen from, etc.; and (3) increasing one’s level of purpose fulfillment and one’s capabilities for particular actions in the additive sense of being able to acquire an education, opportunities for wealth and income, etc.” *Id.*

means to acquire education and health . . . [T]he legal rights grouped under the heading of due process of law identify modes of treatment that are necessary to ensure that one's domain for autonomy will be open. The rights to education, to health, and to due process of law are, then, positive autonomy-based rights.²¹⁵

¶83 Likewise, Professor Joseph Raz has written:

All that has to be accepted is that to be autonomous a person must not only be given a choice but he must be given an adequate range of choices. A person whose every decision is extracted from him by coercion is not an autonomous person. Nor is a person autonomous if he is paralyzed and therefore cannot take advantage of the options which are offered to him.²¹⁶

¶84 The metaphor of being in “paralysis” figuratively fits the situation of the typical *pro se* defendant. Thus, autonomy alone is insufficient. Realization or actualization of autonomy requires additional necessary conditions that the state has a duty to provide if autonomy is to play any significant role in our justice system. Otherwise there really is no autonomy or personhood before the law.

¶85 The foundational right to autonomy (inclusive of dignity and personhood before the law) in the context of self-representation has two dimensions. The state must, first, recognize the right to self-representation. Second, the state must ensure that courts make the first obligation a reality in fact, and not merely in appearance. In order to meet the second dimension of autonomy, courts must create conditions under which the right to self-representation can be effectively fulfilled. A “gray-area” defendant’s insistence on self-representation is a quintessential exercise of the Constitutional rights to dignity and autonomy. But if the request is granted in the absence of the defendant having the competence for meaningful self-representation, then the court has merely recognized a hollow right.

¶86 The second dimension of autonomy requires that the individual have knowledge of relevant circumstances, some minimal level of competence, and an adequate set of options. These philosophical notions are nothing more than the right to a “meaningful hearing” already protected by the Due Process Clause, but they are currently lacking in the case of American “gray-area” *pro se* defendants. The competence required by such defendants should be reflected in a range of instruction, information, and assistance given with the goal of providing these defendants with a fair opportunity to present their chosen defense. The means of ensuring the required competence cannot exist if judicial and alternative forms of assistance are prohibited.

V. INNOVATIVE FORMS OF *PRO SE* ASSISTANCE AND REPRESENTATION

¶87 At common law, not only was there no right to the assistance of counsel in criminal cases, but representation by counsel was prohibited.²¹⁷ Blackstone noted, however, that

²¹⁵ AUTONOMY, *supra* note 117, at 214.

²¹⁶ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 373 (1986).

²¹⁷ DAVID HUTCHISON, *THE FOUNDATIONS OF THE CONSTITUTION* 312–13 (1975) (quoting WILLIAM BLACKSTONE, *COMMENTARIES* 356).

some judges allowed counsel to instruct a defendant as to “what questions to ask or even to ask questions for him . . .”²¹⁸ This early practice demonstrates that the judicial allowance of assistance for *pro se* criminal defendants even preceded the right to counsel, as it is interpreted today.²¹⁹

¶88 In recognizing the right of self-representation in *Faretta v. California*, the Supreme Court held that “[t]o thrust counsel upon the accused, against his considered wish, thus violates the logic of the [Sixth] Amendment. In such a case, counsel is not an assistant, but a master”²²⁰ The footnote following that statement reminds the reader:

Such a result would sever the concept of counsel from its historic roots. The first lawyers were personal friends of the litigant, brought into court by him so that he might ‘take “counsel” with them’ before pleading. . . . Similarly, the first ‘attorneys’ were personal agents, often lacking any professional training, who were appointed by those litigants who had secured royal permission to carry on their affairs through a representative, rather than personally.²²¹

¶89 Moreover, the Supreme Court in *Indiana v. Edwards* was concerned for the first time with the perception of the fairness of an unrepresented criminal defendant with an unstable mental condition and with no legal skill or knowledge presenting his defense, prompting the majority to authorize imposed counsel.²²² Surely, trials would have a greater appearance of fairness if courts provided reasonable judicial or other assistance short of appointment of unwanted counsel to “gray-area” defendants while maintaining their impartiality.²²³

¶90 Previous bench and bar resistance to judicial assistance and the growth of non-lawyer practitioners—regulated or otherwise—does not create a favorable atmosphere for proposals of assistance for “gray-area” defendants.²²⁴ Nevertheless, I argue that courts’ legitimacy is better served by establishing what Professor Haworth called “nurturing conditions,” which increase defendants’ competence to represent themselves.²²⁵ Courts should consider implementation of the following forms of innovative assistance to meet that objective.

²¹⁸ *Id.* at 313.

²¹⁹ The Sixth Amendment itself guarantees the right to “the assistance of counsel.” U.S. CONST. amend. VI.

²²⁰ *Faretta v. California*, 422 U.S. 806, 820 (1975).

²²¹ *Id.* at n.16 (citation omitted).

²²² See *infra* Part II.A. The similar concerns exist in the context of self-represented litigants in the civil context, but the Supreme Court has not yet addressed this issue.

²²³ To provide “gray-area” defendants with alternative forms of assistance short of full representation would also reflect society’s empathy and compassion for such individuals. Some might even argue that the state is required to provide them with these assistance alternatives as “reasonable accommodations” to which they are due under the American with Disabilities Act 42 U.S.C. § 12101, et seq (1990), a subject for future research.

²²⁴ Jona Goldschmidt, *The Pro Se Litigant’s Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance*, 40 FAM. CT. REV. 36, 48–51 (2002) (arguing for an expanded judicial role, to include providing reasonable assistance to *pro se* litigants).

²²⁵ See *supra* notes 203–205 and accompanying text.

A. Judicial Assistance

¶91 Canadian law and practice demonstrate that much can be done to recognize and protect the dignity and autonomy of “gray-area” defendants. First, judges have a duty to provide reasonable assistance to self-represented defendants. As noted by the Ontario Court of Appeal in *R. v. McGibbon*:

Consistent with the duty to ensure that the accused has a fair trial, the trial judge is required within reason to provide assistance to the unrepresented accused, to aid him in the proper conduct of his defence, and to guide him throughout the trial in such a way that his defence is brought out with its full force and effect. How far the trial judge should go in assisting the accused . . . must of necessity be a matter of discretion.²²⁶

¶92 Moreover, in *R v. Romanowicz*, the court held:

Throughout the trial of an unrepresented accused, the court is obliged to assist the accused in presenting his or her defence. . . without compromising the court's impartiality. . . . In rendering assistance to the accused, the court is obliged to take into account the totality of the circumstances, including the sophistication of the accused, the gravity of the offence charged, the nature of the defence and the complexity of the issues at hand. At the end of the day, however, the unrepresented accused has the right to make strategic decisions and to defend himself or herself at whatever level of competence and effectiveness the accused brings to the case.²²⁷

²²⁶ *R. v. McGibbon*, (1988), 431 O.A.C. 10 (Can. Ont. C.A.). A number of cases have recognized the duty of reasonable assistance as a corollary of the duty to ensure fairness. See, e.g., *R. v. Tran* (2001), 55 O.R. 3d 161 (Can. Ont. C.A.); *R. v. Travers* (2001), 193 N.S.R. 2d 263, (Can. N.S. C.A.); *R. v. Dimmock*, 1996 CarswellBC 524, (Can. B.C. C.A.) (WL); *R. v. Turlon*, (1989), 32 O.A.C. 396, (Can. Ont. C.A.); *R. v. Taubler* (1987), 20 O.A.C. 64, 71 (Can. Ont. C.A.); *R. v. Littlejohn*, 1978 CarswellOnt 1201 (Can. Ont. C.A.)(WL).

Canadian courts have overturned convictions where courts gave insufficient assistance to *pro se* defendants. See *R. v. Jones* [1994], 154 A.R. 118 (Can. Alta. Q.B.) (reversing a self-represented defendant's conviction where the trial judge gave the defendant no information about the trial process, failed to inform her of her right to call witnesses or seek an adjournment if they failed to appear, and failed to inform her of what issues were relevant in her cross-examination of Crown witnesses).

²²⁷ *R. v. Romanowicz*, 1998 CanLII 14957, para 34 (Can. ON S.C.) (citations omitted). It should be noted that reasonable accommodations is distinguishable from other forms of assistance involving active judicial involvement. For example, in *R. v. Chemama*, the court—in addition to appointing an *amicus curiae*—ordered the following accommodations be given to the “gray area” *pro se* defendant, who had attention—deficit disorder and learning disabilities:

[Defendant] will be afforded accommodations to meet his special needs. All the participants in this trial will exercise particular patience and consideration. If necessary, questions and answers will be repeated. If he wishes, Mr. Chemama will be permitted to audio-record the proceedings and have use of a computer in the courtroom. Trial dates will be separated, rather than continuous, to allow Mr. Chemama an opportunity to digest the testimony of witnesses and prepare for the next hearing date. And a court-ordered

¶93 The Canadian authorities thus recognize the same need for judicial neutrality as American courts, but also recognize that the dignity and autonomy of the unrepresented individual require some form of affirmative assistance. It is true that some pragmatic American judges provide some assistance to *pro se* defendants to avoid harsh results, but these efforts are not enough. A judicial duty of reasonable assistance should be created through case law, judicial ethics principles, or court rules. If one accepts the axiom that justice should be uniform, then allowing judges to assist *pro se* defendants as a discretionary matter, without guidelines, will mean that access to justice will vary by individual judge.²²⁸ To require that “gray-area” *pro se* defendants—or, for that matter, all *pro se* defendants—be given reasonable judicial assistance will maximize access to justice for both those who are literate but simply lack information and need guidance, and those who for various reasons lack the competence to present their own claim or defense and would not otherwise be able to do so but for some form of assistance. The justice system’s goal of not only being fair, but appearing to be fair, will not be met under the existing same-rules and no-assistance doctrines.²²⁹

B. Duty Counsel

¶94 “Duty counsel” refers to private bar association, pro bono, or legal services lawyers who are available in many Canadian criminal, family, landlord-tenant, and mental health courts on a daily basis to consult with *pro se* litigants.²³⁰ In Ontario, the services of duty counsel are described as providing legal advice; assisting in settlement negotiations; reviewing court documents; assisting in short court hearings; explaining court procedures; assisting at bail, sentencing, and change of plea hearings; and providing other services.²³¹

copy of the transcript of the proceedings of each day of trial will be provided to Mr. Chemama at the official copy rate.

2008 ONCJ 31, para. 33 (Can. Ont. C.J.).
228

Consistency between courtrooms is essential to the legitimacy of any system of justice. . . . If in one courtroom the judge takes greater control over the proceedings and ensures the admission of probative evidence, and in another courtroom the judge refuses to relinquish his role as a detached and neutral arbiter, the result will be inconsistency. Thus, courts need procedures to ensure that trials of *pro se* defendants are consistent among different courts.

Sharon Finegan, *Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice*, 58 CATH. U. L. REV. 445, 494 (2009) (advocating the borrowing of inquisitorial justice system methods for *pro se* criminal cases in order to balance the defendant’s autonomy interest with the court’s duty to ensure fairness).

²²⁹ See *infra* Part II.C.

²³⁰ See generally Gord MacDonald & Helena Brit, *Duty Counsel and the Self-Represented Litigant*, 19 CAN. FAM. L.Q. 497 (2001).

²³¹ One online description of the assistance provided by duty counsel states.

Family duty counsel are private bar or Legal Aid Ontario staff lawyers who can:

Give advice about legal rights, obligations and the court process

Help negotiate and settle issues

Review or prepare court documents to be filed

provide assistance in:

the courtroom for child protection hearings

garnishment and support hearings

¶95 The duty counsel program “ensures that anyone involved in a court matter receives legal advice.”²³² A 2002 evaluation of the family law duty counsel program of the Ontario Legal Aid agency found that there was a “strong need” for duty counsel services, a “high level of support for the expanded duty counsel model among clients and stakeholders,” and “a strong rationale for continued implementation of expanded duty counsel services across the province.”²³³

¶96 While there are some American jurisdictions with similar programs,²³⁴ courts and *pro se* defendants would benefit from adopting the duty counsel model on a broad basis,

requesting adjournments
arguing motions
hearings for issues such as custody, access, or support where the issues
are not complicated

Legal Aid Ontario, *Getting Legal Help in the Courtroom: Criminal Duty Counsel: Family Duty Counsel*, http://www.legalaid.on.ca/en/getting/dutycounsel_family.asp. Likewise, the online brochure describes criminal duty counsel: “Criminal duty counsel are private bar or Legal Aid Ontario staff lawyers who can: give advice about legal rights, obligations and the court process[;] provide assistance in the courtroom for bail hearings and sentencing[;] assist with diversion, guilty pleas and adjournments[.]” Legal Aid Ontario, *Getting Legal Help in the Courtroom: Criminal Duty Counsel*, http://www.legalaid.on.ca/en/getting/dutycounsel_criminal.asp. The online brochure describes tenant duty counsel: “Tenant duty counsel may: give advice about legal rights, obligations and the tribunal process[;] review documents[;] provide referrals for other services.” Legal Aid Ontario, *Getting Legal Help in the Courtroom*, http://www.legalaid.on.ca/en/getting/dutycounsel_tenant.asp. The online brochure describes mental health duty counsel:

People appearing in mental health court on a criminal matter without a lawyer are generally assisted by duty counsel at their first appearance. After the first appearance, people who cannot apply for legal aid on their own can receive help in one of the following ways: *Through a lawyer or criminal duty counsel . . . With a legal aid representative or a Patient Advocate/Rights Advisor.*

Legal Aid Ontario, *Getting Legal Help in the Courtroom: Mental Health Duty Counsel*, http://www.legalaid.on.ca/en/getting/dutycounsel_mentalhealth.asp.

²³² Natalie Fraser, *Canadian Duty Counsel*, CANADIAN-LAWYERS.CA, <http://www.canadian-lawyers.ca/Home/Legal%20Help%20and%20Resources/Canadian%20Duty%20Counsel.aspx>.

²³³ PRA, INC., EVALUATION OF THE FAMILY LAW EXPANDED DUTY COUNSEL PILOT PROJECTS: FINAL REPORT ii–iii (2002), *available at* http://www.legalaid.on.ca/en/publications/downloads/report_EDCevaluation_02oct.pdf. The reference to “expanded” duty counsel refers to the goals of:

advancing cases toward resolution . . . [wherein] duty counsel spend time and effort on behalf of clients in an attempt to assist them in bringing closure to their matter or major elements of their matter. The expanded duty counsel model, therefore, has three important features that distinguish it from the traditional model and that are intended to enable the model to pursue this central principle: the capacity to create and carry client files; the ability to provide continuity of representation; and the capacity to draft court documents.

Summary of Reform: Legal Aid Ontario Family Law Expanded Duty Counsel, CANADIAN FORUM ON CIVIL JUSTICE, <http://cfcj-fcjc.org/inventory/reform.php?id=59>.

²³⁴ For instance, in Plymouth, Massachusetts, the local bar administers a “Lawyer of the Day” program using volunteer attorneys willing to advise indigent self-represented litigants. *Lawyer of the Day Program*, PLYMOUTH COUNTY PROB. & FAM. CT., http://pcpfc.com/lawyer_of_the_day_program.htm; *see also Courtroom Lawyer for the Day in Suffolk Probate and Family Court*, VOLUNTEER LAWS. PROJECT OF BOSTON BAR ASS’N, http://www.vlpnet.org/volunteer/item.718-Courtroom_Lawyer_for_the_Day_in_Suffolk_Probate_Family_Court; *Volunteer Lawyer for the Day Program Prospective Volunteers*, New York State Unified Ct. Sys., http://www.nycourts.gov/courts/nyc/housing/vlfd_hsg_prospectiveattys.shtml.

as this would provide *pro se* litigants with a modicum of legal assistance at important stages of criminal (and civil) legal proceedings. Additional reforms by way of statutory or court rule changes may be needed to implement programs that permit such daily counsel to impart legal assistance, as contrasted to legal information.²³⁵

C. Hybrid Representation

¶197 A standby counsel (sometimes known as “advisory counsel”) is appointed by American and Canadian courts to assist self-represented defendants in serious criminal cases, especially capital cases.²³⁶ They may assist a *pro se* defendant “in overcoming routine procedural or evidentiary obstacles” and may also help to “ensure the defendant’s compliance with basic rules of courtroom protocol and procedure.”²³⁷ The defendant, however, retains control over the organization and content of his defense, files his own motions, makes his own arguments, participates in *voir dire*, and questions witnesses.²³⁸ Standby counsel is particularly important where the defendant has questionable mental competence.²³⁹

¶198 In contrast to standby counsel, whose unique duties are delineated by the trial court in each case,²⁴⁰ “hybrid representation” is an arrangement in which a self-represented

²³⁵ Additionally, some form of immunity from malpractice suits (with exceptions for gross negligence or recklessness) should be adopted to protect counsel who provide legal services or other assistance under this delivery model.

²³⁶ A court 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.” *Faretta v. California*, 422 U.S. 806, 834 n. 46 (1975). Some courts only permit standby counsel in capital cases. *See People v. Garcia*, 93 Cal. Rptr. 2d 796, 802 (Cal. Ct. App. 2000).

²³⁷ *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984).

²³⁸ In *McKaskle*, the Court stated:

First, the *pro se* defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel’s participation over the defendant’s objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded.

Second, participation by standby counsel without the defendant’s consent should not be allowed to destroy the jury’s perception that the defendant is representing himself. The defendant’s appearance in the status of one conducting his own defense is important in a criminal trial, since the right to appear *pro se* exists to affirm the accused’s individual dignity and autonomy. . . . Appearing before the jury in the status of one who is defending himself may be equally important to the *pro se* defendant. From the jury’s perspective, the message conveyed by the defense may depend as much on the messenger as on the message itself. From the defendant’s own point of view, the right to appear *pro se* can lose much of its importance if only the lawyers in the courtroom know that the right is being exercised.

Id. at 178–79 (footnote omitted).

²³⁹ Christine G. Jennings, *Comment: Kaczynski to Moussaoui: Allowing Pro Se Defendants with Mental Illnesses to Represent Themselves*, 31 N.E. J. ON CRIM. & CIV. CONFINEMENT 365 (arguing that standby counsel is particularly appropriate in cases of defendants with limited mental capacity).

²⁴⁰ *See, e.g., State v. Powers*, 563 S.E.2d 781, 788 (W. Va. 2001):

Given the lack of clarity over what, exactly, is the role of standby counsel, we find it is of the utmost importance that, when appointing standby counsel, trial courts do in fact define, precisely, the role counsel is expected to assume. Furthermore, trial courts should clearly inform counsel and the defendant of that role. Accordingly, we hold that when a circuit court appoints standby counsel

defendant requests only specific, limited legal services from counsel, and thereby acts essentially as co-counsel with the attorney. The hybrid relationship may involve, for example, the *pro se* defendant wanting to conduct the opening statement and closing argument, and having counsel conduct the questioning of the witnesses, or some other division of labor during the trial or pretrial process.

¶99 The hybrid model of representation has almost uniformly been rejected by American courts.²⁴¹ One court explained the objection as follows:

As we have noted, the right to counsel and the right to defend *pro se* cannot be asserted simultaneously. The two rights are disjunctive. There can be but one captain of the ship, and it is he alone who must assume responsibility for its passage, whether it safely reaches the destination charted or founders on a reef.²⁴²

¶100 While commentators have discussed the advantages of hybrid representation,²⁴³ only a minority of courts have held that it is within the discretion of the trial judge to permit hybrid representation.²⁴⁴ It is rare for a court to find that denial of hybrid counsel

to assist a criminal defendant who has been permitted to proceed *pro se*, the circuit court must, on the record at the time of the appointment, advise both counsel and the defendant of the specific duties standby counsel should be prepared to perform. For example, the court must state whether counsel should be prepared to take over the case at the defendant's request.

²⁴¹ See, e.g., *McKaskle*, 465 U.S. at 178; *United States v. Washington*, 353 F.3d 42, 46 (D.C. Cir. 2004) (defendant's request to present own closing argument properly denied because defendant does not have right to hybrid representation); *McCulloch v. Velez*, 364 F.3d 1, 8 (1st Cir. 2004) (noting that there is no right to hybrid representation in federal courts); *State v. Cook*, 821 P.2d 731, 739 (Ariz. 1991) (noting that "Arizona does not recognize the right to hybrid representation"); *In re Lee Max Barnett*, 73 P.3d 1106, 1111 (Cal. 2003) (ordering that the court will no longer consider *pro se* petitions from represented criminal defendants); *In re Sondley, Sr.*, 990 S.W.2d 361, 362 (Tex. Ct. App. 1999) ("[A] trial court is under no mandatory duty to accept or consider pleadings filed *pro se* by a party who is represented by counsel.").

²⁴² *Parren v. State*, 523 A.2d 597, 599 (Md. 1987).

²⁴³ See, e.g., Joseph A. Colquitt, *Hybrid Representation: Standing the Two-Sided Coin on Its Edge*, 38 WAKE FOREST L. REV. 55, 65 (2003); Judith Welcom, *Assistance of Counsel: A Right to Hybrid Representation*, 57 B.U.L. REV. 570, 571 (1977); Richard H. Chused, *Faretta and the Personal Defense: The Role of a Represented Defendant in Trial Tactics*, 65 CAL. L. REV. 636 (1977); Marie Higgins Williams, *The Pro se Criminal Defendant Standby Counsel and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789 (2000). An example of the successful use of hybrid representation is the International Criminal Court case against Slobodan Milosevic. Joanne Williams, *Slobodan Milosevic and the Guarantee of Self-Representation*, 32 BROOKLYN J. INT'L L. 553, 600 (2007). Williams argues that there is an advantage to hybrid representation in cases where the defendant is more familiar than his lawyers with complex facts, figures, locations, and witnesses, and "is more likely to encourage efficiency and order than to promote chaos." *Id.* at 600. Moreover, hybrid representation serves to preserve judicial neutrality, rather than requiring the *pro se* defendant to rely on judges for assistance; thus allowing the victim, the prosecutor, and the witnesses to see the judge as impartial. *Id.* 600–01.

²⁴⁴ See, e.g., *United States v. Washington*, 434 F.3d 7, 16 (1st Cir. 2006) (noting that the trial court has discretion to grant or deny defendant's request for hybrid representation); *United States v. Norris*, 780 F.2d 1207, 1211 (5th Cir. 1986) (holding that defendant's request to cross-examine government's experts but have appointed counsel conduct all other aspects of the case was properly denied because this decision is within the trial court's discretion); *United States v. Mosely*, 810 F.2d 93, 98 (6th Cir. 1987) (holding that defendant's request for hybrid representation was found to be properly denied despite the fact that the defendant was an attorney and a judge); *United States v. Oakey*, 853 F.2d 551, 553 (7th Cir. 1988) (holding that defendant's request to proceed *pro se* with standby counsel was denied because defendant sought to act as co-counsel); *United States v. Mentzos*, 462 F.3d 830, 839 (8th Cir. 2006) (holding that defendant's

is reversible error.²⁴⁵ Mississippi and North Dakota appear to be the only states where hybrid counsel is permitted.²⁴⁶

¶101 Hybrid representation is not much different from the limited representation phenomenon (or unbundled legal services) in the civil context,²⁴⁷ which is permissible under legal ethics principles²⁴⁸ and rules of procedure governing limited appearances in a growing number of states.²⁴⁹ The benefits in civil cases include increased access to

request for hybrid representation was within trial court's discretion to deny and the denial was deemed proper after the defendant conducted a majority of the trial *pro se*).

Some courts hold that hybrid representation should only rarely be allowed. *See, e.g.*, *United States v. Olano*, 62 F.3d 1180, 1193 (9th Cir. 1995) (holding that defendant's request to appear as co-counsel was denied when the defendant failed to establish a "special need" to participate); *McCulloch*, 364 F. 3d at 8 (noting that hybrid counsel was only granted occasionally in court's discretion, but noting that "[s]uch largess is, however, to be dispensed sparingly"). *But see* *Page v. Burger*, 406 F.3d 489, 493, 495 (8th Cir. 2005) (noting that hybrid representation was allowed when defendant permitted standby counsel to cross-examine witnesses, make objections, and file for mistrial); *United States v. Leggett*, 81 F.3d 220, 226 (D.C. Cir. 1996) (noting that hybrid representation was allowed when defendant was permitted to participate directly in the trial as he pleased).

²⁴⁵ One such case is *Howard v. State* where the conviction was reversed when the trial court denied the *pro se* defendant's request to allow one of his two standby attorneys to make his closing argument. *Howard v. State*, 697 So.2d 415, 427 (Miss. 1997).

²⁴⁶ *See* *Goff v. State*, 14 So. 3d 625, 642–43 (Miss. 2009) (noting that a trial court may permit hybrid representation which consists of "the participation by an attorney in the conduct of the trial when the defendant is proceeding *pro se*"); *Metcalf v. State*, 629 So.2d 558, 565 (Miss. 1993) (noting that hybrid counsel may participate in or assist in the preparation of such activities as opening statements, examination of witnesses and closing arguments); *City of Fargo v. McMorro*, 367 N.W.2d 167 (N.D. 1985) (noting that defendant was allowed to participate in his defense along with counsel).

²⁴⁷ This model of legal services delivery has been promoted as a means of affording some legal services to those who otherwise would be unable to afford full legal representation and has become popular in both Canada and the U.S. *See, e.g.*, LAW SOCIETY OF BRITISH COLUMBIA, REPORT OF THE UNBUNDLING LEGAL SERVICES TASK FORCE; LIMITED RETAINERS: PROFESSIONALISM AND PRACTICE 3–5 (2008), available at http://www.lawsociety.bc.ca/publications_forms/report-committees/intro.html (follow hyperlink "Report of the Unbundling of Legal Services Task Force—Limited Retainers: Professionalism and Practice"); POLICY SECRETARIAT, LAW SOCIETY OF UPPER CANADA, UNBUNDLING OF LEGAL SERVICES AND LIMITED LEGAL REPRESENTATION: BACKGROUND INFORMATION AND PROPOSED AMENDMENTS TO PROFESSIONAL CONDUCT RULES, available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147483764>; Forrest Mosten & Lee Borden, *Unbundled Legal Services*, <http://zorza.net/resources/Ethics/mosten-borden.htm>; CAL. COMM' N ON ACCESS TO JUSTICE, REPORT ON LIMITED SCOPE LEGAL ASSISTANCE WITH INITIAL RECOMMENDATIONS (2001); MERRIE-ROXIE CROWELL, UNBUNDLED LEGAL SERVICES MONITORING COMMITTEE, REPORT OF THE UNBUNDLED LEGAL SERVICES MONITORING COMMITTEE (2005), available at

[https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/B591E315F65F20FC85256FE1007766E3/\\$FILE/SpecialUnbunLegalServMonitorRpt..pdf?OpenElement](https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/B591E315F65F20FC85256FE1007766E3/$FILE/SpecialUnbunLegalServMonitorRpt..pdf?OpenElement); MICH. BAR ASS'N, ACCESS TO JUSTICE TASK FORCE REPORT (2003), available at www.michbar.org/programs/atj/pdfs/AnnualReport2002-2003.pdf; ABA SECTION OF LITIG., HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE (2003), available at <https://www.abanet.org/litigation/taskforces/modest/report.pdf>.

²⁴⁸ MODEL RULES OF PROF'L CONDUCT R. 1.2(c) (2004) ("[L]awyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

²⁴⁹ For instance, the Arizona rule, which, like other emerging limited representation rules, provides for a simplified method of withdrawing from a case upon completion of the limited representation. ARIZ. FAM. LAW PROC. 9(B) (2010); *cf.* ALASKA R. CIV. P. 81(e) (2007); FLA. FAM. LAW FORM 12.900(g) (2009) N.H.

justice, preparation for self-represented litigants of documents that are legible, complete, and accurate; clarifying the presentation of issues to the court; and reduction of *pro se* errors, continuances, demands on court personnel, and court congestion.²⁵⁰ Serious consideration should be given to permitting hybrid representation to enhance the competence of “gray-area” defendants to control their own defense.

D. *Amicus Curiae*

¶102 Another Canadian method for assisting *pro se* defendants is the *amicus curiae* appointment.²⁵¹ Unlike in the United States, where amici are generally involved at the appellate level, Canadian judges routinely appoint amici at the trial level, particularly in *pro se* criminal cases. The primary role of *amicus curiae* is to assist the court without acting on behalf of the accused; the *amicus*'s role will vary “depending on the circumstances under which the appointment is made.”²⁵² Courts define the role at trial of amici to include: “1) to represent unrepresented interests before the court; 2) to inform the court of some fact or circumstance that the court may otherwise be unaware of; or 3) to advise the court of a point of law.”²⁵³ Amici have been appointed to represent defendants found unfit to stand trial²⁵⁴ and those removed from the courtroom due to disruptive conduct,²⁵⁵ in which case they act more like defense counsel.²⁵⁶ They have also been appointed to assist the court in determining whether a witness, accused, or other

SUPER. CT. 15(e) (2011); N.M. DIST. CT. R. CIV. P. 1-089(C) (2008); N.D. R. CIV. P. 11(e)(1) (2009); Utah R. Civ. P. 75(b)–(c) (2008); Vt. R. Civ. P. 79.1(h) (2009).

²⁵⁰ Liz Pejeau, *Ethically Speaking: Limited Scope Representation: Making Representation Affordable . . . and Ethical*, 48 ORANGE CNTY. LAW. 38, 41–41 (2006) (summarizing the ethical issues arising from unbundled legal services, and noting this model affords lawyers new practice opportunities, and increases pro bono legal services from attorneys who “may be more likely to provide pro bono assistance if not forced to commit to a whole case, but can instead limit his or her involvement to just one aspect of a case.”) See also Kathleen Bird, *A Look at Unbundling of Legal Services*, 63 MO. B. [J. OF THE MO. BAR] 18 (2007) (describing the national unbundling trend as a means of addressing the growth in self-representation, particularly in family courts).

²⁵¹ Canadian courts have the power to appoint *amicus* at the trial of an unrepresented accused. See, e.g., *R. v. Samra* [1998], 41 O.R. 3d 431 (Can. Ont. C.A.).

²⁵² *R. v. Cairenius*, 2008 CanLII 28219 (Can. On. S.C.). An early description of the *amici* role was given in *Grice v. The Queen*: “In its ordinary use the term implies the friendly intervention of counsel to remind the Court of some matter of law which has escaped its notice and in regard to which it is in danger of going wrong.” *Grice v. The Queen*, (1957), 11 D.L.R. 2d 699, 702 (Can. Ont. H.C.J.).

²⁵³ *Khadr v. Canada, (Attorney General)* [2008] F.C. 46 (Can.). Courts sometimes permit *amici* to conduct a cross-examination for an accused. *R. v. Phung*, 2006 CanLII 57079 (Can. On. S.C.).

²⁵⁴ See *R. v. Phung*, 2006 CanLII 57079 (Can. On. S.C.).

²⁵⁵ *R. v. Atherley* 2009 ONCA 195 (Can. On. C.A.); *R. v. Lee* [1998] N.W.T.J. No. 194 (Can. N.W.T. S.C.).

²⁵⁶ Cf. *R. v. Brown* 1999 CarswellOnt 4700, (Can. On. C.J.) (WL) (noting that amici did not cross-examine witnesses or give legal advice to the accused). As noted in *R. v. Cairenius*:

[A]mici do not take instruction from the accused/applicant, and do not have a solicitor-client relationship with the accused/applicant. They are not restricted to making submissions on behalf of the accused/applicant. Indeed, the role of *amicus* in general does not include making submissions on behalf of the accused/applicant. No doubt there will be cases . . . where the patient refuses to participate in the proceedings, and *amicus* may be appointed to present argument as though they were counsel for the patient. However, that is not the general role of *amicus*.

R. v. Cairenius, 2008 CanLII 28219, para 61 (Can. On. S.C.) (emphasis omitted).

third party is subject to informer privilege.²⁵⁷ Similarly courts have appointed amici to help criminal defendants with their appeals.²⁵⁸

¶103 American courts should adopt the Canadian approach of appointing amici to assist the court in the circumstances described. A liaison between the court and a “gray-area” *pro se* defendant will assist the court in communicating the defendant’s position and needs to the court and the prosecution, and performing other functions short of representation that enhance the defendant’s competence to present his or her defense.

E. Non-Lawyer Agent

¶104 While a foreign concept in today’s American courts, non-lawyer practice exists today under Canadian law. Non-lawyer “agents” may be given a “right of audience,” in other words, the right to represent another, in a variety of matters. These include small claims cases,²⁵⁹ family law cases,²⁶⁰ traffic cases,²⁶¹ and minor criminal cases.²⁶² Courts must assure themselves that the agent selected by an otherwise unrepresented party is

²⁵⁷ *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253 (Can. S.C.C.).

²⁵⁸ *Attorney General of Ontario v. McNeil*, 2007 CanLII 25191 (Can. C.C.C.). There are also instances in which motions for appointment of amicus curiae counsel are denied, such as where a defendant sought the appointment of an amicus to assist him in securing the services of an expert witness. *See, e.g., R. v. Beitel*, 2008 CanLII 63180 (Can. On. S.C.) (denying motion where there is no evidence that the defendant is unable to find an expert himself); *H.M.Q. v. Waranuk*, 2008 YKSC 49 (Can. Y.S.C.) (finding no error in trial judge’s refusal to appoint amici for defendant found fit to stand trial in light of judicial assistance provided, but judgment reversed because of court’s failure to appoint counsel where reasonable grounds existed defendant was unfit).

²⁵⁹ Ontario Courts of Justice Act provides:

A party may be represented in a proceeding in the Small Claims Court by a person authorized under the *Law Society Act* to represent the party, but the court may exclude from a hearing anyone, other than a person licensed under the *Law Society Act*, appearing on behalf of the party if it finds that such person is not competent properly to represent the party, or does not understand and comply at the hearing with the duties and responsibilities of an advocate.

R.S.O. 1990, c. C.-43, 26 (Can.).

²⁶⁰ In the Family Court, the Agent must apply in writing for permission with sufficient materials to allow the Court to exercise its discretion. The Agent must indicate:

(1) the extent of the representation requested . . . (2) qualifications of the paralegal, including education and experience; (3) how those qualifications relate to the nature of the representation requested; (4) [an] indication of whether the paralegal is subject to the direction or supervision of anyone or any organization; (5) evidence of good character; (6) what insurance or compensation fund would be available in the event of the paralegal's negligence or fraud; and (7) indication of whether the paralegal is knowledgeable about and prepared to abide by any relevant code of conduct [and the Rules].

Equiprop Management Ltd. v. Harris reflex [2000], 51 O.R. 3d 496 (Div. Ct.).

²⁶¹ *But see Law Soc. of B.C. v. Lawrie*, 1987 CanLII 2443 (BC S.C.).

²⁶² The Canadian Criminal Code provides: “A defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally” R.S.C. 1985, c. C-46, 800(2). However, § 802.1 prohibits an appearance, examination, or cross-examination of witnesses by an agent “if he or she is liable, on summary conviction, to imprisonment for a term of more than six months, unless the defendant is a corporation or the agent is authorized to do so under a program approved by the lieutenant governor in council of the province.” R.S.C. 1985, c. C-46, 802.1. The provision of the Canadian Criminal Code permitting non-lawyer agents in minor criminal cases does not, however, permit their appearance for a fee in the juvenile court. *R. v. D.S.* (2005), A.B.P.C. 114 (Can. Alta.).

qualified.²⁶³ Canadian courts also have inherent power to use non-lawyer representatives, but courts have held that this power should be used only “rarely and with caution,”²⁶⁴ and may not be invoked when in conflict with a statute, such as that which regulates the unauthorized practice of law.²⁶⁵

¶105 These provisions are not without controversy, as they operate within an extensive scheme of Canadian provincial laws that, as in the United States, prohibit the unauthorized practice of law.²⁶⁶ But there are many persons who could perform the functions of a non-lawyer agent for “gray-area” defendants and assist them in presenting their chosen defense in many cases. These could include former police officers, college professors, counselors, paralegals, or anyone else with prior experience in the justice system. Use of such agents would be cost effective and, like the other alternatives presented, would enhance the “gray-area” defendant’s competence to present his or her defense.

F. *McKenzie Friend*

¶106 In the English case of *McKenzie v. McKenzie*,²⁶⁷ an appeal in a divorce action, the appellate court addressed the trial court’s refusal to allow an Australian attorney who was not licensed in Great Britain to assist the husband in court. The court held that the trial judge should have allowed the attorney to assist the husband because the husband had problems communicating and the case was quite complex.²⁶⁸

¶107 The headnote to *McKenzie* asserted that *pro se* defendants had a right to a non-lawyer “friend” to assist them in court. That assumption was dashed in *R. v. Leicester*

²⁶³ Courts have the responsibility to ensure that persons appearing before them are properly represented and defended so as to maintain the rule of law and the integrity of the court generally. There are times when the court must scrutinize the selection or representation provided by a nonlawyer agent:

It is impossible to catalogue all of the circumstances in which representation by a particular agent would imperil the administration of justice and properly call for an order disqualifying that agent. Obviously, representation by agents lacking the ability to competently represent an accused endangers all aspects of the proper administration of justice, particularly the accused’s right to a fair trial.

R. v. Romanowicz, 1999 CanLII 1315, para. 74 (Can. ON C.A.).

²⁶⁴ *Venrose Holdings Ltd. v. Pacific Press Ltd.* 1978 CanLII 378 (Can. B.C.C.A.).

²⁶⁵ *See Law Society et al. v. Nixon* (1992), 102 Nfld. & P.E.I.R. 310, para. 41 (noting that the judge’s inherent powers to regulate the procedure of his or her court applies only if they do not conflict with relevant statutes or the rules of court); *See also Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, [1976] 2 S.C.R. 475, 480 (Can.).

²⁶⁶ The Federation of Law Societies of Canada has created a website that gives quick access to all the provincial practice-of-law statutes. *The Practice of Law in Canada*, FEDERATION OF LAW SOCIETIES OF CANADA, <http://www.flsc.ca/en/lawSocieties/lawSocieties.asp#discipline>.

²⁶⁷ *McKenzie v. McKenzie* [1970] 3 W.L.R. 472 (Eng.).

²⁶⁸ The court cited in the English case of *Collier v. Hicks*, where an attorney in a criminal case began to act in defense of the accused without first having filed an appearance in the case. [1831] 2 B. & Ad. 663. The court removed him from the courtroom. He then brought an action against the judge. *Id.* at 672. On appeal, the court held that the attorney had no right to appear and defend the accused unless he properly filed his appearance: “Any person, whether he be a professional man; or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice, but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.” *Id.* at 669.

City Justices, et al.,²⁶⁹ in which the court held that the language from Collier quoted in the *McKenzie* headnote was dicta, and that having a “*McKenzie* friend” to help a self-represented defendant is not a right, but rather is permissible at the discretion of the court. While the court declined to set forth guidelines for future cases, it held that “justices must when considering an application that a friend assists an unrepresented defendant strive to ensure by their decision that no injustice will be done if they refuse the application and that the proceedings bear the appearance of fairness.”²⁷⁰

¶108 English courts routinely grant self-represented litigants assistance from a variety of “friends,” including spouses,²⁷¹ siblings,²⁷² solicitors,²⁷³ and accountants.²⁷⁴ English courts see the assistance to a *pro se* party as necessary to conduct fair proceedings.²⁷⁵ Permitting non-lawyers to assist the *pro se* defendant is a more reasonable means of balancing and protecting the defendant’s right to real autonomy, while ensuring a fair trial.

¶109 Canadian courts also permit self-represented litigants the assistance of a “*McKenzie* friend.”²⁷⁶ In Canada, as in England, the “*McKenzie* friend” may not represent the *pro se* party, but may sit at the counsel table, make suggestions quietly, refer the *pro se* party to documents, take notes, suggest questions for examination or cross-examination, and so forth.²⁷⁷ This practice, now commonplace in British courts and a growing trend in Canadian courts, has also been adopted in other Commonwealth countries.²⁷⁸ It has great promise as a means of providing assistance to *pro se* parties that the court declines to provide, and which may be essential for the conduct of a fair trial in cases where the issues are complex, or where *pro se* parties do not have the capacity for any number of reasons to present their own claim or defense.

¶110 The U.S. Supreme Court’s admonition that, “in the long run, experience teaches that strict adherence to the procedural requirements specified by the legislature is the best guarantee of evenhanded administration of the law,”²⁷⁹ rings hollow because it falsely presumes an equality of arms in an adversarial competition. Courts sometimes provide

²⁶⁹ [1991] W.L.R. 974 (Eng.).

²⁷⁰ *Id.* at 986.

²⁷¹ *KD v. Chief Constable of Hampshire*, [2005] EWHC 2550 (QB) (Eng.).

²⁷² *S.K. Thakrar & Co. & Ors. v. Suburban Properties Ltd.*, [2005] EWHC 2667 (TCC) (Eng.).

²⁷³ *Queen v. Secretary of State For Home Department ex parte Fakunle Sunday* [1997] EWCA (Civ) 1940 (Eng.).

²⁷⁴ *Williams v. Fairbairn, et al.*, [2006] EWHC 1723 (Ch) (Eng.).

²⁷⁵ *Queen v. Bow County Court* [1999] QBCOF 0478/4 (Eng.).

²⁷⁶ See *Milne v. Milne*, [2009] ABQB 361 (Can. A.Q.B.) (permitting friend to assist); *Schmidt-Paborn v. Lucas*, 2005 CarswellAlta 930 (Can. A.B.Q.B.) (WL) (permitting father to assist); *Moss v. NN Life Insurance Co.*, 2004 MBCA 10 (Can. Man. C.A.) (holding that husband is not allowed to represent his wife, but adding that “In my opinion, lending a helping hand to a self-represented litigant, without fee and on an isolated occasion, does not constitute a violation of s. 20(2)(b) by ‘appear[ing] as a lawyer’ before a court”).

²⁷⁷ *Law Society of Manitoba v. Pollock*, 2007 MBQB 51 (Can. Man. Q.B.) The *friend* could not hold himself out “a McKenzie Friend to all and sundry, or proposed to charge a fee for his services” because “then . . . different considerations would apply.” *Id.* So long as serving as a McKenzie Friend was only “an occasional basis” and the friend sought court permission, his services as a friend “may not constitute the unauthorized practice of law.” *Id.*

²⁷⁸ See, e.g., *Mihaka v Police*, [1981] 1 NZLR 54 (HC); *Giniotis v. Farrugia*, 1985 NSW LEXIS 5704 (Whales).

²⁷⁹ *Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980).

leeway for *pro se* parties in some procedural contexts, and judges may now provide “reasonable accommodations” without threat of sanction for lack of impartiality. But, until the Supreme Court overrules its earlier decisions declaring that self-represented defendants are not entitled to instruction or assistance from the court, no court will be constitutionally obligated to provide such assistance.²⁸⁰ Developments in state law or judicial ethics rules may be the only available means for courts to give meaning to the right to self-representation, to enhance access to justice for self-represented litigants, and to thereby gain the public’s trust and confidence in the legitimacy of the justice system.

¶111 The same level of assistance is not required for every *pro se* defendant. The extent of assistance necessary for any given “gray-area” *pro se* defendant lies on a spectrum, or sliding scale, and depends upon the characteristics of the defendant, the complexity of the case, and the substantive, procedural, and technical barriers to his making his defense of choice. Thus, the court should have multiple options available like those described above to ensure the appropriate form and degree of assistance. The availability of these options will be a matter for changes in or adoption of new court rules and perhaps legislation.

VI. CONCLUSION

¶112 The recognition of a right to self-representation without the creation of the conditions necessary for the fulfillment of this right is contradictory. In the case of “gray-area” defendants, the Supreme Court has made autonomy a legal fiction. *Indiana v. Edwards* demonstrates that injustice may result when the court, to avoid a “spectacle” and the appearance of unfairness, imposes unwanted counsel on a defendant. Autonomy, as expressed through self-representation in the justice system, is a precious and fundamental right that is denied when the courts fail to provide any form of assistance short of imposed counsel.

¶113 It is axiomatic that courts need the trust and confidence of the public to operate effectively,²⁸¹ especially in democratic societies, like ours, that are founded on individual freedom and autonomy. But to argue that “gray-area” *pro se* defendants’ unassisted defense would result in a “spectacle,” giving rise to a perception of unfairness, as the court did in *Indiana v. Edwards*, assumes that judges’, lawyers’, and the public’s

²⁸⁰ Reformers are frustrated by the fact that the restrictive Supreme Court language negating the self-represented litigant’s right to assistance by the trial judge on “appearance” of impartiality grounds arises almost entirely from criminal cases. There have been very few civil cases. *See, e.g., McNeil v. United States*, 508 U.S. 106 (1993) (procedural rules should not be interpreted to excuse mistake by self-represented a litigants). *Pro se* litigation rules must first be changed in criminal case law before any change will come about on the civil side. Lower courts do *not* assume that, if a judicial duty is recognized in criminal cases, it also applies in the civil context. On the other hand, if some request is made by a self-represented defendant and *denied* in a criminal case, civil courts will assume the same denial *should* apply in a civil case. Based on the outcome of cases in the criminal context, the case law on the civil law side of this subject has been practically frozen for decades.

²⁸¹ YANKOLOVICH, SKELLY AND WHITE, INC., THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS AND COMMUNITY LEADERS (1978), available at <http://www.ncjrs.gov/App/Publications/abstract.aspx?ID=46104> (follow hyperlink “how to obtain documents”) (reporting results of a national survey which found, *inter alia*, (i) general public lack of knowledge about—and dissatisfaction with—courts, (ii) profound differences regarding the image of courts between the public’s view and those of lawyers and judges, and (iii) those members of the public voicing the greatest dissatisfaction were those who had court experiences).

perceptions are the same. It erroneously assumes that a reasonable observer would see unfairness in the *pro se* spectacle itself, rather than seeing the unfairness of a court which condones a process in which no assistance is provided to such defendants who are mentally challenged. Moreover, to argue that avoidance of the spectacle by imposition of unwanted counsel will protect the legitimacy of the court is to improperly use such defendants as a means to an end. Imposing unwanted counsel should simply be a last resort and not a matter of course.

¶114 The Supreme Court created the exclusionary rule as a prophylactic remedy for Fourth Amendment violations to deter police misconduct, protect the integrity of the court, and give meaning to the Fourth Amendment.²⁸² It also established special rules and principles governing access to justice for prisoners in order to maintain a fair and accessible justice system.²⁸³ So, too, should the Court recognize the reasonableness and necessity of establishing a judicial duty of reasonable assistance to “gray-area” *pro se* defendants, and permit the use of innovative forms of assistance and representation in lieu of unwanted counsel. These approaches will prevent the feared “spectacle” the Supreme Court in *Edwards* sought to avoid, and will increase the perception of fairness and satisfaction with the justice system among defendants, jurors, public trial observers, and those permitted to render assistance. More importantly, it will fulfill the promise of freedom and equal justice by giving meaning to the fundamental rights of dignity, autonomy, and personhood before the law.

²⁸² *Mapp v. Ohio*, 367 U.S. 643, 659–60 (1961).

²⁸³ *See* *Bounds v. Smith*, 430 U.S. 817 (1977) (requiring the state to provide prison law libraries); *Ex parte Hull*, 312 U.S. 546 (1941) (invalidating a prison regulation that required prison officials to review and approve prison writ of habeas in order for it to be filed); *Burns v. Ohio*, 360 U.S. 252 (1959) (invalidating a state provision that required indigent prisoners to pay a fee before filing leave to appeal); *Smith v. Bennett*, 365 U.S. 708 (1961) (holding that the State's refusal to docket an indigent prisoner's petition for a writ of habeas corpus without the payment of a statutory filing fee denied the prisoner the equal protection of the laws guaranteed by the Fourteenth Amendment).