Trial by Champion

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I. INTRODUCTION

The dignity of the human person . . . requires that every man enjoy the right to act freely and responsibly. For this reason, therefore . . . man should exercise his rights, fulfill his obligations and, in the countless forms of collaboration with others, act chiefly on his own responsibility and initiative.

The law reflects, in a significant way, the values of the society in which it is practiced. Respect for the dignity of each individual is a fundamental value of our society. Self-determination is essential to the preservation of dignity. Therefore the legal system of the United States purports to accord dramatic acknowledgment to the criminal defendant or civil litigant as an autonomous individual.

This libertarian ideal is embodied in a number of familiar phrases. It is said that ours is a society of laws, not men; that all men are created equal and stand equal before the law; and that consequently any individual, no matter how lowly, can challenge any other, no matter how powerful, with the outcome of his legal battle determined solely on the merits of his case.

Obviously, these ideas express an ideal that we can never fully realize. The President of the United States is a more formidable adversary in the system than a ghetto youth charged with a drug offense. It is difficult to see how it could be otherwise. The following discussion, however, does not focus on this kind of inequality before the law. Instead, the concern here is with a legal fallacy. The legal system purports that it is really the individual, the autonomous human being, who is accorded his day in court and his opportunity

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to do combat with his adversary or society. This facet of the individualistic ideal, in actuality is more fallacy than fact for the "normal" defendant. And for the defendant accused of mental illness, it is almost totally illusory.

One need not dig deeply before discovering that the idealized individual confrontation that our legal mythology would lead us to believe exists is in fact very limited. The temples of law are the sacred provinces of lawyers. As a rule, in these temples, as in all others, only the priests are heard; the penitents are reduced to silence or are allowed, at most, to utter some ritual incantations taught them by the priests. One of the functions of the lawyers is to protect their sacred precincts from pollution by the spiritually unclean—that is, by anyone who is not a lawyer and an "officer of the court."

This interposition of attorneys in the legal process frequently deprives individuals of their autonomy. As Professor Sylvia A. Law has written:

A lawyer has a special skill and power to enable individuals to know the options available to them. . . . [However], [f]ar too often, professional attitude, rather than serving to enhance individual autonomy and self-control, serves to strip people of autonomy and power. Rather than encouraging clients and citizens to know and control their options and lives, the legal profession discourages client participation and control of their own legal claims.²

Under the guise of zealous representation of a client's best interests, lawyers too often usurp the individual's power of self-determination, preempt their client's decisions, and destroy the client's dignity and humanity in the process.

Persons accused of mental illness are even more prone to this legal usurpation. Although society claims to be solicitous of their needs—or, perhaps better, of their legal salvation—the mentally ill cannot participate in the ceremonies of legal adjudication even to the extent allowed to the non-ordained "layman." Why are lay persons, and to an even greater extent the allegedly mentally ill, so divorced from the legal process? The answers to these questions are rooted in the history of law and the adversary system.

II. TRIAL BY ORDEAL

One of the deepest and thickest roots of our contemporary adversary system of justice is its earlier form known as trial by ordeal. In his great work on this subject, Henry Charles Lea showed that trial by ordeal has been practiced by people throughout all parts of the world. Its widespread popularity springs from the universal human abhorrence of doubt and the primitive human propensity to resolve doubt by means of chance or choice attributed to divine intervention. "To this tendency of human mind," writes Lea,

'[M]en, oppressed with doubt, have essayed in all ages to relieve themselves from responsibility by calling in the assistance of Heaven. Nor, in so doing, have they seemed to appreciate the self-exaltation implied in the act itself, but in all humility have cast themselves and their sorrows at the feet of the Great Judge, making a merit of abnegating the reason which, however limited, has been bestowed to be used and not rejected.'

The Chinese method of resolving marital conflict was rather hard on wives and their lovers, faithfully reflecting the values of the society in which it was practiced. The European versions of trial by ordeal reflect the values of the people who practiced them: the superstitions of Christian theology and the literality of belief in original sin, a belief which made all persons accused of crime guilty until proven otherwise, as all were guilty of sin by nature. One favorite method with both secular and ecclesiastic authorities in the Middle Ages was the ordeal of boiling water. To determine guilt or innocence the subject thrust his hand into a caldron of boiling water: if the part was scalded, he was guilty; if it was not, he was innocent. That this was an essentially religious procedure is demonstrated in

4. Id. at 4. Lea cites the following example from China.
   If an injured husband surprises his wife flagrante delicto, he is at liberty to slay the adulterous pair on the spot; but he must then cut off their heads and carry them to the nearest magistrate, before whom it is incumbent on him to prove his innocence and demonstrate the truth of his story. As external evidence is not often to be had in such cases, the usual mode of trial is to place the heads in a large tub of water, which is violently stirred. The heads, in revolving, naturally come together in the centre, when, if they meet back to back, the victims are pronounced guiltless and the husband is punished as a murderer; but if they meet face to face, the truth of his statement is accepted as demonstrated, he is gently bastinadoed to teach him that wives should be more closely watched, and is presented with a small sum of money wherewith to purchase another spouse.

Id.
5. Id. at 7.
Lea's following account:

After the hand had been plunged in the seething caldron, it was carefully enveloped in a cloth, sealed with the signet of the judge, and three days afterwards it was unwrapped, when the guilt or innocence of the party was announced by the condition of the member. By way of extra precaution, in some rituals it is ordered that during this interval holy water and blessed salt be mingled in all the food and drink of the patient—presumably to avert diabolic interference with the result.6

This example is revealing, not only as an illustration of this ordeal, but also as evidence that people then used religion to resolve their doubts much as we now use psychiatry to resolve ours. By this method, an ancient pagan custom which medieval Europeans christianized, doubt was resolved through the vehicle of religion. Ecclesiastic law offered the following justification for the use and efficacy of the ordeal: “Because in boiling water the guilty are scalded and the innocent are unhurt, because Lot escaped unharmed from the fire of Sodom, and the future fire which will precede the terrible Judge will be harmless to the Saints, and will burn the wicked as in the Babylonian furnace of old.”7

The medieval ordeal most widely remembered today is that which was most widely used in witch trials—the ordeal by cold water or so-called “swimming”, an obvious euphemism for “sinking.” The accused, typically a woman charged with witchcraft, was dropped in a river with her hands and feet tied. If she sank, she was innocent; if she floated she was guilty. While we may view this as an obvious plot to murder the defendant, to our forebearers this seemed to be a genuine test consistent with their religious beliefs. Witches and sorcerers were, after all, possessed by and acted as the agents of Satan: “[F]rom their intercourse with Satan, [they] partake of his nature; he resides within them, and their human attributes become altered to his; he is an imponderable spirit of air, and therefore they likewise become lighter than water.”8 Clearly, in medieval times, perhaps even more than in ours, it was a good idea to avoid being a

6. Id. at 34-35.
7. Id. at 36. The ordeal by fire, practiced by many cultures, is a variation on the ordeal by boiling water. There are allusions or references to it in Hindu Vedic writings, in Greek tragedy, and in Judaism. Lea cites the “Rabbinical story of Abraham when he was cast into a fiery furnace by Nimrod, for reproving the idolatry of the latter, and escaped unharmed from the flames . . . .” Id. at 57-58. The persistent popularity of this method of ascertaining guilt or innocence is dramatically demonstrated by its employment in Naples as recently as 1811. Id. at 71.
8. Id. at 81.
defendant.

After trial by ordeal came trial by combat. Here the defendant was pitted against a person who was not exactly like our public prosecutor, nor like an executioner, but who served a function that was a mixture of the two. If the defendant was not defeated, he was pronounced innocent. Exceptions were quickly made to the rule that the battle had to be fought by the accused. Women and children were declared to be unable to fend for themselves and were provided "champions." It also occurred to some that it could not be true that all the tall, strong defendants were always more innocent than the small, frail ones. To deal with this discrepancy, the practice of assigning champions to men and women alike began. A special class of champions developed, composed in part of persons who had previously acquitted themselves of their own charges. The practice of having one's innocence demonstrated by the skill of a hired sword continued until relatively recently when the practice was outlawed in England in 1819. Whether there were neighborhood offices of the public champions, and whether the courts of the day held that the state was required to furnish an adequate champion, seem somehow to have been lost in the literature.

A basic assumption underlies the historic judicial processes discussed above: a person may be appropriately represented by another. Although the issue at hand was always the guilt or innocence of a particular individual, the persons and processes used to ascertain this judgment focused not on the accused but on some action taken by another on his behalf. Trial by ordeal was thought to operate by divine intervention. Perhaps figuratively to us, but literally to our forebears, God was the champion of the innocent. In trial by combat, it is not so much divine intervention as the romantic notion that being right is expected to be productive of a just result. One major change from these systems to our modern one is that we have substituted words for weapons. The champion now becomes the lawyer, and the combat focuses on the language of accusation and defense. Divine intervention has been replaced by psychiatric intervention just as the ideology of medicine has supplanted that of religion. Thus, much as before, the system carefully keeps the defendant out of the contest and focuses attention instead on his champion.

10. G. Neilson, Trial by Combat (1890), 48-54.
11. 2 Pollock & Maitland, supra note 9, at 633.
12. Id. at 632.
III. The Right to Self Representation

Although defendants have long been represented by champions, today a criminal defendant has the right to represent himself and his own interests in court. This has been recognized by the United States Supreme Court in *Faretta v. California.* The Court held that the right to defend *pro se* springs from the Constitution itself:

The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense. . . . Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally. To thrust counsel upon the accused, against his considered wish, thus violates the logic of the Amendment. In such a case, counsel is not an assistant, but a master; and the right to make a defense is stripped of the personal character upon which the Amendment insists. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of "that respect for the individual which is the lifeblood of the law."

Although the Court's opinion emphasizes "respect for the individual" and the "personal character" of the choice to defend oneself, it also requires that the defendant's choice be "knowingly and intelligently" made.

How, then, do courts decide who is competent to exercise this personal right and who must be defended by a champion? The guidelines vary. Some courts hold that a person must be "sui juris

14. Id. at 819.
15. Id. at 820 (footnote omitted).
16. Id. at 834 (emphasis added).
17. Id. at 834-35. Although the court does not define what it means by "knowingly and intelligently," it does state that technical legal knowledge is not relevant to an assessment of an accused's knowing exercise of the right to defend himself. See Id. at 836.
and mentally competent," meaning that anyone fit to stand trial, that is anyone who is not insane, is fit to defend himself. Other courts deny the right to defend oneself to any defendant who is possessed by "ignorance, feeblemindedness, youthfulness, illiteracy, or the like." In this formulation, the notion of "incompetence" falls far short of a determination of mental illness; the principle of "parens patriae" implicit in this perspective could easily be interpreted to encompass the entire population.

In determining competency to represent oneself, the state's "better judgment" is substituted for the individual's decision through the concept of waiver. Although there are statements to the effect that the right to counsel and the right to dispense with counsel are "correlative and coequal," in fact the courts do not recognize that coequality. The Court in Faretta recognized that the right to self-representation does not arise "mechanically from a defendant's power to waive the right to assistance of counsel." The Court required that "in order to represent himself the accused must 'knowingly and intelligently' forego those relinquished benefits" associated with the right to counsel. The right to counsel and the right to self-representation are mutually incompatible. It is necessary to waive one in order to elect the other. With more ruse than respect, however, judges have seized on the waiver of one right to prevent the election of the other. The following is an illustration of the way this judicial assault on individual self-determination has operated.

The California courts have held that while it is reversible error to refuse to allow a competent accused to defend himself, the defendant must first waive his right to counsel. Further, they have held that the presumption against the waiver of such a constitutional right is very strong, that the defendant's waiver of counsel must be "intelligent and understanding," and that the factors that determine whether or not a waiver meets these requirements include the defendant's age, education, social background, psychological maturity, knowledge of the law, and the seriousness of the charges against

18. See, e.g., Mackenna v. Ellis, 263 F.2d 35 (5th Cir. 1959).
19. See, e.g., Ex Parte Cornell, 193 P.2d 904 (Okla. 1948).
22. Id. at 835.
23. See Woolard v. United States, 178 F.2d 84 (5th Cir. 1949).
him.26

These courts have thus refused to recognize a simple truth: if the rights to counsel and to reject counsel are truly equal, the accused would have to waive his right to defend himself before he could exercise his right to be represented by counsel. This waiver of self-representation would also have to conform to all of the strictures governing the waiver of counsel. A defendant deemed competent enough to "waive" self-representation or accept counsel should likewise be deemed competent enough to "waive" counsel and represent himself. The discrepancy between the waiver requirements is not a rational one.

This differential treatment of the right to counsel and the right to self-representation diminishes the power of individual defendants and may reflect judicial confusion: the courts simply fail to distinguish between waiver as a forfeiture of the right and waiver as the election of one. This confusion is evidenced by Chief Justice Burger's dissent in *Faretta*:

> In short, both the 'spirit and the logic' of the Sixth Amendment are that every person accused of crime shall receive the fullest possible defense; in the vast majority of cases this command can be honored only by means of the expressly guaranteed right to counsel, and the trial judge is in the best position to determine whether the accused is capable of conducting his defense. True freedom of choice and society's interest in seeing that justice is achieved can be vindicated only if the trial court retains discretion to reject any attempted waiver of counsel and insist that the accused be tried according to the Constitution.27

It makes sense for the courts, as the protector of the weak individual against the strong state, to require the state to carry the heavy burden of proof in asserting that a defendant has waived his constitutional right to counsel. It makes no sense, at least not from this individualistic point of view, for the courts to use this device, designed to protect the defendant, to prevent him from protecting himself. If a person is considered to be accountable in court for his behavior, if he is competent to stand trial or to be a litigant, then he ought to be free to choose between one of two mutually incompatible rights, regardless of whether a judge considers his choice wise.28


27. 422 U.S. 806, 840 (1975).

28. As indicated in his dissent in *Faretta*, Justice Blackmun would probably never consider it wise for a defendant to choose to represent himself: "If there is any truth to the old
Occasionally, people do conduct their own trials and sometimes do so splendidly, especially when they have something to say that has not yet been accepted by the orthodoxy of the law. The self-expression of a sincere and inspired defendant can far better persuade a jury than the intercessions of a defense attorney who is too conforming and timid. Howard Roark's defense, in *The Fountainhead*, of his destruction of his butchered, plagiarized architecture, and the real life ordeal of Angela Davis, are two such examples. But both of these figures were lucky in that their sanity was not questioned. The sad truth is that no person accused of being of unsound mind, can possibly hope to waive counsel, conduct his own hearing, or even assist in his own defense. All these rights and privileges are taken from him. Neither American psychiatrists, nor American lawyers and courts, nor the American people have been able to define an unsound mind. This militates to the advantage of the present law, and to the disadvantages of the person accused of possessing such a mind.

Much like the "sound mind" requirement for self-representation is the "sound mind" requirement to stand trial at all. Under the Constitution, no person can be tried unless he is able to assist in his own defense. The skills required are cognitive. He must be able to understand the proceedings and to communicate with his attorney. Theoretically, this protection is an outgrowth of the prohibition against trial in absentia; practically, it is the measure par excellence that has been used to deprive all kinds of persons of trial on the mere accusation that they were mentally ill and hence unfit to stand trial. Until only a few years ago, innocent persons could be, and often were, imprisoned in hospitals for the criminally insane on such a charge of mental unsoundness; once so imprisoned, they had to wait, often for decades or forever, until the hospital managers declared them fit to stand trial.

The fuss over effective assistance is hard to understand. In actuality, when a person wants to use the services of a lawyer, and has the resources to pay for those services, his own participation in the

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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. Id. at 852.

33. T. SZASZ, supra note 31.
trial as a defendant is probably quite minimal. If he prefers to be inactive, he does not have to do anything but can let his lawyer defend him. Thus, the legal requirement that the defendant be able “to assist in his own defense” is, when used against the defendant’s self-defined interests, much like his “right to counsel”: both are “Catch 22’s” with which to ensnare him in the web of forensic psychiatry. This fact has at last been discovered by the law itself, and the tactic is increasingly being declared unconstitutional.\textsuperscript{34}

IV. THE CASE OF NICOLA SACCO

There are many examples of famous defendants being denied the right to self-representation, being saddled with counsel they did not want, being incriminated by such counsel as mentally ill—and, consequently, being committed to a mental hospital. The case of Ezra Pound is one instance.\textsuperscript{35} That of Nicola Sacco is another.\textsuperscript{36} The seven-year trial of Sacco, which resulted in his and co-defendant Bartolomeo Vanzetti’s execution, dramatically illustrates the importance of the right to self-representation.

On April 15, 1920, in South Braintree, Massachusetts, two men employed by a local shoe factory were robbed and murdered. On May 5, Sacco and Vanzetti, both Italian immigrants, one a shoe worker, the other a fish peddler, were arrested. The two were brought to trial in 1921, convicted, and after numerous appeals were executed on August 27, 1927. Although it is unclear whether or not these men were innocent, many believed that Sacco and Vanzetti were convicted more for their radical political beliefs than for having committed the charged crimes. Guilt or innocence, however, is irrelevant to the issue to be explored here—namely, the denial of Sacco’s right to self-representation.

On February 14, 1923, after he had been in jail for two years, Sacco went on a hunger strike. In\textit{Tragedy in Dedham}, Francis Russell provides details on what followed:

Sheriff Capen made no attempt to force him to eat, and by the middle of March he had grown noticeably weaker. On the afternoon of the sixteenth, at Judge Thayer’s request, he was examined by Charles Cahoon, superintendent of the Medfield State Hospital; Albert Thomas, superintendent of the Foxboro

\textsuperscript{34} See, e.g., Jackson v. Indiana, 406 U.S. 715 (1972).
\textsuperscript{35} T. Szasz, Law, Liberty, and Psychiatry (1963), Ch. 17.
\textsuperscript{36} See F. Russell, Tragedy in Dedham: The Story of the Sacco-Vanzetti Case (1971).
State Hospital; and a Boston psychiatrist, Abraham Meyerson. Sacco, lying on his cot, calmly explained to the doctors that the state was trying to kill him. Poison was being put into his food—even into the food his wife brought him . . . 37

Instead of waiting to be killed by the state, Sacco asserted that he preferred to starve himself to death. Ready to perform an execution, but not willing to countenance suicide, the state thus found itself in a precarious position. And here is where psychiatry came to the rescue of the law.

The doctors found that Sacco was mentally disturbed, and Judge Thayer ordered him to the Boston Psychopathic Hospital for observation. On his arrival he was warned by Dr. Meyerson, "Nick, they have sent you here to eat, and if you don't, we will feed you with a tube." According to the newspaper reports he was then forcibly fed by an attendant in the doctor's presence . . . 38

Sacco was, of course, represented by counsel: Fred H. Moore, a young attorney who specialized in defending "radicals," had been retained and paid by the "Sacco and Vanzetti Defense Committee." Why did Moore take the case? According to Russell, because:

Sacco and Vanzetti were to typify a cause, Moore explained to a friend, adding, 'In saving them we strengthen our muscles, develop our forces preparatory to the day we save ourselves.' The more extreme anarchists of the Defense Committee were critical of such an attitude, feeling that Moore was more interested in building up the biggest labor case in history than in the fate of the men involved. This, too, was [Mrs.] Rosina Sacco's feeling from the first time she met Moore. . . . Instinctively, she distrusted the sparkle of the bohemian lawyer.39

Indeed, it was Moore who staged the drama of the Sacco and Vanzetti "case" as we now know it; who, in Russell's words, "painted the affair in broad expressionistic strokes, embellished it and retouched it, spread the panoramic design on a world canvas. But for Moore there would have been no case as it is today remembered . . . ."40

The attorney for the defense acted not as an agent of his client, but rather as an agent of himself or of the "cause" he fancied himself

37. Id. at 238.
38. Id. at 238-39.
39. Id. at 112-13.
40. Id. at 125.
as serving. As a result, Moore could not and did not represent Sacco's interests as Sacco himself saw them. If he had, he might have pleaded with the court that Sacco had as much right to take his own life as the state had to take it. The forced feedings of a prisoner by physicians—of any prisoner, but especially of one headed for execution—constituted an impermissible corruption of the medical mandate and an unconstitutional deprivation of the prisoner's civil rights. Moore did not assert this point of view for his client. Instead, he had Sacco committed to Bridgewater Institution; he signed the commitment papers himself.

Sacco was diagnosed as suffering from psychosis of a paranoid character. The court committed him on April 23 [1923] to the Bridgewater State Hospital for the Criminally Insane. Moore was greatly troubled by Sacco's suicide attempts. As one way of saving his client he had agreed to Sacco's examination by alienists and—even though he objected to the Bridgewater Institution—signed the commitment papers. Sacco and his wife never forgave him for it, and the differences of opinion that had troubled the two men now began to harden into enmity.41

It is crystal clear that the judicial system of the Commonwealth of Massachusetts had inflicted an enormous injustice on Sacco. The "injustice" did not spring from the possibility that he was not given a fair trial (although perhaps he was not), nor from the possibility that he was convicted although innocent. Rather, this "injustice" stemmed from the fact that he was deprived of the right to self-representation. It was not his conviction alone, but his dehumanization by the legal process that offends the conscience. The enormity of this indignity is eloquently expressed in a remarkable letter from Sacco to Moore. The letter, quoted exactly as it was written, is reproduced below:

Sir: —Saturday I received your letter with enclose the post card that Mrs. Mateola Robbins sent me—and the little pamphlet that you use to send me it just to insult my soul. Yes, it is true, because you would not forget when you came here two or three times between last month with a groups of people—that you know that I did not like to see them any more; but you broad them just seem to make my soul feel just sad as it could be. And I can see how clever and cynic you are, because after all my protest, after I have been chase you and all yours philanthropist friends of the "New Trial League Committee" not to print any

41. Id. at 241.
more these letters with my picture and name on, and to be sure to take my name out if they should print any more of these little pamphlets, because you and yours philanthropist has been use it from last three years like a instrument of infamous speculation. . . . I am telling you that you goin to stop this dirty game! Your heare me? I mean every them word I said here, because I do not want have anything to do any more with "New Trial League Committee," because it does repugnant my conscience. Maney time you have been deluder and abuse on weakness of my comrades good faith, but I want you to stop no and if you please get out of my case, because you know that you are the obstacle of the case; and say! I had been told that from last May twenty fifth—that was the last time you came see me, and with you came comrade Felicani and Profess Guadagni. Do you remember? Well, from that day I told you to get out of my case, and you promised me that you was goin to get out, but my—dear—Mr. Moore! I see that you are still in my case, and you are still continued to play your famous gam. Of course it is pretty hard to refuse a such sweet pay that as been come to you right long—in—this big—game. It is no true what I said? . . . Well—! anyhow, wherever you do if you do not intent to get out of my case, remember this, that per September I want my case finish. But remember that we are right near September now and I don’t see anything and any move yet. So tell me please why you waiting now for? Do you wait till I hang myself. That’s what you wish? Lett me tal you right now don’t be illuse yourself because I would not be surprise if somebody will find you some morning hang on lamp-post.
Your implacable enemy, now and forever,
Nick Sacco

Moore thereupon withdrew from the case. Although only a year before he considered Sacco mad enough to have him committed to the insane asylum, he now evidently considered him sane enough to discharge his own defense attorney. He was not, however, deemed sane enough to represent himself and avoid Moore’s charade.

V. HABEUS CORPUS AND THE SOUND MIND REQUIREMENT

Although a “sound mind” is a requirement both for standing trial and self-representation, persons accused of mental illness are often forced to perform both functions unfairly. This happens typically when a person incarcerated in a mental hospital petitions for

42. Id. at 254-55.
The writ of habeas corpus may be employed to test the legality of any person's detention anywhere—whether in prison or a mental hospital. While the petitioner is incarcerated, the keeper may be required to explain why his prisoner is held in captivity. The proceeding is heard by a judge who then renders a decision to release or reincarcerate the prisoner. Committed mental patients have long and fruitlessly sought this avenue of escape from the madhouse. Most of the persons who engage in this effort are poor and hence cannot retain counsel. Lawyers have traditionally avoided such cases, presumably because they themselves believe that "crazy" people should be behind bars and that they would not be behind the bars of madhouses if they were not "crazy."

The result is that almost all hospitalized mental patients who petition for a writ of habeas corpus represent themselves. They appear in court, call their witnesses, if they have any, and present their argument to the judge. This often takes only a few minutes, after which the judge almost invariably pronounces them in need of continued institutional care and sends them back to the "hospital." The "patient" can later apply for another writ and sustain another dismissal; this charade of a day in court may go on for years. According to one study, during the fiscal year of 1965-66 there were 292 appearances by patients on writs of habeas corpus from the Matteawan (N.Y.) State Hospital; in only five of these cases was the patient's writ sustained.

The absurdity of this procedure, not just legally but logically, is apparent. Here are "patients" who are in the "hospital" because they have been adjudged mentally incapable of assisting in their own defense and hence unfit to stand trial. Yet, in the habeas corpus hearing, which is also a trial, the court allows the same persons not only to stand trial but to represent themselves!

VI. SELF REPRESENTATION AND THE MENTALLY ILL

It is evident that while the right to self-representation is an essential right for persons engaged in any kind of litigation, it is especially important for persons charged with crimes. It is even more important for persons charged with crimes that inflame political passions, and perhaps most important for persons charged with mental illness. The reason for this is that the litigant's right to trial is so

43. T. SZAESZ, supra note 35, Ch. 14.
easily changed into, and subverted by, his alleged supervening right to psychiatric treatment.\textsuperscript{45}

The 1972 proposed Federal Rules of Evidence governing the legal relationship between the psychiatrist and his client exemplify this denial of the alleged mental patient's integrity and self-determination. These rules recognize a medical privilege between the psychiatrist and his patient.\textsuperscript{46} This privilege may seem enlightened and protective of both patient and psychiatrist, but in fact it is neither. Elsewhere in the same rules the privilege is waived whenever the psychiatrist concludes that he must use the information entrusted to him in confidence to effect the patient's commitment to a mental hospital.\textsuperscript{47} Although the patient seems to be guaranteed a confidential relationship with his psychiatrist in order to make his treatment effective, he is, in fact, guaranteed no such thing unless he agrees that the "psychiatrist knows best." The "right to treatment" is thus symmetrical with the right to counsel. The right to treatment is the denial of the right to reject treatment. The right to counsel is the denial of the right to reject counsel. Beneath these deprivations of the right

\textsuperscript{45} Hardly a day passes that one does not see a report in the daily press of the denial of the right to self-representation justified on psychiatric grounds. Here is such a real story:

"Girlfriend Admits Killing," read the headline. The relevant parts of the story, excerpted from the Associated Press report, are as follows:

JoAnne Brown has blurted out that she killed her boyfriend, law secretary Burr Hollister. . . . But the Long Island woman's attorney replies that she is obviously deranged. . . . Judge John D. Campilli held her without bail for mental tests. . . . Mrs. Brown surrendered Tuesday to Nassau County Chief of Detectives Edward Curran. She appeared calm Wednesday in court as her attorney, Robert Rivers, obtained Campilli's court order that she undergo psychiatric examination on Rivers' contention that she was not competent to stand trial. Rivers said she has been under psychiatric treatment for at least five years and was 'not a rational person.' As Mrs. Brown was being led from the building she sobbed to reporters: 'I am being framed for this. I killed Burr and I'm ready to talk about it. They are trying to make me think I'm sick.' . . . Rivers was not present when she said she killed Hollister, but he said later in his Westbury office that 'I can't be responsible for what she says because I believe basically she is sick. It's obvious that she is a sick woman. Her statement simply doesn't hold water. It's the statement of a deranged woman.'


\textsuperscript{46} \textsc{Fed. R. Evid.} (Proposed) par. 504, 1972. In adopting the Federal Rules of Evidence, Congress rejected the rule expressly providing for a psychiatrist-patient privilege, noting that "the action of Congress should not be understood as disapproving any recognition of a psychiatrist-patient . . . [privilege]. Rather, our action should be understood as reflecting the view that the recognition of a privilege based on a confidential relationship and other privileges should be determined on a case-by-case basis."

\textsuperscript{47} \textit{Id.} 504(d)(1). The rules as adopted, by requiring a case-by-case determination of the psychiatrist-patient privilege, gives the court even more leeway to allow or require the psychiatrist to breach the confidential relationship with his patient when he or the court believes it to be necessary.
to self-determination lies, uneasily, a collective fear of the individual and of the genuine exercise of his individuality. Our law bespeaks the need to control individuality rather than foster it.48

VII. THE PARADOX OF SELF REPRESENTATION

This denial of individuality is as prominent in the courtroom setting as it is in the denial of self-representation. In Anglo-American law every person is considered innocent until proven guilty. Assuredly, this is greatly preferable to Roman law under which an accused person is guilty unless he can prove his innocence. But our system works smoothly only as long as guilt and innocence can be defined by and within the legal system itself. For example, if courts were to allow defendants to talk directly to the jurors the system might break down. A middle-class defendant charged with evading a few thousand dollars in taxes might try to justify his individual action by telling the jury about the tax payments of prominent politicians and millionaires. Similarly, a youngster charged with smoking marijuana might convince the jurors that many of their own children smoke it too, and that marijuana is not so bad. These jurors, too, might decide not to convict. In so-called political trials—such as the cases of Sacco and Vanzetti, Ezra Pound, or Angela Davis—the possibilities of the individual defendant disrupting the trial by arguments which the court, but only the court, might deem irrelevant, are even greater and more explosive. These are the risks of self-representation and the risks of individuality which are mitigated by the "right to counsel" and by the professional restraints placed upon lawyers. As Justice Blackman put it in his dissent in Faretta: "I cannot agree that there is anything in the Due Process Clause or the 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.49

Lawyers are trained to be "relevant" and not to say things which are "prejudicial." And they learn that, although they have a duty to defend their client, they are also "officers of the court." The lawyer's position as an officer of the court carries with it many heavy obligations and few noticeable advantages. If a lawyer misbehaves, there is the awesome power called "contempt of court" to bring him or her back into line.

48. In this connection, see T. SZASZ, CEREMONIAL CHEMISTRY (1974).
49. 422 U.S. 806, 849 (1975).
Not every "ignorant" defendant inclined to try his own case knows of the "sanctity" of the courtroom; he might not understand that the philosophical reasons for his individual actions are not relevant. He might not understand or agree that judges are above criticism. As a defendant he certainly would not consider himself an officer of the court. Not being an attorney, he might not be deterred by the threat of a thirty-day contempt sentence. Having his day—his real day!—in court might be worth much more than thirty days in jail to him.

All these embarrassing possibilities are avoided by having the defendant represented by an attorney, who ostensibly could do a better job defending him. The defendant is thus handicapped, in part, by the informal constraints of the judicial system. The accused must have a lawyer if he is deemed incapable of "knowingly and intelligently" waiving his right to be represented. When the accused is not permitted the right to defend himself, the proceedings are then increasingly focused on the lawyer instead of on the defendant. And the lawyer, knowing that he must come back to court again after this particular defendant's trial is over, is not likely to risk antagonizing the court in any way. In short, requiring professionals to play the courtroom game guarantees the establishment norm—and sacrifices the rights of the individual defendant. Lawyers and judges are human beings, and everything about the courtroom situation militates toward their conformity.

But also because lawyers are human beings, there will be some among them who will not blindly conform to the norms and pressures of the judicial system. These are the legal "deviants"—the civil right advocates and other "activists." The system, however, can adjust to and compensate for their irregular behavior; it does so by treating their clients as if they were guilty until proven otherwise.

The presumption that the accused is innocent until proven guilty is just that—a presumption. As such, it is not completely independent of all other variables that may affect a criminal trial. Actually, this presumption applies only to conventional defendants conventionally defended. The more unconventional the defendant and the more unconventional his defense, the more the presumption of innocence metamorphoses into a presumption of guilt. Both political trials, and military trials which are common and relatively undramatic, illustrate and support this contention.

The uniform code of military justice provides for universal representation of defendants by assigned military counsel. The military grants these services free. The lawyers are soldiers who "under-
stand” the needs of the military. Here, then, is a system that ideally protects the group from the accused offender: the defendant’s champion is, in fact, an agent of his adversary. This is why the mere act of showing up at a military court martial with a civilian lawyer shocks the administrators of the military legal system and incriminates the defendant as guilty. Mutatis mutandis, if a person accused of a political crime chooses to be defended by a prominent activist lawyer, he courts the risk of being widely viewed as guilty. Why else would he pick such a defense lawyer? And if a person is accused of mental illness and chooses to be “defended” by a psychiatrist who is opposed to commitment he courts the risk of being widely regarded as crazy. Why else would he pick such a psychiatrist? If these persons choose their champions, whether legal or psychiatric, from within the system, they may get not only incompetence but also conformity. If mental illness is introduced as an issue, they may get committed as well.

The ethics of the legal and psychiatric professions present none of the barriers needed to protect litigant patients from being subjected to all of the unsolicited “help” they are supposed to need. The client has a right to represent himself, but only if he can knowingly and intelligently waive his right to counsel by the court’s careful standards. The client has a right to counsel, so counsel he gets. The client also has a right to treatment, so if counsel in conjunction with institutional psychiatry provides that too, is he not conducting himself on the highest moral plane of professional ethics?

VIII. CONCLUSION

In a free society, respect for human dignity and recognition of individual autonomy are essential. The preservation of individual autonomy requires that each member of society be accorded the right to elect a course of conduct and the right to be responsible for the consequences of that choice.

Interjecting the spurious issue of mental illness as a consideration in determining a defendant’s competence to stand trial and right to choose self-representation insidiously subverts individual responsibility, deprives the defendant of his autonomy and his substantive rights, and destroys the defendant’s dignity and humanity in the process. The requirement that a defendant must “knowingly and intelligently” waive his “right to counsel” before being permitted to represent himself must be rejected as a legal euphemism formulated by lawyers effectively to deny the right to self-representation.

A defendant’s right to represent himself and his competence to
stand trial should be determined at a judicial hearing prior to trial. Here, the judge should be directed to apply a purely functional standard, excluding consideration of any expert psychiatric testimony or other "scientific evidence." There should be a very strong presumption that persons are competent to assist in their own defense unless physically unable to attend trial or totally incoherent (as opposed to irrational). Any person marginally able to conduct his own trial should be permitted to proceed in pro per.

When self-representation is allowed, the trial judge should have an obligation to assist the defendant by, for example, making suggestions regarding admissible evidence or by overlooking the defendant's minor violations of the procedural rituals of the court. In certain cases, it may be appropriate or necessary for the court to appoint advisory counsel to assist with the defense, even if the defendant is reluctant to accept such assistance. Such counsel would, of course, remain subordinated to the defendant's control of the case.

In some cases, the judge will determine that the defendant is not functionally capable of conducting his own defense, either at the pre-trial hearing or during the trial, necessitating appointment of counsel to represent the defendant. When a defendant is thus forced to accept unwanted representation by appointed counsel, the assigned attorney should still be required to be guided by the wishes of the client to the greatest possible extent. The freedom enjoyed by attorneys in conventional representation to make independent decisions regarding procedural and other non-substantive matters should be severely curtailed, and the attorney should be obliged to accord the defendant every possible opportunity to control the proceedings.

Having thus removed the legal shackles that hinder the opportunity for self-representation, the defendant who chooses to proceed in pro per would not be permitted thereafter to complain that his own defense was inadequate resulting in a denial of effective assistance of counsel. The choice to represent oneself carries with it the corresponding responsibility to accept the consequences of that choice, including the possibility of incompetent representation. However, if the trial court refused to make appropriate adjustments in the process to accommodate the self-represented defendant, such refusal would constitute adequate grounds for retrial or reversal on appeal if found to have been prejudicial to the defendant resulting in a miscarriage of justice. This type of trial court error would be subject to the same review process as any other.

Although the proposal outlined would undoubtedly require other adjustments in the formalities of the legal process, the incon-
venience or disruption engendered by the need for such adjustments is a small price to pay. In our legal system the right of a defendant to represent himself is a fundamental facet of his autonomy. By choosing self-representation, the accused can at least directly confront the judicial process. This confrontation is supremely important in vindicating his rights and preserving his dignity. When the allegedly incompetent defendant is forced to accept unwanted representation, the invariable result is a deprivation of the defendant's substantive rights. By recognizing the freedom to choose, and the right and responsibility to suffer the consequences, for good or ill, we support and defend one of the cornerstones of our way of life—human dignity and individual autonomy.