Pro Se Criminal Trials and the Merging of Inquisitorial and Adversarial Systems of Justice

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The United States Supreme Court recently reaffirmed the constitutional basis for the highly criticized right of a criminal defendant to represent himself.\(^1\) The Court, however, has yet to address a critical gap in its self-representation jurisprudence. Although the Court has provided guidance on how to determine whether a defendant is capable of exercising the right to represent himself, it has been silent on how a trial should be conducted when a defendant chooses to do so.\(^2\) The narrow focus on competency is misplaced. Indeed, in focusing only on competence, the Court seems to assume that trials with pro se defendants will be conducted in the same manner as trials where defendants are represented by counsel. This assumption, however, is not always correct.

Pro se criminal trials have evolved into a distinct type of trial with distinct procedures to ensure the fairness of the proceedings. Interestingly, in some pro se criminal proceedings, courts have adopted characteristics resembling those utilized in inquisitorial systems of justice that feature prominently in international law. Thus, in order to ensure the fairness and accuracy of the verdict in pro se criminal cases, courts have taken a more active role in the

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\(^2\) See Decker, supra note 1, at 488–89.
proceedings and have relaxed strict procedural rules, mimicking procedures in civil law countries.

This Article argues that this evolution of the pro se adversarial criminal trial should be taken one step further. Specifically, procedures should be consistently adopted to encourage the use of these inquisitorial practices to ensure the fairness of pro se criminal proceedings. As criminal law becomes increasingly international in nature, it is fitting that problems presented by pro se criminal defendants in an adversarial system may be best resolved by adopting procedures resembling those utilized in inquisitorial trials.

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Under the Sixth Amendment of the United States Constitution, defendants have the right to be represented by counsel in criminal actions and will be appointed counsel in criminal felony prosecutions. The right to counsel comports with American concerns regarding procedural fairness in criminal trials and the expertise required to ensure that a criminal trial properly adheres to constitutional procedural requirements. However, in Faretta v. California, the U.S. Supreme Court held that the Sixth Amendment to the Constitution also contains a corollary right: that of a criminal defendant to represent himself

3. U.S. Const. amend. VI.
at trial.\textsuperscript{4} While the Supreme Court has noted that the right to self-representation is a qualified right, the elevation of this proposition to constitutional status represents a manifestation of the American ideal of autonomy—that a criminal defendant should be able to conduct his own defense in a court of law.\textsuperscript{5}

In practice, the right of a criminal defendant to represent himself in court in many ways conflicts with the uniquely American focus on procedural fairness and, indeed, the adversarial process generally. Although the right to self-representation is not a right universally guaranteed in countries outside of the United States, in practice the right is tied in various ways to international norms and global concerns.\textsuperscript{6}

While the right to self-representation is a unique characteristic of the adversarial system, the ability of a defendant to represent himself has created numerous problems relating to the fundamental fairness of adversarial trials. Thus, it is fitting that, in addressing these problems, some courts have adopted procedures and practices that are not typical of an adversarial system.\textsuperscript{7} In order to ensure the fairness of the trial and the accuracy of the verdict, some courts have asserted greater control over the proceedings and relaxed strict procedural and evidentiary requirements.\textsuperscript{8} In this way, pro se criminal trials in the United States can begin to look more like inquisitorial proceedings.

As criminal law becomes increasingly internationalized, with criminal tribunals created to address criminal activity on an international scale and

\begin{itemize}
  \item[4.] Faretta v. California, 422 U.S. 806, 807 (1975).
  \item[5.] The United States is one of many countries in the world that has laws or a constitution allowing for self-representation. In other countries, however, the right to represent oneself "complements the right to counsel and is not meant as a substitute thereof. This right assures the accused of the right to participate in his or her defense, including directing the defense, rejecting appointed counsel, and conducting his or her own defense under certain circumstances." M. Cherif Bassiouni, \textit{Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions}, 3 DUKE J. COMP. & INT'L L. 235, 283 (1993).
  
  Bassiouni further notes that
  
  \[t\]he right to self-representation is guaranteed by the ICCPR, the Fundamental Freedoms, the AMCHR, and possibly the Banjul Charter. This right is also guaranteed in thirty-three of the national constitutions surveyed. In addition, more than sixty-five constitutions contain language pertaining to the right of defense which may also be intended to encompass the right to self-representation. \textit{Id.} (footnotes omitted).

  Britain and the United States both allow for self-representation, but unlike these two countries, "most countries of the world do not allow criminal defendants to represent themselves under any circumstances, and this has been confirmed by the bodies that administer the European human rights system." See Michael P. Scharf, \textit{ICTY Appeals Chamber Decision on Slobodan Milosevic's Right of Self-Representation}, ASIL INSIGHTS, Nov. 2004, http://www.asil.org/insight041111.cfm.
  \item[6.] \textit{See} Bassiouni, \textit{supra} note 5, at 283.
  \item[7.] \textit{See infra} Part III.B.
  \item[8.] \textit{See infra} Part III.B.
\end{itemize}
national courts addressing more and more criminal activity with an international component, it is not surprising that judicial systems have begun to adopt procedures used by different countries to address problems not easily resolved by their own practices. By looking to inquisitorial systems of justice, and borrowing practices that allow for greater participation of the judge and more relaxed procedural rules in trials in which a defendant represents himself, the American adversarial system of justice would help to ensure that the criminal defendant's Sixth Amendment right to represent himself does not undermine his fundamental right to a fair trial.

Part I of this Article looks at the history of the right to self-representation in the United States and the evolution of this doctrine. Part II compares the American adversarial system with the French inquisitorial system, and describes the distinct characteristics of each. Part III of this Article discusses some of the problems associated with pro se criminal proceedings and how an adversarial trial involving a pro se defendant can take on characteristics resembling that of an inquisitorial trial. Part IV examines how pro se criminal proceedings outside of the United States have faced problems similar to those in American criminal trials in which a defendant represents himself. Finally, Part V of this Article argues that courts can go one step further, and recommends the consistent use of inquisitorial procedures to better ensure a fair result in pro se criminal trials.

I. THE RIGHT TO SELF-REPRESENTATION IN THE UNITED STATES

In order to ensure the fairness of criminal proceedings, the U.S. Constitution provides defendants with certain protections, guaranteeing the right to a fair trial.9 One of those protections is the right to an attorney to act on behalf of the defendant in criminal proceedings and to ensure that the defendant's rights are protected.10 When a defendant is not represented by an effective attorney, his rights may not be adequately protected and the fairness of the proceedings may be questioned.11 Thus, the right to counsel has been heralded as one of the guarantors of a fair trial in the United States. However, despite the recognized importance of the right to counsel, the Supreme Court has held that there is a corollary right—one permitting a criminal defendant to represent himself.12 Thus, unlike in many civil law inquisitorial systems of justice, where a defendant must be represented by counsel, in the American adversarial system a defendant can choose to proceed without the assistance of an attorney.13 In order to explain how these two seemingly contradictory constitutional rights coexist, this Part first looks at the history of the right to counsel in the United

10. See U.S. CONST. amend. VI.
States. Next, this Part examines the right to self-representation and recent Supreme Court jurisprudence that has limited this right in some ways. In subsequent Parts, this Article will examine how trials in which a defendant chooses to exercise his right to self-representation begin to resemble inquisitorial proceedings and why this development has occurred.

A. History of the Right to Counsel in the United States

To fully understand the origins of the right to self-representation, one needs to first look at the history of the right to counsel in the United States. The right to counsel for serious offenses was not a right under English common law that the early American colonists brought with them to the New World. Prior to the American Revolution, the American colonies varied in the statutory rights granted to colonists, and therefore it is impossible to make a blanket assertion about the right to counsel in the colonies as a whole. However, it is clear that in several colonies the right to counsel was granted to defendants either in practice or by statute. This difference between colonial law and English law was based on many factors. First, traditional English criminal law did not contemplate the use of a public prosecutor, but was rather an accusatorial system in which the victim often represented himself in court. On the other hand, “by the time of the American Revolution all of the colonies employed professionally trained and state-funded lawyers to pursue criminal charges.”

14. JAMES J. TOMKOVICZ, THE RIGHT TO THE ASSISTANCE OF COUNSEL 1–2 (Jack Stark ed., 2002) (explaining that England only afforded defendants the right to counsel in minor cases because the monarchy “fear[ed] that lawyers would prevent the successful prosecution and punishment of those whose acts most threatened the state’s survival”).

Indeed, a felon’s ability to be represented by counsel was not permitted by English Parliament until 1836, well after the American Constitutional Convention and adoption of the Sixth Amendment. WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 8–9 (Univ. of Mich. Press 1955) (noting that before 1836, treason was the only felony for which a defendant was appointed counsel). “Until the middle of the eighteenth century, the British courts strictly adhered to a common law rule that prohibited those accused of [murder, manslaughter, larceny, robbery, rape, or treason or misprision of treason] from employing lawyers to assist in their defense.” TOMKOVICZ, supra, at 3. This rule prohibiting the representation of defense counsel was first modified by the Treason Act of 1695, which allowed for a defendant to be represented by counsel in a trial for treason. Trial in Treason Act, 1695, 7 Will. 3, ch. 3 (Eng.). Subsequent to the Treason Act, judges began to use their discretion to allow some defendants to be represented by counsel in court. TOMKOVICZ, supra, at 6. Note that these advancements did not allow for the appointment of counsel, but rather were limits on the prohibition of counsel in serious cases. See id., at 6–8.


16. See id. at 11–12. A survey of early colonial practices by William Beaney indicates that Connecticut afforded counsel in practice, if not by statute, until 1818 when the state constitution was adopted. Pennsylvania, Delaware, and South Carolina statutorily granted criminal defendants the right to counsel in capital cases, while the practice in Virginia and Rhode Island was essentially the same as that in England. See BEANEY, supra note 14, at 15–18.

17. TOMKOVICZ, supra note 14, at 9.

18. Id.
This led to a disparity in power between the prosecution and defendant which necessitated the use of professional defense attorneys. Further, the number of lawyers in the colonies was rapidly rising, making the employment of defense attorneys logistically possible in criminal actions.\textsuperscript{19} In addition, "colonists came to recognize the critical roles that counsel could play in protecting individual rights and liberties against oppressive or overreaching government authorities."\textsuperscript{20}

Over time, jurisprudence governing the right to counsel developed significantly and the right expanded from allowing counsel to appear on a defendant's behalf to appointing counsel for indigent defendants in federal criminal actions.\textsuperscript{21} The right to counsel was further expanded by the Supreme Court in 1932 with the landmark case of Powell v. Alabama.\textsuperscript{22} In Powell, the Supreme Court held that when a defendant is unable to employ counsel and make his own defense, counsel must be assigned in a capital case, regardless of whether that case is in state or federal court.\textsuperscript{23} As commentators

\textsuperscript{19} Id.
\textsuperscript{20} Id. at 10. Justice Sutherland wrote for the Court in Powell that "[i]t thus appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitely rejected and the right to counsel fully recognized in all criminal prosecutions." Powell v. Alabama, 287 U.S. 45, 64–65 (1932).


\textsuperscript{22} 287 U.S. 45 (1932). Powell involved the trial and conviction of three young African American men for the rape of two white women in Alabama. Id. at 49–50. The three defendants were appointed counsel the day of trial, and each defendant was tried separately and convicted within that same day. Id. at 50, 56. The Alabama Supreme Court held that this procedure complied with the state constitution's right to counsel. Id. at 59–60. The Supreme Court of the United States held that, although such procedures might comply with the state statutory and constitutional right to counsel, the Constitution of the United States applied, and demanded far more than was afforded to the defendants in this case. Id. at 71–72. For the story in Powell that does not appear in the Court's opinion, see Michael J. Klarman, Powell v. Alabama: The Supreme Court Confronts "Legal Lynchings", in CRIMINAL PROCEDURE STORIES I (Carol S. Steiker ed., 2006).

\textsuperscript{23} Powell, 287 U.S. at 72–73. The Powell Court focused on the specific facts of the case, including the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, and above all that they stood in deadly peril of their lives . . . .

Id. at 71.

Betts v. Brady, 316 U.S. 455 (1942), severely limited the holding in Powell, stating that the Fourteenth Amendment of the United States Constitution did not incorporate the right to counsel, id. at 461–62, and so states had no constitutional requirement to supply counsel for defendants except in special circumstances such as those presented in Powell, id. at 462–65, 471–73. The Betts Court quoted this language from Powell specifically:

"All that is necessary now to decide, as we do decide, is that, in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his
have pointed out, the Powell Court's holding relied on the adversarial nature of the American criminal justice system, and noted that an adversarial system depends on effective assistance of counsel protecting the interests of the defendant.\textsuperscript{24} Justice Sutherland stated in his opinion:

\begin{quote}
Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.\textsuperscript{25}
\end{quote}

Subsequent Supreme Court rulings determined that the right to counsel applied in all federal criminal proceedings in which a defendant was at risk of losing his life or liberty.\textsuperscript{26} Finally, in 1963, the Supreme Court decided \textit{Gideon v. Wainwright},\textsuperscript{27} holding that the Fourteenth Amendment incorporates the right to counsel of the Sixth Amendment, and defendants therefore have the constitutional right to counsel in state prosecutions.\textsuperscript{28} The Court noted that "a provision of the Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the States by the Fourteenth Amendment," and concluded that the right to counsel is such a fundamental right.\textsuperscript{29} Further cases established at what point the right to counsel attaches for a criminal defendant and at what proceedings the presence of counsel is constitutionally required.\textsuperscript{30}

\textit{Id.} at 463–64 (quoting \textit{Powell}, 287 U.S. at 71).

24. See Metzger, \textit{supra} note 21, at 1643 ("Powell's holding, which required a meaningful appointment of counsel, was based upon a profound commitment to fairness in the adversarial system.").


28. \textit{Id.} at 339. In so holding, the Supreme Court expressly overruled its previous decision in \textit{Betts}. \textit{Id.}

29. \textit{Id.} at 342 (internal quotation marks omitted).

30. See United States v. Ash, 413 U.S. 300, 321 (1973) (holding that counsel is only required when a defendant is entitled to be present at that proceeding); Kirby v. Illinois, 406 U.S. 682, 690 (1972) (creating the "critical stage doctrine," which affords a defendant counsel after the commencement of formal adversarial criminal proceedings); Memp v. Rhay, 389 U.S. 128, 137
Thus, although the right to counsel in the United States has not been as expansive or zealously guarded in past centuries as it is today, the Supreme Court has focused increasingly on the right in the twentieth century. Indeed, the Court has gone beyond requiring the mere presence of counsel in the courtroom, and has mandated that the counsel guaranteed by the Sixth Amendment be "effective," underscoring the importance of the right to competent representation in criminal proceedings.\(^{31}\)

The Court and scholars have focused on the adversarial nature of criminal proceedings, and the need to rely on lawyers to protect the rights of defendants in light of this system.\(^{32}\) As Justice Sutherland's quote from *Powell* demonstrates, the Court has seriously doubted the ability of a layperson to adequately conduct his own defense in a criminal proceeding.\(^ {33}\) Further, if a defendant cannot be adequately represented in court, the entire adversarial system is unable to work justly or fairly.\(^ {34}\) This might lead one to the inevitable conclusion that, in the United States, a criminal defendant must be represented in court by counsel, at least in felony cases and adversarial proceedings. However, this is not the case—defendants in the United States also have a constitutional right to waive counsel and represent themselves. But how can such a right be justified in light of the adversarial nature of the American criminal justice system? And how do proceedings involving self-represented defendants operate in practice?

### B. Evolution of the Right to Self-Representation in the United States

While a defendant has had the ability to represent himself in court since colonial times, the Supreme Court did not declare the right to be of constitutional magnitude until the 1975 decision of *Faretta v. California.*\(^ {35}\) Since the *Faretta* decision, the Supreme Court has addressed several cases dealing with the right to self-representation. In those decisions, the Supreme Court has examined a defendant's competency to assert the right to represent himself, and has limited the right in some respects. But the Court has never clearly examined what happens in a criminal trial when a defendant proceeds pro se, nor has it directly addressed whether the right to self-representation undermines the fundamental fairness of criminal proceedings.


\(^{32}\)See *Tomkovicz*, supra note 14, at 47 ("Proponents of the adversary system hold it as an article of faith that when the state accuses one of its citizens of a criminal offense, a contest between committed opponents is the method that will most accurately and reliably determine the merits of that accusation.").


\(^{34}\) See id. at 71–72.

\(^{35}\) 422 U.S. 806 (1975).
Because the right to counsel is so important in an adversarial system of justice, when a defendant represents himself in a criminal proceeding without the assistance of counsel, numerous problems may arise to undermine the fairness of the proceedings. To compensate for that lack of fairness, some judges have adopted procedures that help to ensure the fairness of the proceedings and the accuracy of the verdict. These changes transform the criminal trial and cause the proceedings to take on characteristics resembling those used in inquisitorial systems of justice. In order to understand why this occurs, one must first understand the history of the right to self-representation, and the narrow focus of the jurisprudence that has defined the right.

This Part explores the Court's jurisprudence examining the right to self-representation. The following Parts examine the problems that occur in criminal trials in which a defendant represents himself, and how judges attempt to compensate for the lack of counsel by adopting procedures that mimic those used in inquisitorial systems of justice.

American defendants have had the right to represent themselves in court since colonial times, and Supreme Court jurisprudence originally revolved around preserving the defendant's autonomy or the circumstances when the defendant waives counsel. Indeed, the norm in early American colonies was self-representation, not representation by counsel. Some early state constitutional provisions expressly provided for the right to self-representation, but even absent such provision, no state expressly precluded a defendant from being able to represent himself in court. In 1942, Justice Frankfurter wrote the majority opinion for *Adams v. United States ex rel. McCann*, in which he noted that "an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel." In *Adams*, the Court dealt specifically with a defendant who, while representing himself, waived his right to a jury trial. The defendant's lawyer on appeal, and the dissenting Justices, argued that the right to a jury trial cannot be competently waived without advice of counsel.

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36. AM. JUDICATURE SOC'Y, REVISED PRO SE POLICY RECOMMENDATIONS 4–5 (2002), http://www.ajs.org/prose/pdfs/Policy%20Recom.pdf (noting that "[m]any judges currently use individual strategies for handling pro se litigants, but there appears to be no uniformity").
37. See TOMKOVICZ, supra note 14, at 14.
38. See id.
40. Id. at 270–71. Writing on the right of an accused to waive counsel, Justice Frankfurter noted that "[t]here is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer." *Id.* at 275.
41. See id. at 282 (Douglas, J., dissenting) ("It would be unlikely that a layman without the benefit of legal advice would understand the limited nature of the defenses available under [the mail fraud] statute or the scope of the ultimate issues on which the question of guilt usually turns.


The majority in *Adams* focused on general principles of autonomy as the rationale for not imposing counsel on an accused in such circumstances. In the opinion, Justice Frankfurter eloquently addressed the autonomy interests of the defendant:

When the administration of the criminal law in the federal court is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards... and to base such denial on an arbitrary rule that a man cannot choose to conduct his defense before a judge rather than a jury unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution.42

The Court acknowledged that a defendant may not be the one most able to effectively present his case at trial, but indicated that the autonomy interests of the accused overrode these fairness concerns:

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms... The public conscience must be satisfied that fairness dominates the administration of justice... 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.43

Thus, the *Adams* Court clearly recognized that the fairness of adversarial proceedings may be compromised when the defendant chooses to represent himself. However, the Court was more concerned with protecting the defendant's autonomy interests from interference by the imposition of an unwanted lawyer.

In subsequent cases the Supreme Court noted the right of a defendant to waive counsel, and focused on the content of the waiver and whether that waiver was intelligent and voluntary.44 These cases often involved a defendant who was unrepresented by counsel and whom the government claimed had

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42. *Id.* at 280 (majority opinion).
43. *Id.* at 279.
44. See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 729 (1948) (noting that an accused has the right to waive counsel guaranteed by the Sixth Amendment, but that "[t]here must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible").
waived counsel. For example, in *Rice v. Olson*, the Court noted that a plea of guilty alone cannot be an absolute and final waiver of the right to counsel. Because of the nature of these early cases, and their focus on the defendant’s competency to waive counsel, the actual right of a defendant to represent himself in court was not at the core of these opinions. Rather, the Court focused on the right of a defendant to be represented by counsel and the strict standards by which a defendant’s waiver of his constitutional rights must be scrutinized.

Indeed, the Supreme Court did not explicitly hold that there is a constitutional right to self-representation enshrined in the Sixth Amendment until *Faretta v. California*. *Faretta* departed from past cases in two significant respects. First, as the Court noted, the question before it in *Faretta* was “whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense.” Thus, whereas previous Supreme Court decisions focused on the principle that “the Constitution [itself] does not force a lawyer upon a defendant,” *Faretta* focused on whether the Constitution also forbade states from forcing counsel on an unwilling defendant. Second, *Faretta* is distinguishable from previous Supreme Court cases because the Court’s concern was “with an independent right of self-representation.” As the Court noted: “We do not suggest that this right arises mechanically from a defendant’s power to waive the right to the assistance of counsel. On the contrary, the right must be independently found in the structure and history of the constitutional text.” Thus, the Court in *Faretta* determined whether there is an actual constitutional right to self-representation found in the Sixth Amendment, and not merely the ability of a defendant to waive the constitutional right to counsel if he did so knowingly and intelligently.

45. *See, e.g.*, *Carter v. Illinois*, 329 U.S. 173, 177 (1946) (“A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel.”).

46. *See Rice v. Olson*, 324 U.S. 786, 788 (1945) (noting that the lower court’s finding that a plea of guilty “absolutely’ and finally waives” the right to counsel “is inconsistent with [the Supreme Court’s] interpretation of the scope of the Fourteenth Amendment”).

47. 422 U.S. 806, 819 (1975).

48. *Id.* at 807.

49. *Id.* at 814–15 (internal quotation marks omitted) (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)).


51. *Id.* at 819–20 n.15.

52. *Id.* at 820 n.15 (citation omitted).

53. *Id.* In questioning *Faretta*, the trial court determined that he “had once represented himself in a criminal prosecution, that he had a high school education, and that he did not want to be represented by the public defender because he believed that that office was ‘very loaded down with . . . a heavy case load.’” *Id.* at 807 (omission in original).
The Supreme Court noted that previously the federal government had statutorily guaranteed the right to self-representation, and that the majority of state constitutions explicitly granted this right.\textsuperscript{54} The Court then noted the "nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."\textsuperscript{55} In so holding, the Court looked to both the language of the Sixth Amendment and the history of self-representation in the adversarial systems of England and the United States.\textsuperscript{56}

A major criticism of the right to self-representation is that it does not square with the adversarial nature of the American criminal justice system. The Court addressed this issue by noting that the Sixth Amendment "constitutionalizes the right in an adversary criminal trial to make a defense as we know it."\textsuperscript{57} Yet the Court also noted that the language of the Sixth Amendment, and the rights guaranteed by the Amendment, were afforded to the defendant in a criminal trial, not to counsel for the defendant.\textsuperscript{58}

In addition to looking at the language of the Constitution, the Supreme Court also examined British and American legal history and concluded that the ability of a criminal defendant to represent himself in court had a longstanding tradition in both English and colonial courts.\textsuperscript{59}

In its opinion, the Court directly addressed the conflict presented by previous decisions—stressing the necessity of a criminal defendant to be aided by effective counsel—and a decision that would allow a defendant to represent himself, regardless of how ineffective such representation might be.\textsuperscript{60} Like in

\begin{itemize}
\item \textsuperscript{54} Id. at 812–13 & n.10.
\item \textsuperscript{55} Id. at 817.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Id. at 818.
\item \textsuperscript{58} See id. at 819. The Court noted that [i]t is the accused, not counsel, who must be “informed of the nature and cause of the accusation,” who must be “confronted with the witnesses against him,” and who must be accorded “compulsory process for obtaining witnesses in his favor.” 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.
\item \textsuperscript{59} See id. at 822–32. The Court noted that the use of counsel by defendants in early English criminal courts was the exception, and not the rule. Id. at 823. Even when reforms guaranteed some English criminal defendants the right to counsel, the court noted that “[a]t no point in this process of reform in England was counsel ever forced upon the defendant.” Id. at 825–26. Further, the Court observed that, while “[c]olonial judges soon departed from ancient English practice and allowed accused felons the aid of counsel for their defense[,] . . . the basic right of self-representation was never questioned.” Id. at 827–28 (footnote omitted). Indeed, the Court was unable to find any “instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer.” Id. at 828.
\item \textsuperscript{60} Id. at 832 (“There can be no blinking the fact that the right of an accused to conduct his own defense seems to cut against the grain of this Court’s decisions holding that the Constitution
Adams, the Court weighed the interest of autonomy against the interest of an effective and efficient trial, and again the Court held that the autonomy interest of a defendant won out: "although [a defendant] 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.'" Further, the Court addressed the possibility, however remote, that a criminal defendant might be able to better represent himself than an attorney would.

Finally, the Supreme Court held that a court must ensure that a defendant's waiver of counsel is voluntary and knowledgeable, by making him "aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" However, the Court explicitly held that such knowledge and voluntariness is not contradicted by a lack of "technical legal knowledge," and therefore a defendant's knowledge of the law or procedural rules is irrelevant to determining whether the exercise of his constitutional right to self-representation is permissible.

In addition to arguing there was no constitutional language, legal precedent, or history on which to base a constitutional right to self-representation, both Chief Justice Burger's and Justice Blackmun's dissents in Faretta focused on the almost certain inability of the lay defendant to effectively represent himself. Chief Justice Burger underscored the unfairness that would ensue from self-representation in the American adversarial system.

Although we have adopted an adversary system of criminal justice the prosecution is more than an ordinary litigant, and the trial judge is not simply an automaton who insures that technical rules are adhered to. Both are charged with the duty of insuring that justice, in the broadest sense of that term, is achieved in every criminal trial. That goal is ill-served, and the integrity of and public confidence in the system are undermined, when an easy conviction is obtained due to the defendant's ill-advised decision to waive counsel.

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61. *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring)). The Founders, in framing the Sixth Amendment, appreciated the "value of state-appointed counsel," but "the notion of compulsory counsel was utterly foreign to them." *Id.* at 833. Thus, the Court concluded that "whatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice." *Id.* at 833-34.

62. *Id.* at 834. In so holding, the Court wrote that "[p]ersonal liberties are not rooted in the law of averages." *Id.*

63. *Id.* at 835 (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 270, 279 (1942)).

64. *Id.* at 835-36.

65. *Id.* at 839 (Burger, C.J., dissenting) (citations omitted).
Thus, as Chief Justice Burger noted, the fairness of criminal proceedings may be jeopardized if an ordinary adversarial criminal trial is used in the case of a pro se defendant.\^{66}

Since Faretta, the Supreme Court has examined the right to self-representation in several cases, most recently in Indiana v. Edwards.\^{67} Although the post-Faretta decisions have limited the right to self-representation in certain respects, the Court has consistently reaffirmed the right as a constitutional guarantee.

Less than ten years after Faretta, the Supreme Court was confronted with a case involving one of the difficulties the right to self-representation presents in practice. In McKaskle v. Wiggins, the trial court appointed standby counsel over the objection of the defendant, who expressed a desire to represent himself.\^{68} The United States Court of Appeals for the Fifth Circuit reversed the district court, holding that the defendant's constitutional right to represent himself had been violated by "the unsolicited participation of overzealous standby counsel."\^{69} The Supreme Court held that the appointment of standby counsel over the objection of a pro se defendant does not violate the constitutional right to self-representation.\^{70} In so holding, the Court clarified the rationale for allowing a defendant to proceed without counsel, noting that "[t]he right to appear pro se exists to affirm the dignity and autonomy of the

\^{66} Id. at 838–39.

In his dissent in Faretta, Justice Blackmun enumerated a lengthy list of problems and questions posed by the ruling that would need to be solved by the courts:

Must every defendant be advised of his right to proceed pro se? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed pro se, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or pro se? Must he be allowed to switch in midtrial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the pro se defendant differently than it would professional counsel?

Id. at 852 (Blackmun, J., dissenting). And indeed, since the Supreme Court's holding in Faretta, a vast jurisprudence has been created to deal with the very questions Justice Blackmun asked. A significant number of cases post-Faretta deal with the adequacy of the "Faretta warnings" given to defendants, the timing of such warnings, and the competency of a defendant to invoke his right to self-representation. E.g., Indiana v. Edwards, 128 S. Ct. 2379, 2383 (2008); Iowa v. Tovar, 541 U.S. 77, 81 (2004); McKaskle v. Wiggins, 465 U.S. 168, 170 (1984).

\^{67} 128 S. Ct. at 2388 (explicitly declining to overrule Faretta).

\^{68} McKaskle, 465 U.S. at 170–72. In fact, the defendant was inconsistent in his rejection of the appointment of standby counsel. Id. at 171. At times the defendant relied on the advice of his attorneys and sought out their assistance. Id. At other times, he rejected the advice of counsel and objected to their presence at counsel's table. Id. at 171–72.

\^{69} Id. at 173.

\^{70} Id.
accused and to allow the presentation of what may, at least occasionally, be the accused’s best possible defense.”

In support of its holding that a trial court may appoint standby counsel over the objection of the defendant, the Supreme Court discussed the many ways in which a defendant’s control over his own case is limited by other actors in the courtroom:

A pro se defendant must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense, from the plural voices speaking “for the defense” in a trial of more than one defendant, or from an amicus counsel appointed to assist the court.

Further, the Court approved the use of standby counsel by noting that it can “relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant’s achievement of his own clearly indicated goals.”

Thus, while not directly addressing the issue, the Court seemed to acknowledge that a trial judge may be much more involved in the proceedings in the trial of a pro se defendant—actively engaging in questioning and assisting the defendant with achieving his goals. Yet at the same time the Court wrote that the Constitution does not “require judges to take over chores for a pro se defendant that would normally be attended to by trained counsel as a matter of course.”

Thus, while not addressed by the Court directly, this early decision exploring the right to self-representation demonstrates the conflict between the American adversarial ideal of a judge as a neutral arbiter and the practical problems imposed when a defendant proceeds pro se. However, despite the problems presented by this right, the McKaskle Court reaffirmed the ability of a defendant to proceed pro se, albeit with the possible presence of standby counsel.

Less than a decade after McKaskle, the Supreme Court again was presented with a case involving a defendant’s right to represent himself. In Godinez v. Moran, the Court examined the competence necessary for a defendant to waive the right to an attorney. In Godinez, the defendant elected to represent

71. Id. at 176–77. The Court recognized some limitations on the participation of standby counsel, indicating that standby counsel may not interfere with the defendant’s actual control over his defense and that the jury must perceive that the defendant is representing himself. Id. at 177–78.

72. Id. at 177 n.7 (citation omitted).

73. Id. at 184.

74. Id. at 183–84 (also noting that “[a] defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure”). The dissent agreed with the majority opinion in the premise that “the trial judge himself should not be burdened with educating the defendant in trial procedure and that he should be able to insist that the defendant learn what he needs to know from standby counsel.” Id. at 192–93 (White, J., dissenting).

himself, and pleaded guilty. Because the lower court found that the defendant was competent to stand trial, he was therefore competent to waive counsel and plead guilty. However, the Ninth Circuit Court of Appeals held that “[c]ompetency to waive constitutional rights . . . requires a higher level of mental functioning than that required to stand trial” and provided a heightened competency standard for defendants electing to represent themselves. The Supreme Court rejected the Ninth Circuit’s standard and held that there is not a heightened level of competency required to waive the right to effective assistance of counsel, stating that “the competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself.” Thus, it matters not if the defendant is incapable of effectively representing himself in court. What matters is whether he can knowingly and intelligently waive his right to counsel.

Following the Godinez decision, lower courts found themselves having to allow defendants who were competent to stand trial the ability to represent themselves in court, regardless of how questionable their ability to represent themselves may have been. Scholars and courts alike amplified their criticism of Faretta’s grant of constitutional status to the right of self-representation. Trials with pro se defendants clearly incapable of conducting a coherent—let alone effective—defense cast doubt on the fairness of allowing such defendants to represent themselves.

In 2000, the Supreme Court again examined the right of a defendant to represent himself. In Martinez v. Court of Appeal of California, the Court was asked whether a defendant had the right to represent himself on appeal. The Court noted that the right to self-representation is found in the right to a fair trial, guaranteed by the Sixth Amendment. Thus, a defendant has no constitutional right to proceed pro se on appeal. While the Martinez decision does limit the ability of a defendant to act as his own counsel in certain circumstances, Justice Kennedy concurred that the decision does not affect a defendant’s ability to defend himself at trial.

76. Id. at 392–93.
77. Id.
78. Id. at 394 (quoting Moran v. Godinez, 972 F.2d 263, 266 (9th Cir. 1992)) (internal quotation marks omitted).
79. Id. at 399.
80. See supra note 1.
82. Id. at 159–60.
83. Id. at 163.
84. Id. at 164 (Kennedy, J., concurring) (“To resolve this case it is unnecessary to cast doubt upon the rationale of Faretta v. California. Faretta can be accepted as quite sound, yet it does not follow that a convicted person has a similar right of self-representation on appeal.” (citation omitted)).
Following the criticism of trials after *Godinez*, the Supreme Court reexamined the competency standard for a defendant seeking to assert the right to represent himself. In June 2008 the Supreme Court clarified the standard used for determining a defendant’s competency to represent himself in *Indiana v. Edwards*. In *Edwards*, the Court held that a state can determine that a defendant is competent to stand trial, yet not competent to represent himself at that trial. In so holding, the Court noted that cases following *Faretta* “have made [it] clear that the right of self-representation is not absolute.” The Court further acknowledged some of the problems presented by pro se defendants and the criticism surrounding those cases in which defendants chose to represent themselves. As Justice Breyer wrote for the Court, in a case with “a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel . . . the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling.” The Court further noted that a trial involving a pro se defendant of questionable capacity threatens “the most basic of the Constitution’s criminal law objectives, providing a fair trial.”

In his dissent, Justice Scalia argued that the majority opinion diminished the strength of the right to self-representation and gave it lesser constitutional import than other established rights. Justice Scalia opined that the majority may have limited the right of self-representation based on a “suspicio[n] of the constitutional footing of the right . . . itself.” He went on to state that “[t]he right is not explicitly set forth in the text of the Sixth Amendment, and some Members of [the] Court have expressed skepticism about *Faretta’s* holding.”

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85. 128 S. Ct. 2379, 2388 (2008) (explicitly declining to overrule *Faretta*). The defendant in *Edwards* had a history of schizophrenia and was found incompetent to stand trial on multiple occasions. Once determined competent to stand trial, he requested a continuance and the ability to represent himself. The trial judge denied the request for continuance and the defendant proceeded with counsel. After the jury failed to reach a verdict on certain charges, the State retried the defendant. Prior to the second trial, the defendant again asserted the right to represent himself. The trial judge held that the defendant was competent to stand trial, but not competent to represent himself. *Id.* at 2382–83.

86. *Id.* at 2388. The Court distinguished *Godinez* by noting that the heightened standard in *Edwards* related to the defendant’s ability to conduct trial proceedings, rather than the defendant’s ability to enter a guilty plea. *Id.* at 2385. The Court further noted that in *Godinez* the State sought to permit the defendant to proceed pro se, whereas in *Edwards* the State was seeking to deny the defendant the ability to proceed pro se. *Id.*


88. *Id.* at 2387.

89. *Id.*

90. *Id.* at 2392 (Scalia, J., dissenting) (“Until today, the right of self-representation has been accorded the same respect as other constitutional guarantees.”).

91. *Id.* at 2393.

92. *Id.* (citing *Martinez*, 528 U.S. at 156–58; *id.* at 164 (Breyer, J., concurring)).
Yet despite this purported skepticism, and the majority's acknowledgment of the problems created by the right to self-representation, the Edwards Court expressly declined to overturn Faretta.\textsuperscript{93} Although lower courts, scholars, and practitioners have critiqued the Faretta opinion since it was first decided, the Supreme Court has expressly and repeatedly refused to overturn its landmark holding and defendants have continued to choose to represent themselves in criminal cases.\textsuperscript{94}

II. DISTINCTIONS BETWEEN INQUISITORIAL AND ADVERSARIAL SYSTEMS OF CRIMINAL JUSTICE

While the right to represent oneself has been held to be a core right in the adversarial system of justice, it is noteworthy that some trials in which a defendant proceeds pro se take on attributes uncharacteristic of a typical adversarial proceeding. In fact, these trials begin to look less like adversarial proceedings, with the parties defining the issues and eliciting the testimony, and more like inquisitorial proceedings, with the judge taking a more proactive role in the trial process. In order to understand how and why these changes

\textsuperscript{93.} Id. at 2388 (majority opinion).

\textsuperscript{94.} The reasons cited by defendants for proceeding pro se in a criminal case are many and varied. See Michele Morgan Bolton, More Defendants Take Law Into Their Own Hands, TIMES UNION (Albany, N.Y.), Feb. 8, 2004, at D1 ("[A] growing number of civil and criminal litigants are choosing to defend themselves, citing a shortage of cash, mistrust of lawyers or a misplaced belief—based on popular courtroom dramas—that they can swing it on their own.").

Defendants often do not trust court appointed attorneys, assuming that they are part of the government that has put defendant on trial in the first place, and therefore are incapable of representing the defendant's best interests. Other defendants may believe that they are more than capable of representing their own interests in court, having witnessed many real and fictional trials on television programs. Other defendants may simply want to delay and disrupt the proceedings against them, either because they can see no chance at an acquittal and simply want to throw a wrench in the system, or they feel delay may help their interests in some way. Some defendants are aware that they cannot speak on their own behalf without subjecting themselves to cross-examination and possible confrontation with prior convictions and other impeachment techniques. These defendants may realize that by representing themselves they may speak on their own behalf in their opening statement, questioning of witnesses, and summations without exposing themselves to impeachment or cross-examination. See id.

In the case of pro se defendant Hosea Jackson, the defendant "was acquitted of punching and robbing a clerk at the Dunbrook Mobil Station in Albany even after he left a letter he had written to his girlfriend at the scene." \textsuperscript{Id} While the prosecutor was fairly confident in obtaining a guilty verdict, "an impassioned closing argument in which Jackson basically begged jurors not to return him to prison apparently worked in his favor." \textsuperscript{Id}

take place, one must first examine the modern and historical differences between inquisitorial and adversarial systems of justice.

Many civil law countries have an inquisitorial system of justice, rather than the adversarial system used in the United States and England. This fundamental structural difference has led to myriad resultant distinctions. Those distinctions range from basic theoretical differences (the focus in civil law countries is on substantive law, rather than procedural rights) to procedural differences (many civil law countries require that a criminal defendant be represented by an attorney). In comparing the inquisitorial system of civil law countries with the adversarial system of the United States, this Article will focus primarily on the procedure in French courts.

A. Historical Emergence of the Inquisitorial System

The French inquisitorial system has its roots in the twelfth century. Originally used by ecclesiastical courts to investigate charges of heresy, inquisitorial procedures were ultimately adopted by secular courts to replace adversarial proceedings. The inquisitorial system differed in some major respects from the adversarial system that preceded it. The inquisitorial system still employed the use of a judge, but now the judge was no longer the passive, neutral arbiter of an adversarial system; rather, he became an active participant in the criminal proceedings. Further, inquisitorial systems used government investigators, not private accusers, and if the evidence provided by the government investigator was unsatisfactory to the judge, the judge himself could investigate. In fact, in its initial stages, the French inquisitorial system allowed the judge to question witnesses outside of the presence of the defendant.

Both the inquisitorial and adversarial criminal systems were aimed at discovering the truth of an accusation, but the systems diverged in their definitions of truth. As some scholars have written,


96. See ERIKA FAIRCHILD, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 126 (1st ed. 1993) ("In the Civil Law, it is the substantive rules of the law, the rules that explain what is lawful and what is not, rather than how one makes a case in court, that have tended to predominate.").


98. It has been noted that "French criminal procedure . . . is most typical of a pure inquisitorial model." Abraham S. Goldstein, Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure, 26 STAN. L. REV. 1009, 1018 (1974).


100. See id. at 70–71.

101. See id. at 71.

102. Id.

103. Id.
Truth in the adversarial system was actually a determination of which opposed position was more likely to be correct. Truth was a matter of plausibility, of mature judgment, and of balancing two versions of a given event against each other. By contrast, the inquisitorial system demanded that one truth be ascertained by assembling all available evidence. Every effort of reason and all scientific knowledge had to be directed toward finding the truth. Only upon such overwhelming evidence, and not upon less proof or upon probabilities of guilt, could an accused be declared innocent or guilty.\footnote{104}

Confessions were a significant part of inquisitorial systems because the overwhelming burden of proof required conclusiveness of fact, and confessions were one of the few ways such conclusiveness could be established.\footnote{105}

\textbf{B. Current Distinctions Between Inquisitorial and Adversarial Systems of Justice}

The inquisitorial system has evolved in the centuries since its adoption, and the differences between modern inquisitorial systems of justice and modern adversarial systems of justice are numerous and substantial. For example, the pretrial process in the French inquisitorial system differs significantly from that used in the American adversarial system.\footnote{106} Suspects in France may be interrogated by police without being given an opportunity to consult with...
counsel. Further, in French felony cases, a substantial part of the justice process is conducted prior to trial. Expansive pretrial investigation is conducted by a magistrate, and requires that, before bringing a case to trial, there must be witness testimony, fact-gathering, and interrogation of the accused. Because the pretrial investigation is conducted to determine whether criminal charges should even be brought, the pretrial investigation is not open to the public in order to avoid prejudicing the suspect. On the other hand, these pretrial proceedings can extend for long periods of time, with the suspect often in custody and not formally charged.

The French pretrial investigation differs significantly from the pretrial process in the United States. In the American adversarial system, great emphasis is placed on the formality of the charge and the timing of a suspect's access to a judge and an attorney. In the United States a defendant is charged by a formal indictment, information, or complaint. Once arrested, a defendant must appear publicly before a judge within forty-eight hours. At this appearance the judge reviews the probable cause for the arrest and detention of the suspect. Further, unlike practices in the inquisitorial system, a suspect may not be questioned by police without being advised of his right to an attorney. In addition, in the American adversarial system, if the defendant opts to have an attorney present, all interrogation by the police must cease. Finally, the judicial authorities in the United States are not charged with conducting or directing the investigation, nor are they permitted to determine what charges to bring against a suspect. In the adversarial system of justice, the prosecutor and police run the investigation and determine what charges to file against a defendant.

The pretrial process is just one area in which significant differences between the adversarial and inquisitorial criminal justice systems can be seen. The


108. See FAIRCCHILD, supra note 96, at 126.

109. See id.

110. See id. at 126-27.

111. See id. ("[T]he potential for abuse in lengthy, secret pretrial proceedings is obvious. In effect, the accused may spend long periods of time in detention, often without possibility of bail, while the proceedings are going on. . . . In France in 1984, 51.9 percent of those in detention were awaiting trial rather than serving sentences." (citation omitted)).


113. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991); Gerstein, 420 U.S. at 126. This does not apply to cases in which the defendant was arrested pursuant to a warrant (and therefore subject to a judicial probable cause determination prior to arrest).

114. Gerstein, 420 U.S. at 114.


116. Id.
differences in the two systems are evident in nearly every aspect of the proceedings, from procedures attendant to the initial investigation, to those associated with the sentencing of a defendant found guilty. However, for purposes of the discussion of the right to self-representation in an adversarial system of justice, this Article focuses on four main areas of distinction between adversarial and inquisitorial criminal trials: (1) the role of the judge at trial; (2) the significance and use of evidentiary rules; (3) the role of the defendant at trial; and (4) the right of a defendant to represent himself.

1. The Judge's Control of the Proceedings

Much like in an adversarial system, the judge in an inquisitorial system presides over the trial.\(^\text{117}\) However, unlike in the United States, French judges play a much more active role in the trial process.\(^\text{118}\) An inquisitorial judge is more proactive than the "neutral and detached" arbiter typically found in an adversarial system.\(^\text{119}\) The proactive nature of the judge's role in inquisitorial proceedings represents the "affirmative obligation upon state officials to insure that state policies, both substantive and procedural, are carried out.”\(^\text{120}\) The judge, rather than the parties, ensures that these policies are met by controlling both the investigation and the trial. Thus,

> [the judge] is expected to take the initiative in amassing evidence and in assuring that the merits of guilt and penalty are correctly assessed. And the judiciary is accustomed to participating in and directing investigative and administrative processes which, in [the American] system, are largely left to police or to counsel.\(^\text{121}\)

That is not to say that the parties do not assist the judge in his role, but "their role is only secondary and supportive" and not the primary means by which evidence is obtained.\(^\text{122}\) Thus, an inquisitorial judge has the primary responsibility for calling witnesses to the stand and questioning those

\(^{117}\) FAIRCHILD, supra note 96, at 127. In France, for instance, felony cases are presided over by a judge, called a president. Juries, another import from Common Law systems, have been used in felony trials since the nineteenth century, but in a modified form that allows for greater interchange between judge and jury members. Although France has not abandoned trial by jury, as have most other Civil Law countries, its practice resembles the system of lay judges that are common in most Civil Law systems.

\(^{118}\) Ross, supra note 107, at 371.


\(^{120}\) Goldstein, supra note 98, at 1018. Professor Goldstein notes that it is typically the judge who is assigned the task of ensuring that the state policies are fulfilled by the criminal proceedings, but explains that some exceptions to this norm do exist. Id.

\(^{121}\) Id. (noting that in an inquisitorial system the judge "regards himself as more than an umpire").

\(^{122}\) Marcus, supra note 119, at 1193.
The inquisitorial judge also commonly asks questions of the accused and can demand further inquiry by calling and questioning additional witnesses or requiring further investigation.

In order to effectively control the proceedings and question witnesses, the inquisitorial judge must be aware of the facts of a case before it is testified to at trial. Thus, in the French system, a judge relies on a “dossier” containing all relevant facts of the case. In this way the judge is aware of what facts are important to elicit from a witness and can more effectively call and question witnesses regarding those facts. The French judge is tasked with aiding in the determination of the truth of the defendant’s guilt or innocence, and so is given the responsibility of eliciting facts that will lead to this ultimate determination. Thus, with dossier in hand, and a knowledge of all relevant facts before the proceedings begin, the inquisitorial judge controls and directs the course of proceedings in a criminal trial.

In an adversarial system of justice, the judge oversees the trial process, but does not control the course of the proceedings in the way that an inquisitorial judge controls the trial process. A hallmark of the adversarial system is that the parties control the direction of the trial, with each side determining what facts to enter in evidence, what witnesses to call, what arguments to make, and what objections to raise. An adversarial judge will oversee this process and rule on objections and evidentiary issues, but the judge will not determine what facts need to be introduced into evidence to prove a particular argument, nor ask questions to ensure that relevant information is entered in the record for the finder of fact to consider. These tasks are assigned to the prosecution and the defense. In a system based on a contest between two parties, the burden falls on those parties if one side fails to make an effective argument or properly introduce a fact. Thus, unlike an inquisitorial judge, the judge in the American adversarial system relies heavily on the parties to define the relevant issues in a case and argue facts and law related to those issues.

2. Significance and Use of Evidentiary Rules

Inquisitorial systems typically focus more on the substantive rights of a defendant than on procedural rights. In an inquisitorial trial, by contrast,
less emphasis is placed on procedural rules and more weight is given to the substantive rights of the defendant. Because an inquisitorial judge is assigned to the ultimate task of eliciting information to determine the truth of the defendant’s guilt or innocence, the court is not significantly restricted by strict evidentiary rules. A finder of fact in the French inquisitorial system is permitted to consider all relevant information, regardless of its reliability. It is left to the finder of fact to determine which facts should be given greater weight, and which facts should be discounted as unreliable or unimportant. Thus, “[f]ew rules of evidence inhibit the judge and the state has no explicit burden of proof or persuasion.”

These relaxed evidentiary procedures lie in stark contrast to the strict procedural rules employed in the adversarial system of the United States. Because the American system is a contest between two parties, the fairness of proceedings relies heavily on strict adherence to the rules governing the contest. Rules regarding the admissibility of evidence ensure that false or unreliable facts are not presented to the finder of fact as evidence. Much of an adversarial criminal trial involves arguments based on the numerous evidentiary rules and the precedent interpreting those rules. The admissibility of evidence is a key component of the American legal system, and trials are won or lost on these technical legal rules. Thus, parties in an adversarial system must be well-versed in the effective introduction of evidence, including procedures on laying a proper foundation to have a fact admitted into evidence, and arguments for the exclusion of evidence.

3. The Role of the Defendant at Trial

Another significant difference between the French inquisitorial system and the American adversarial system is the ability of a defendant to speak in his own defense. Continental rules of procedure and evidence place fewer impediments in the way of defendants actively participating at trial than do American rules. For example, use of prior convictions does not turn on whether the accused decides to testify. Also, the presiding judge already has seen defendant’s record in the dossier, though technically the dossier is not considered evidence in some countries. Finally, because the Continental defendant is not sworn as a witness he is not subject to prosecution for perjury.
Indeed, in Continental criminal trials, the accused is encouraged to be an active participant in the proceedings, and may even be invited by the judge to respond to certain witness testimony. Thus, a defendant in the inquisitorial system of justice is able to give his narrative to the finder of fact directly, without being placed under oath and subject to perjury proceedings should he lie. As discussed above, the inquisitorial finder of fact is tasked with determining what weight to give all probative evidence, including the unsworn testimony of the defendant.

In the American adversarial system, the only way in which a represented defendant can speak directly to the finder of fact is by testifying on his own behalf. In order to testify, the defendant must be placed under oath. Further, the defendant typically cannot engage in a narrative on the stand, but instead must respond to questioning by his counsel and the prosecution. Indeed, in this way the defendant is really speaking to the attorney questioning him, rather than the finder of fact (although the clear purpose of such testimony is to provide the defendant’s version of relevant events to the finder of fact). Unlike in the inquisitorial system, if a defendant lies in his testimony, he is subject to perjury charges. Thus, the defendant’s role in an adversarial proceeding varies from that of a defendant in an inquisitorial proceeding.

4. The Defendant’s Right to Represent Himself at Trial

Finally, a significant difference between the American adversarial system of justice and the French inquisitorial system of justice is that, in the French inquisitorial system, criminal defendants are required to be represented by counsel. “Since 1897 French law has required that an attorney represent the accused during the process of pretrial investigation. The magistrate may not ask questions of the accused unless this attorney is present, and the accused may not refuse assistance of counsel.” Relevant to this point is the fact that defense attorneys in France do not merely represent the interests of their client, but those of the justice system as well. The concern of the inquisitorial system is to determine the truth of the defendant’s guilt through a probing

138. See id. at 834.
139. See supra Part II.B.2.
140. It should be noted, however, that in France and other Continental legal systems, defendants may be interrogated without counsel immediately following arrest. “There is no general understanding on the Continent that a right to counsel during initial questioning of suspects by the police is a necessary aspect of a fair criminal process.” Van Kessel, supra note 106, at 810. For example, the Netherlands permit police to hold and interrogate a suspect for the initial six hours of detention without counsel “as opposed to questioning by the investigating magistrate, which takes place later in serious cases.” Id. at 811–12.
141. See Van Kessel, supra note 106, at 815 (“Defense attorneys generally perceive of themselves as defenders, but not obstructionists, and as responsible to the system of justice, as well as to the client. These perceptions are supported by a general understanding that finding out what happened and why—truth discovery—is an important part of the process.” (footnote omitted)).
investigation of all relevant facts. Thus, a defendant’s autonomy interests in representing himself in trial proceedings are subordinate to the ultimate investigation and determination of the truth. Therefore, a defendant is not permitted to represent himself at trial in the French system.\footnote{142}{FAIRCHILD & DAMMER, supra note 97, at 148. Related to this point, a defendant is also not permitted to plead guilty and avoid a trial. See id. at 148–49. The inquisitorial system’s emphasis on the determination of an empirical truth extends to a defendant’s ability to bargain with the state for a lesser sentence and avoidance of trial. Even if a defendant confesses in the French system, a trial will be conducted to determine the truth of the defendant’s guilt. See id. Thus, the subordination of the defendant’s autonomy interests encompass not only his inability to represent himself, but also his ability to bargain with the state to achieve a lesser sentence in exchange for a guilty plea.}

This plainly contrasts with the defendant’s constitutional right to represent himself at trial in the American adversarial system. While scholars, practitioners, and judges have noted that this right undermines the fairness of criminal trial proceedings, the American system of justice places greater weight on a defendant’s autonomy interests than does the French inquisitorial system. Thus, subject to previously enumerated exceptions, a defendant is constitutionally permitted to represent himself at trial in the United States.

These differences between the American adversarial and French inquisitorial systems of justice may appear clear and well-defined. It is interesting to note, then, that in certain areas these two systems begin to overlap. One of the clearest examples of this overlap is when a defendant in the American adversarial system chooses to represent himself. When this occurs, the adversarial process is turned on its head. The fair contest between two fairly matched parties begins to look like “a sacrifice of unarmed prisoners to gladiators.”\footnote{143}{United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975). But see Erica J. Hashimoto, Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant, 85 N.C. L. REV. 423, 423 (2007). Professor Hashimoto has engaged in an interesting analysis of data from state and federal felony cases and has determined that pro se defendants may not fare as poorly in criminal cases as commonly thought. See id.} In order to compensate for the unbalanced nature of the proceedings, the actors in a pro se criminal trial may abandon their traditional roles in some ways. Indeed, these proceedings may begin to take on characteristics of inquisitorial trials in order to ensure the fairness of the outcome. Thus, in cases involving pro se defendants, the American adversarial system of justice begins to adopt some characteristics of an inquisitorial system of justice.

III. PROBLEMS INHERENT IN A PRO SE CRIMINAL TRIAL AND THE MERGING OF INQUISITORIAL AND ADVERSARIAL SYSTEMS OF JUSTICE

Despite the outward appearance of clear distinctions between the adversarial criminal justice system of the United States and the inquisitorial criminal justice system of France, in practice and on closer examination many of these
distinctions are less obvious. In cases involving pro se defendants, the distinctions between inquisitorial and adversarial systems of justice previously discussed become muddled and features begin to interweave. In a pro se criminal trial, some adversarial customs may be abandoned and American norms central to the control over the proceedings, strict procedural requirements, and the role of the defendant may give way to procedures that resemble an inquisitorial trial.

This change in the character of some pro se criminal proceedings is a direct result of the need for courts to balance the autonomy interests of the defendant with the fairness of the trial. Trials in which a defendant represents himself present a host of problems that undermine the fairness of the proceedings. Determinations of competency, conflicts with standby counsel, utilization of proper procedure, and overall fairness of the proceedings are all called

144. Indeed, some scholars have noted that the distinctions between the two systems have never been entirely clear. For example, while a significant characteristic of the American adversarial system is the lack of judicial involvement in the investigative process, "[f]rom the earliest times, grand juries and justices of the peace have served investigative functions, even though they are judicial agencies." Goldstein, supra note 98, at 1019-20.

145. This blurring of the lines between the adversarial and inquisitorial system is particularly noteworthy because Americans have a generally negative perception of the inquisitorial system of justice employed in other countries. Although Americans "generally are receptive to reforming our system of justice, we have an instinctive reaction against foreign, particularly European, systems based on a distrust of anything inquisitory and a confidence in adversary forms of procedure." Van Kessel, supra note 106, at 800.

146. While the Supreme Court has recently clarified the standard for determining a defendant's competence to represent himself, the determination that a defendant is competent to elect to represent himself can present difficulties for a judge and defense counsel. Counsel for the defendant must zealously represent his client, but also follow his client's wishes. When an attorney is unsure of the competency of his client, and his client elects to represent himself, the attorney's role is unclear.

147. Another area that scholars and courts have focused on in criticizing the Faretta decision is when the court chooses to appoint standby counsel to assist the defendant in representing himself. Appointment of standby counsel is common practice in proceedings where a defendant is "representing himself." In theory, standby counsel provides legal guidance to the defendant while still protecting his autonomy interests by allowing him to represent himself. In practice, as scholars have noted, the appointment of standby counsel can create as many problems as it solves. See, e.g., Anne Bowen Poulin, The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System, 75 N.Y.U. L. REV. 676, 677-78 (2000). Standby counsel are often in an untenable situation, required to protect the interests of their clients while allowing their clients to choose the manner, mode, and execution of their defense. If the defense attorney interferes with the trial in order to zealously represent his client, he interferes with his client's autonomy interests. On the other hand, if he sits back and lets his client flounder without guidance on the best defense and the way in which to present it, his utility in the courtroom is questionable.

148. Assuming that a defendant is held to be competent to elect to represent himself, and that standby counsel is not appointed to assist in the defense, problems are presented in the method by which the defendant conducts his defense at trial. Pro se defendants are unlikely to be aware of complex procedural rules, or the manner in which a trial is conducted. Trial judges are reluctant to allow defendants to shoot themselves in the foot because of a lack of knowledge of procedural
into question when a defendant proceeds pro se. As Judge Reinhardt stated in a concurrence to *United States v. Farhad*, "the right to self-representation has now been extended to the point that it frequently, though not always, conflicts squarely and inherently with the right to a fair trial." Indeed, because of the inherent problems associated with a defendant proceeding pro se, it is typical for judges to strongly discourage defendants from asserting this constitutional right.

Yet when a defendant ignores these warnings and decides to proceed pro se, the court still must ensure the fairness of the proceedings and the accuracy of the verdict. In doing so, some courts have adopted procedures that mimic those used in other countries. In order to understand these changes in the criminal trial process, this section examines the adoption of practices resembling those used in inquisitorial systems and how this adoption addresses some of the problems posed when a defendant represents himself at trial. It is interesting to note that while these problems occur in pro se adversarial proceedings in the United States, similar problems have arisen in international criminal proceedings, representing a hybrid of adversarial and inquisitorial procedures.

**A. Control of the Proceedings**

In an adversarial system of justice the parties typically control the proceedings at trial. This means that the parties define the issues, decide what arguments to make, decide what witnesses to call, decide what testimony to elicit from those witnesses, make objections to inappropriate questioning or testimony, and decide what to focus on in their opening and closing statements rules or proper examination techniques. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." *Twomey*, 510 F.2d at 640.

149. United States v. Farhad, 190 F.3d 1097, 1107 (9th Cir. 1999) (Reinhardt, J., concurring specially).

150. The judge will often explain to the defendant the difficulty in proceeding pro se, and the near certainty that he will be better served by utilizing counsel. See Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under Faretta*, 42 BRANDEIS L.J. 329, 332 (2003–2004) ("Although a defendant need not himself have the skill and experience of a lawyer in order to competently and intelligently choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open."). But see Dallio v. Spitzer, 343 F.3d 553, 555 (2d Cir. 2003) (holding that an explicit warning on the dangers of proceeding pro se is not constitutionally required).

151. See Goldstein, *supra* note 98, at 1018.

152. In several international criminal cases, the tribunals have adopted procedures more akin to an adversarial process, and in so doing have granted the defendant the right to represent himself. In these international pro se criminal proceedings, problems have arisen akin to those in American pro se criminal proceedings. See Daryl A. Mundis & Fergal Gaynor, *Current Developments at the Ad Hoc International Criminal Tribunals*, 2 J. INT'L CRIM. JUST. 642, 664–68 (2004).
to the jury. When one of the parties is not represented by counsel, however, it is less clear who is controlling the trial.

While there is a long-held American ideal of the judge as neutral arbiter overseeing a case in which control of the issues and evidence is in the hands of the prosecution and defense, in practice

[judges] restrict control of the case by the parties and restrain the jury’s impulses towards irrationality and nullification of law. Moreover, many American judges comment on the evidence, require that witnesses be summoned even when counsel do not call them, appoint experts, suggest defenses to counsel, use the doctrines of "plain error" and "effective assistance of counsel" to intrude upon counsel’s control of the case, and apply "harmless error" to excuse counsel’s inadequacies.\textsuperscript{153}

Thus, the passivity of the judge and control of proceedings by the parties, believed by many to be fundamental attributes of the adversarial system, may not be as ubiquitous as commonly thought. In pro se criminal cases, the adoption of procedures resembling inquisitorial practices becomes more obvious than in other areas of the adversarial justice system. Because of the judge’s role in ensuring a fair trial, the role of neutral arbiter is sometimes abandoned when a defendant decides to represent himself, and the judge begins to look less like the detached overseer of the adversarial system and more like the proactive participant in the inquisitorial process.\textsuperscript{154}

The judge in a pro se criminal trial may attempt to exert control over the proceedings by informing the defendant of the relevant issues to address and assisting the pro se defendant in asking questions to effectively elicit the desired responses. In \textit{Commonwealth v. Jackson}, the judge “attempt[ed] to

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\item 153. Goldstein, \textit{supra} note 98, at 1022.
\item 154. Inquisitorial legal systems are also taking on more aspects of adversarial criminal systems. As Professor Van Kessel wrote, “[i]nspired by the Court of Human Rights, as well as \textit{Perry Mason} and \textit{LA Law}, Continentals have been moving toward more adversary forms of procedure, and today Continental justice systems contain numerous adversary elements.” Van Kessel, \textit{supra} note 106, at 802 (footnote omitted). Indeed, this movement toward adversarial procedures may be due in part to the civil-law requirement that a defendant be represented by a lawyer at all stages of the proceedings. Furthermore, [t]he mandatory representation by an attorney, which predated the provision of attorneys to indigents in the United States by over half a century, is actually antithetical to the spirit of pretrial investigations within the inquisitorial process. These investigations were meant to be inquiries, similar to police investigations before a suspect is arrested, that would help to determine if charges should be brought against an individual. While this rule that an attorney be assigned to the accused was designed to ensure that no abuses would occur during the investigation, the result, according to some commentators, has been to lengthen the process and inject a note of formality that makes it far less useful as a preliminary investigation than it was originally planned.\textsuperscript{\textup{\textsuperscript{\textsuperscript{\textsuperscript{127}} }}}
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assist the defendant by explaining to him how to show that a witness made a prior inconsistent statement at the probable cause hearing. In so doing, the judge helped define the relevant issues and arguments for the defendant, and assisted him in asking questions of the witness on the stand.

A judge may seek to define the issues at trial because the defendant may define the issues in a way that does not allow for the most relevant evidence to be presented to the finder of fact. In United States v. Davis, the defendant elected to represent himself at the penalty phase of his capital murder trial. The defendant chose not to present any mitigating evidence to the jury. The judge, presented with a situation where the jury was not going to be informed of relevant facts, opted to appoint an independent counsel to present mitigating evidence to the jury. The judge found the power to appoint an outside attorney in the inherent authority of a federal district court to appoint amicus curiae counsel. In so doing, the judge noted the difficult situation presented by a defendant defining the issues of a capital case and choosing not to engage in a vigorous defense:

"[t]he public has a substantial independent interest in being assured of a full and fair sentencing proceeding, in compliance with constitutional and statutory requirements, so that the death penalty is not imposed arbitrarily and capriciously."

Despite the trial court's attempts to ensure the fairness of the sentencing hearing, the Fifth Circuit Court of Appeals reversed the decision, holding that

155. Commonwealth v. Jackson, 647 N.E.2d 401, 405 n.6 (Mass. 1995). The appellate court went on to note that "[t]he judge could have, but did not, simply exclude the questions and require the defendant to question the witnesses correctly or to forego presenting that evidence before the jury." Id.


157. Id. As Judge Dennis noted in his dissent on the appeal of this case, the defendant chose not to present mitigating evidence because he was actively seeking the death penalty: "Davis's own words reveal that his sole motivation is to receive the death penalty, and he has gone so far as to threaten to do nothing at the sentencing trial in order to realize this goal." United States v. Davis, 285 F.3d 378, 386 n.2 (5th Cir. 2002) (Dennis, J., dissenting).

158. Davis, 180 F. Supp. 2d at 797–98.

159. Id. at 799–800.

160. Id. at 798. The trial court noted the inherent unfairness of a sentencing hearing that only considers aggravating factors. The court cited the Supreme Court to support its decision that mitigating factors must be considered:

"[A] sentencing system that allow[s] the jury to consider only aggravating circumstances would almost certainly fall short of providing the individual sentencing determination that we . . . have held . . . to be required by the Eighth and Fourteenth Amendments. . . . A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."

the appointment of independent counsel interfered with the defendant's constitutional right to represent himself. As the appellate court noted, [a]n individual’s constitutional right to represent himself is one of great weight and considerable importance in our criminal justice system. This right certainly outweighs an individual judge’s limited discretion to appoint amicus counsel when that appointment will yield a presentation to the jury that directly contradicts the approach undertaken by the defendant.

The appeals court remanded the case, and ordered the sentencing hearing to proceed without the presentation of relevant mitigating evidence.

Judges presiding over pro se criminal proceedings may also help define the arguments presented at trial. In Brown v. Alaska, the judge instructed the defendant on the types of arguments that could be made at trial, noting that the defendant’s arguments to the jury were inappropriate in a criminal trial. The defendant in Brown was accused of burglary and criminal mischief. In his opening statement, the defendant repeatedly attempted to make a jury nullification argument. The judge instructed the defendant and the jury that the finder of fact could not ignore the law in coming to a verdict. The defendant openly argued with the judge about this point, in front of the jury. On appeal, the defendant argued that the statements of the judge were prejudicial to his case. The Court of Appeals of Alaska disagreed. The appellate court found that the judge appropriately steered the defendant in his opening statement in defining arguments that could not be made.

Perhaps nowhere is the control of proceedings more uncertain than in cases where a pro se defendant chooses not to contest his guilt, but rather opts to contest the validity of the proceedings. These defendants wish to use the criminal trial as a platform from which to express a political viewpoint or rejection of the system of justice which is placing them on trial. These defendants will often use their pretrial motions and opening and closing statements to explain their political agenda, rather than argue the merits of the case. And the defendants will call and cross examine witnesses, not to prove or disprove the fact of their guilt, but rather to further support their message. It would be difficult for a defendant in an adversarial criminal setting to promote

161. Davis, 285 F.3d at 381.
162. Id.
163. Id. at 385.
165. Id. at *1.
166. Id. at *8.
167. Id.
168. Id.
169. Id.
170. Id.
this political defense if he were represented by an attorney.\textsuperscript{171} Thus, it is more likely that a defendant would be able to promote a political agenda while representing himself, rather than if he were represented by an attorney.\textsuperscript{172}

Such pro se defendants provide particular difficulties for the adversarial criminal trial setting, in that they are difficult to confine to the rules of procedure. Even more problematic, however, is the threat to fairness such tactics pose to the adversarial criminal trial. Defendants wishing to promote a political agenda may be charged with any range of crimes and enlist any number of tactics or strategies. In recent years, however, the more prominent instances of self-representation have involved an international component. Trials of accused terrorists, such as Zacharias Moussaoui, have involved requests for self-representation by the defendant.

In \textit{United States v. Moussaoui}, similar issues arose when the defendant asserted his right to self-representation in federal district court.\textsuperscript{173} Moussaoui was charged with being a co-conspirator of the terrorists who attacked the United States on September 11, 2001.\textsuperscript{174} Initially the trial judge allowed Moussaoui to file briefs with the court, but she appointed standby counsel to

\textsuperscript{171} Hashimoto, \textit{supra} note 143, at 475. Lawyers are governed by strict rules of behavior and are required to follow the rules of the court, evidence, and procedure when appearing on behalf of their client, regardless of whether the client wishes them to do otherwise. Violation of these rules could lead to a lawyer being held in contempt, barred from appearance, and even disbarred from the profession. \textit{See Model Rules of Prof'L Conduct R. 8.1, 8.2 (2007)}.

\textsuperscript{172} Indeed, as has been seen clearly in the conviction of attorney Lynne Stewart, lawyers put themselves at risk when representing politically unpopular defendants and abiding by their clients' wishes. \textit{See Richard Acello, Stewart Conviction: A Big Chill?, 4 ABA J. EREP. 7, Feb. 18, 2005}. Lynne Stewart represented Sheik Omar Abdel Rahman who was convicted of masterminding the 1993 World Trade Center bombing. \textit{United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004)}.

In the Sattar case, the Attorney General imposed special administrative measures that prevented Rahman from communication with the public. \textit{Id.} at 289. Because of a fear that Rahman had a dangerous influence over other terrorists, Rahman was only permitted to communicate with his attorney and immediate family members. \textit{Id.} at 289–90. Stewart was charged with assisting Rahman's communication with his followers through the transmission of letters and a press release that Stewart read to a reporter, which announced Rahman's withdrawal of support for a cease-fire with Egypt. \textit{Acello, supra}. Stewart was convicted of providing material aid to terrorists, among other things. \textit{Id.} Throughout her trial, Stewart maintained she was merely acting as a zealous advocate for her client, and was not guilty of materially supporting terrorism. \textit{See Sattar, 314 F. Supp. 2d at 286–321}. Stewart's conviction sent shockwaves through the legal community, and increased the likelihood that an attorney could face much more than contempt charges if she chooses to assist her client in mounting a political defense, making such representation on the part of an attorney extremely unlikely. \textit{See Acello, supra; Sarah Werthan Buttenwieser, Column, Echoes of 1950, NEWSDAY, Feb. 27, 2005, at A41}.

\textsuperscript{173} \textit{See United States v. Moussaoui, 43 F. App'x 612, 613 (4th Cir. 2002)} (dismissing appeals by Moussaoui challenging orders appointing counsel to him). The Supreme Court eventually denied the defense petition for writ of certiorari to review the case. \textit{Moussaoui v. United States, 544 U.S. 931 (2005)}.

\textsuperscript{174} \textit{United States v. Moussaoui, 282 F. Supp. 2d 480, 483 (E.D. Va. 2003)}.
assist Moussaoui in his defense. After this decision, however, Moussaoui filed objectionable pleadings and caused delays in the proceedings. Thus, in December 2003, the judge reappointed defense counsel to represent Moussaoui, noting that she would not accept any pleadings filed by Moussaoui that were not submitted through his attorneys. Moussaoui’s refusal to participate in the adversarial process in a way that would result in a fair trial required the judge to intrude on his right to self-representation.

Often this appears to be the result of trials where defendants proceed pro se, particularly those trials in which the defendant uses the courtroom as a platform to argue a political agenda or question the legitimacy of the proceedings. The control of these trials no longer appears to lie in the hands of the parties, and judges are ill-equipped to handle such proceedings. Thus, many defendants who begin criminal proceedings may have their right to represent themselves revoked by the time of trial. If the defendant is disruptive, obstructionist, or engages in tactics to delay the proceedings, the judge may determine that he should no longer be permitted to represent himself and appoint defense counsel to take over the case.

Indeed, judges have been criticized or reversed for failing to assert sufficient control over trials involving a self-represented defendant. In United States v. Nivica, the appellate court upheld the appropriateness of the trial judge’s requirement that the defendant ask questions of himself on the stand. However, in a concurrence, Judge Reinhardt criticized the decision of the trial court to force the defendant to engage in such questioning:

[T]he district judge should have taken steps, sua sponte, to protect Wellington’s interests in securing a fair trial. The right to testify in one’s own defense is a fundamental constitutional right, and [the defendant’s] attempt to offer his own testimony, by means of self-questioning, was obviously a total failure. . . . [A] willingness on the part of the district court to explore alternative methods of enabling [the defendant] to testify in his own defense, and a sensitivity to the difficulties presented by the defendant’s attempt to elicit essential testimony through self-questioning, would have better served the

176. Jerry Markon, Court Reins in Terror Suspect, MIAMI HERALD, Jan. 1, 2004 at 7A (“What followed [Judge Brinkema’s ruling] was a 17-month stream of blistering handwritten motions, scrawled from Moussaoui’s jail cell in Alexandria, in which he taunted the government, blasted his attorneys and compared Brinkema to a Nazi SS officer. . . . Moussaoui’s trial was delayed twice because of issues resulting from his self-representation, such as the multitude of documents he had to review from his jail cell.”).
177. Id.
interests of justice and afforded greater protection to the important constitutional right at stake.\textsuperscript{179}

Thus, Judge Reinhardt noted that the trial judge should have understood and acknowledged that there are differences between overseeing a trial involving a represented defendant and a trial involving a pro se defendant. Indeed, the concurring opinion indicated that the appropriate course of action for the trial judge would have been to take a more proactive role in the trial to ensure protection of the pro se defendant’s constitutional rights.

In \textit{Grubbs v. State}, the Supreme Court of Indiana went as far as reversing the lower court for not having asserted sufficient control over the proceedings.\textsuperscript{180} In \textit{Grubbs}, the pro se defendant failed to object to prejudicial and irrelevant testimony elicited by the prosecution.\textsuperscript{181} In reversing the trial court, the high court of Indiana held that

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[a] trial court cannot sit idly by in a circumstance of this sort. He must actively direct the course of the trial so as to protect the ultimate purpose of that trial which is to bring about a decision by the judge or jury which is based upon relevant and non-hearsay evidence.\textsuperscript{182}
\end{quote}

Thus, in a criminal trial in which a defendant represents himself, a judge may be more proactive in directing the course of the proceedings than in a trial where both sides are represented by counsel. While the courts have held that the Constitution does not require judges to take on a more proactive role in trials involving pro se defendants, in order to ensure a fair trial judges may become more involved in the process to assist the self-represented defendant. Much like inquisitorial proceedings, a judge may actively engage in questioning witnesses, including the defendant. The judge may also clarify and define the issues presented by the case and assist the defendant in eliciting testimony relevant to those issues. This proactive behavior of the trial judge, resembling that of a judge in an inquisitorial system, helps to ensure the fairness of the trial and protect the defendant’s constitutional rights.

\textbf{B. Significance and Use of Procedural Rules}

Related to the judge’s greater control over proceedings involving a pro se defendant is the involvement of the judge in eliciting testimony and the employment of more relaxed evidentiary and procedural rules used in a trial in which a defendant represents himself. A defendant who is untrained in the law is little able to effectively use the strict procedural rules of the adversarial system. Even if a pro se defendant is aware of the issues and arguments relevant to his case, he may not know what evidence to introduce to prove his

\begin{footnotes}
179. \textit{Id.} at 1128 (Reinhardt, J., concurring) (citations omitted).
181. \textit{Id.} at 43.
182. \textit{Id.}
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defense. If he is aware of the relevant evidence, he may still be incapable of laying a proper foundation to have that evidence admitted. Further, a defendant who represents himself may allow prejudicial or irrelevant testimony to enter the record because he does not know to object. The complicated evidentiary and procedural rules in place in the United States ensure an even playing field, even between the resource-rich government and a public defender. However, for these procedural rules to protect the defendant's right to a fair trial, they must be used effectively. A pro se defendant's lack of knowledge of procedural rules undermines the fairness of the proceedings.

A judge presiding over a trial involving a self-represented defendant may assist the defendant in navigating the complicated procedural and conduct rules with which the defendant will be required to comply. Because a pro se defendant usually has little knowledge of the complex procedural rules that ensure fair trials in the United States, the judge may instruct the defendant on the rights that he has under the Constitution. For example, the judge may inform the defendant that he has the right not to testify, and that if he does testify he may be impeached with prior testimony. The judge may also advise a pro se defendant on more technical procedural rules, such as jury selection and specific rules of evidence. Courts have held that trial judges are not required to instruct pro se defendants on these laws and rules in criminal trials. But in order to ensure a fair trial and keep the proceedings running efficiently and within the rules, a judge will often abandon, to some extent, his role as a detached and passive arbiter and inform a pro se defendant of his rights and how to protect those rights under the law.

In addition to informing a defendant of the complicated rights and procedures in place to ensure fair trials in the United States, judges may also go one step further and become an active participant in the trial process by

183. See, e.g., United States v. Pavich, 568 F.2d 33, 40 (7th Cir. 1978). In Pavich, the trial judge assisted the defendant in the proper technique to lay a foundation for a prior statement; to impeach a prior statement; and to introduce a document into evidence. The trial court also attempted to advise the defendant outside the hearing of the jury to avoid eliciting damaging evidence. Id. (citations omitted).

184. In People v. Barnum, 64 P.3d 788 (Cal. 2003), the California Court of Appeal determined that the judge need not advise a pro se defendant of his right not to testify under Faretta, id. at 799. However, the court also stated that

[i]n any given case, the court remains free to provide such an advisement, so long as its words do not stray from neutrality toward favoring any one option over another. A trial court of course must proceed carefully in providing an advisement, but it may provide one if it deems appropriate. Id. at 799 (quoted in Moskovitz, supra note 150, at 335).

185. See Pavich, 568 F.2d at 40.

186. See Bolton, supra note 94 (quoting Albany County Judge Thomas A. Breslin as stating that, in the case of pro se defendants, his "hands are pretty well tied . . . . You can't let a miscarriage of justice occur, but in the same breath, you can't be the second defense lawyer. I tell people, 'Please don't do this. You don't have the training to do this.'").
rejecting improper evidence or testimony, sua sponte, and by conducting questioning themselves.\textsuperscript{187} In the American criminal justice system, courts rely on the adversarial nature of the system to highlight and prevent inappropriate questioning or evidence. In a pro se trial, the defendant is often ill-equipped to identify an improper question or object to such a question. Thus, a judge observing such impropriety may step in and object to the question himself, at the same time ruling on the objection and striking any witness response. In this way the judge ensures that a lack of procedural knowledge on the part of the defendant does not undermine the fairness of the proceedings. Further, if a witness on the stand is not being effectively questioned by the pro se defendant, and the judge believes further questioning is necessary to clarify the witness's statements, the judge may step in and do the questioning.\textsuperscript{188}

When the court does become more proactive in protecting the procedural rights of the defendant, it can put the judge, as a neutral arbiter, in a difficult position. For

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[w]hile the trial judge has a broad discretion with respect to his interrogation of witnesses, he must always be sensitive to his role as a judge and the fact that in the eyes of the jury he "occupies a position of preeminence and special persuasiveness" and accordingly "be assiduous in performing his function as governor of the trial dispassionately, fairly and impartially."\textsuperscript{189}
\end{quote}

Thus, the trial judge is placed in a complicated position when he presides over a pro se criminal trial. "An overprotective judge who refuses to allow a defendant to jeopardize his own defense may be reversed, and a judge who does not make a copious inquiry into the thought process of the accused (which

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\textsuperscript{187} JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS 57–58 (Am. Judicature Soc'y 1998). Some judges have noted the following techniques for dealing with pro se litigants: "I give the pro se greater latitude and on critical issues I may ask questions and make my own objections that normally are made by trial counsel"; "The court begins the trial by asking extensive questions of each party, under oath; this seems to work well with custody cases, the bulk of our caseload"; "I guide them through the process a bit—making sure they know they have the right to object to the other party's proffered evidence and nudging them along by asking them if they want X to be marked and they want X to be admitted"; and "[I suggest] how the evidence sought might properly be presented."

Jona Goldschmidt, The Pro Se Litigant's Struggle for Access to Justice: Meeting the Challenge of Bench and Bar Resistance, 40 Fam. Court Rev. 36, 58 n.73 (2002) (alteration in original).\textsuperscript{188} See GOLDSCHMIDT ET AL., supra note 187, at 57–58. There is nothing in the Constitution preventing a judge from questioning a witness himself, so long as he does not overstep his bounds as a neutral arbiter. In most trials, however, the questioning is left solely in the hands of counsel, with the contest-like atmosphere of the adversarial system hinging on the effectiveness of each lawyer at eliciting or discrediting testimony.\textsuperscript{189} United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975) (quoting United States v. Cassiagnol, 420 F.2d 868, 879 (4th Cir. 1970)).
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may themselves [sic be characterized as trial strategy) is subject to an appeal . . . .”

Yet trial judges have the inherent authority to call and question witnesses, and may choose to do so in trials where a pro se defendant is not able to adequately use strict procedural rules to present his defense.

In *State v. Hutch*, a defendant accused of theft, terroristic threatening, and assault elected to represent himself. At times during the trial, the judge determined that the defendant’s questions posed to witnesses were unclear or did not fully elicit material facts. In order to clarify the questions and “further elicit material facts,” the trial judge stepped in and asked his own questions of witnesses. On appeal, the Supreme Court of Hawaii noted that a trial judge has the right to examine witnesses to elicit pertinent material facts not brought out by either party or to clarify testimony. Such power is incident to the search for truth in judicial proceedings. At no time, however, must the court assume the role of an advocate for either party.

Thus, the high court held that the judge acted within his powers when he engaged in the questioning of witnesses.

Similarly, in *Burgess v. Bintz*, a pro se defendant objected to the trial judge questioning witnesses during the defendant’s cross-examination of those witnesses. Reviewing the defendant’s petition for habeas corpus relief, the United States District Court for the Southern District of New York held that the questioning of witnesses by the judge was appropriate. In so holding, the district court noted that the trial judge’s questions were “neutrally phrased and intended to clarify the witness’s testimony.” Further, the court emphasized the need for the trial judge to be engaged in the trial of a pro se defendant by quoting the United States Supreme Court’s holding in *Bollenbach v. United States* that a “judge is not a mere moderator, but is the governor of

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191. Indeed, even in a case where a defendant is represented by counsel, the trial judge may attempt to ask questions of witnesses when the defense attorney is ineffectively representing his client. In *People v. LaBree*, the trial court attempted to compensate for the inadequacies of the defense counsel by asking questions of witnesses and repeatedly instructing the defense attorney. 313 N.E.2d 730, 731–32 (N.Y. 1974). The Court of Appeals of New York held that “[i]n the court's valiant attempt to cure vital and obvious deficiencies cannot be deemed to satisfy *in toto* the constitutional requirement of the assistance of counsel.” *Id.* at 732.
193. *Id.* at 22.
194. *Id.*
195. *Id.* at 21.
196. *Id.* at 22.
198. *Id.*
199. *Id.*
A judge presiding over a pro se criminal trial may help the defendant comply with complex evidentiary and procedural rules because pro se defendants may not have adequate knowledge or skill to ensure that all relevant evidence is considered by a jury. Thus, a pro se defendant might not be aware of the significance that asking certain questions may have. In *Burgess*, the defendant successfully argued that an encounter with the police several days prior to the charged crime was irrelevant to the proceedings and should not be introduced at trial. The court held that the prosecution could not ask any questions about this encounter unless the defendant “opened the door to such testimony.” An attorney familiar with procedural rules would studiously avoid asking any questions that would lead to answers relating to the defendant’s encounter with police. In *Burgess*, however, the pro se defendant cross-examined one of the police officers and proceeded to “ask[] a series of questions that the court ruled opened the door to testimony about the [previous] encounter.”

In addition, a pro se defendant, unaware of the types of questions to ask on direct or cross-examination, may ask questions of a witness that result in irrelevant testimony entering the record. In *Commonwealth v. Jackson*, the defendant was charged with armed robbery, armed assault, and assault and battery. The defendant elected to represent himself. In his cross-examination of the victim, the defendant asked open-ended questions, which resulted in answers that implicated the defendant. Thus, in response to the defendant’s vague and general questions, the victim testified that the defendant had committed the crime.

An experienced defense attorney would know not to ask open-ended questions of the victim on the stand like the ones posed by the defendant in this case. Indeed, the prosecution used this statement in the trial as evidence of the defendant’s guilt. Although the defendant protested such use, the Supreme Court of Massachusetts noted that “[w]hile the victim’s responses were damaging to the defendant, they were responsive to the wide-open questions the defendant employed on cross-examination. [Thus, it was appropriate for the prosecutor to] argue this evidence in his summation.”

200. *Id.* (quoting *Bollenbach v. United States*, 326 U.S. 607, 612 (1946)).
201. *Id.* at *1*.
202. *Id.*
203. *Id.*
205. *Id.*
206. *Id.* at 403 n.2.
207. *Id.*
208. *Id.*
209. *Id.*
Even if the questions are appropriate and designed to elicit relevant, helpful testimony, a pro se defendant's questions may not be clear to either the witness or the jury. In Burgess, Brown, and Jackson, the judge repeatedly stepped in to ask questions of the witnesses to clarify what the defendant was attempting to ask. As the Tenth Circuit noted in United States v. Wheeler, "[t]he trial judge is allowed to participate in a trial and ask questions of witnesses in order to ascertain the facts." However, when a pro se defendant's questions are unclear, the trial judge must first ascertain what testimony the defendant is trying to elicit, then clarify that with the defendant, and finally ask the question of the witness. This back and forth draws out the questioning and can confuse the jury, undermining the defendant's examination.

Further, a defendant may not be aware of courtroom protocol, or when to ask questions. In Brown, the defendant continually interrupted the prosecution's questioning of witnesses, interjecting his own questions throughout. The judge had to repeatedly instruct the defendant on the proper time for questioning of a witness.

Even if the questions asked by the defendant are relevant, clear, and made at the proper time, the defendant may not know to object to inappropriate questioning by the prosecution. In Grubbs, the prosecution took advantage of the defendant's pro se status by asking questions that elicited inadmissible testimony. As the Supreme Court of Indiana noted in reversing the defendant's conviction, although the prosecution "chose to bring out matters which were clearly inadmissible and which would tend to enrage the jury against the accused," the defendant failed to make a single objection at trial. While the trial judge stepped in several times to limit the prosecution's questioning, the failure of the defendant to make objections and participate effectively in the adversarial process led to the admission of prejudicial and irrelevant testimony.

211. United States v. Wheeler, 444 F.2d 385, 390 (10th Cir. 1971) (the court went on to note that the judge "cannot show hostility toward one side or become an advocate for one side").
213. Id. at *7-9.
215. Id. The court also noted:
[T]estimony elicited by the prosecutor as part of his case in chief from the witness Ratcliff was clearly inadmissible as irrelevant. This testimony is totally unrelated to the elements of the offense of which the defendant was charged. The same witness related a general conversation, the content of which supports the State's case only by innuendo and suggestion, and at no time specified who said what to whom, but continually referred only to what "they said."
Id. at 43.
216. Id. at 42-43.
In addition to problems related to the questioning of witnesses, a pro se defendant may also inadvertently allow evidence to enter the record that would not be introduced by an effective defense attorney. In *State v. Kerns*, the pro se defendant put at issue the adequacy of his investigator. In *State v. Kerns*, the pro se defendant put at issue the adequacy of his investigator. The trial judge then questioned the defendant on the details of his investigation. In addition to putting the details of his investigation at issue, the defendant also sought to interview a witness he believed could provide exculpatory information. The defendant informed the judge of his desire to question this witness, but noted that he would not be able to speak with his investigator for a few days. The judge then asked the prosecutor to find and interview the defense witness in order to determine what information he may have had about the defendant’s participation in the crime. On appeal, the defendant argued that he should not have been forced to disclose his defense strategy in open court, nor should the judge have allowed the prosecution to find and interview a defense witness. The appellate court rejected these arguments, essentially holding that the defendant had created the circumstances that led to both of these situations at trial. Because the defendant raised the issue of his investigator’s inadequacy, and because the defendant raised the possibility of a witness having exculpatory information, the appellate court held that the trial court had acted correctly in ordering disclosure of the defendant’s investigation details and the prosecution’s interview of a defense witness.

A defendant might not even realize he is raising an issue or providing evidence to the court when he represents himself. In *United States v. Pinkey*, the pro se defendant was charged with mail fraud. The defendant was accused of having sent handwritten letters from prison to several women, falsely informing them that their deceased husbands owed him money. In the course of the court’s voir dire of potential jurors, the defendant handwrote several questions that he wanted the judge to ask of the jury pool. He then gave the judge the paper containing the handwritten questions. The judge, in turn, gave the prosecution the handwritten questions to use as a handwriting

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218. *Id.*
219. *Id.* at *4.
220. *Id.*
221. *Id.*
222. *Id.* at *1–2.*
223. *Id.* at *3–4.*
224. *Id.*
226. *Id.* at 306–07.
227. *Id.* at 307.
228. *Id.*
sample to compare to the letters at issue in the case.\textsuperscript{229} An experienced attorney would likely have gone to great efforts to avoid providing a handwriting sample to the prosecution, where the identification of the defendant's handwriting was at issue. A defendant representing himself, however, would not likely know of the consequences of providing handwritten voir dire questions to the judge.

Adherence to rigid procedural and evidentiary rules and strict courtroom protocol places a defendant at an extreme disadvantage when he represents himself at trial. A defendant unfamiliar with these rules and untrained in the law is often not able to adequately elicit relevant testimony, object to inappropriate questioning, or avoid raising prejudicial issues. Thus, the fairness of the adversarial system breaks down when the rules in place to ensure a fair contest are not effectively utilized or enforced. In addition to the pro se defendant's inability to effectively abide by procedural rules, the role of a defendant in a pro se criminal trial is often problematic.

Thus, because of the complex evidentiary and procedural rules inherent to the American adversarial system of justice, judges may step in to ensure that the defendant's story is told and that strict evidentiary rules do not prevent relevant evidence from being presented to a jury. Judges may relax procedural rules and allow pro se defendants leeway in introducing relevant evidence, in order to ensure that all material facts are presented to the jury. In this way, the importance of strict procedural and evidentiary requirements of an adversarial system is lessened, and the cases involving pro se litigants begin to take on characteristics that resemble that of an inquisitorial system. As previously discussed, inquisitorial systems of justice are focused less on adherence to rigid procedural requirements and the procedural rights of the defendants, and more on substantive rights and an ultimate determination of the truth. Similarly, in adversarial trials involving pro se defendants, adherence to procedural rules may be relaxed in order to allow a defendant to present relevant material facts to the jury.

\textbf{C. The Defendant's Role at Trial}

Finally, the defendant's role at trial changes when he opts to represent himself. In a typical adversarial trial, the only time a defendant is able to tell his side of the story, in his own words, is if he elects to take the stand and testify on his own behalf. Defendants have a constitutional right to avoid self-incrimination; however, if a defendant wishes to explain his version of the events he must be willing to testify under oath, thereby subjecting himself to cross-examination, impeachment, and perjury charges should he lie in his testimony. By only permitting defendants to speak to the finder of fact under these circumstances, the adversarial system attempts to ensure that a defendant's trial is based on facts and evidence in the record, and not on a false
tale spun by a defendant to convince the jury of his innocence. Yet, when a defendant represents himself, these norms are turned on end.

As previously discussed, a defendant in an inquisitorial trial is encouraged to participate in the proceedings. In the French inquisitorial system, defendants may testify but are not placed under oath when they do testify. Thus, defendants in the French inquisitorial system are able to present their account of events to the finder of fact without being subject to perjury charges should the prosecution think that the defendant lied on the stand.

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Much like in the French inquisitorial system, in the United States, an unsworn pro se defendant can address a finder of fact directly. By speaking directly to the jury in both his opening statements and closing arguments, a defendant is essentially able to testify while not under oath. Although a judge can instruct a defendant to only discuss evidence that is raised at trial, jurors may not be able to differentiate between the testimony of witnesses on the stand, who are under oath and subject to cross-examination, and the statements of the defendants in his opening statement and closing argument, which are accompanied by neither of these safeguards. This ability to testify directly to the finder of fact without being under oath represents yet another way in which a pro se criminal trial in the United States takes on characteristics of a French inquisitorial trial.

In addition to the problems associated with a defendant’s ability to present his narrative directly to the jury, difficulties can also arise when a pro se defendant decides to take the stand in his own defense. In United States v. Nivica, the pro se defendant declared his intention to take the stand and testify on his own behalf. The defendant, Mark Wellington, requested that his standby counsel be permitted to ask him questions, but the judge refused. The judge stated that because the defendant had elected to proceed pro se, he would have to ask himself questions on the stand and then respond to those questions with an answer. This led to the following direct testimony:

MR. WELLINGTON: The question is: Does Mark Pedley Wellington, a/k/a Jack Williams, have anything to hide?

The answer is No.

[PROSECUTOR]: Objection.

THE COURT: Sustained. Please strike the answer. Please wait until an objection is made, if any is made, before you answer.

MR. WELLINGTON: Well, I guess I can’t ask myself any more questions then.

230. See supra Part II.B.3.
231. See supra Part II.B.3.
234. Id.
235. Id.
THE COURT: Thank you. You are excused.\textsuperscript{236}

Because of his clear confusion regarding the rules attendant to questioning witnesses and the difficulty of asking oneself questions on the stand, the defendant was effectively prevented from testifying on his own behalf. Yet even if a pro se defendant is able to effectively question himself, or if standby counsel is permitted to conduct the questioning, the change in role from advocate to witness may confuse the jury and undermine the defendant's credibility on the stand.

Thus, the right of a defendant to represent himself in the adversarial criminal justice system of the United States creates numerous dilemmas for the trial judge, prosecutor, and defense attorneys involved. Without the assistance of the judge and prosecutors relating to evidentiary issues, examination of witnesses, jury instructions, and opening and closing statements, a defendant will have difficulty conducting a successful defense. For these reasons, courts and scholars have criticized the right to self-representation as being ineffective, difficult to administer, and ultimately unfair.\textsuperscript{237}

Despite the problems and criticism associated with the right to self-representation, the Supreme Court has reaffirmed the right time and time again, and defendants continue to exercise their right to self-representation and proceed pro se in criminal trials. However, the Supreme Court cases interpreting the right to self-representation seem to focus on the ability of a defendant to assert this right, rather than whether the right itself furthers the interests of justice in an adversarial system or how to conduct trials in which a defendant represents himself. Except to note that the Constitution does not "require judges to take over chores for a \textit{pro se} defendant that would normally be attended to by trained counsel as a matter of course," the Court has not acknowledged that these cases are any different than cases in which a defendant is represented by counsel.\textsuperscript{238}

Yet pro se criminal trials can take on characteristics more akin to an inquisitorial system of justice than to an adversarial trial. Judges in the United States may elect to resolve some of the problems presented by a pro se defendant by adopting procedures that resemble those used in the inquisitorial system. In this way, judges could attempt to compensate for the imbalance created when one party is unrepresented in an adversarial system by seeking the truth though measures other than a pure contest between two fairly matched parties.

This merger of distinct systems of justice is the result of American courts attempting to ensure the fairness of proceedings when a criminal defendant chooses to represent himself. The American adversarial system of criminal justice relies on the judge as a neutral and detached umpire—presiding over a

\textsuperscript{236} \textit{Id.}

\textsuperscript{237} See Hashimoto, \textit{supra} note 143, at 434.

trial but not a proactive participant in the proceedings. A judge’s typical role is a passive one: he reacts to issues and situations presented but does not affirmatively enter the process. However, the American system of criminal justice is also premised on the idea that two adversaries, pitted against each other and bound by strict procedural rules in a trial setting, is the most effective means of determining the guilt or innocence of a defendant. Such a system may indeed be effective should each adversary be trained in the strict procedural rules and knowledgeable about the rules guiding courtroom conduct. However, when one of those adversaries is significantly disadvantaged, the effectiveness of determining guilt or innocence is severely hampered. In such situations, a judge may take on a much more proactive and assertive role, instructing the disadvantaged defendant on rights and rules, and even taking a part in the presentation of evidence to the jury, through witness questioning and sua sponte rulings. In this way, an American adversarial criminal trial begins to look more like a civil-law inquisitorial trial, with a proactive judge and a determination to find guilt as a matter of empirical truth, rather than as the outcome of a contest between two parties.

IV. ADDITIONAL INTERNATIONAL IMPLICATIONS OF THE RIGHT TO SELF-REPRESENTATION

In trials outside of the United States, where defendants have been given the right to represent themselves, problems have arisen that are similar to those experienced in the American system. In the International Criminal Tribunal for the Former Yugoslavia (ICTY), the question of a defendant’s right to self-representation was argued and debated in the case of Slobodan Milošević. Milošević was tried before the tribunal for crimes against humanity committed during his presidencies of Serbia and Yugoslavia. At the outset of the proceedings, Milošević asserted the right to represent himself. The trial chamber determined that the statute authorizing the ICTY allowed a defendant to opt to represent himself. The trial chamber also decided that the

239. See JOHNSON & WOLFE, supra note 99, at 71.

240. For an interesting article advocating a more engaged role for judges in civil pro se cases, see Richard Zorza, The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality when Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 GEO. J. LEGAL ETHICS 423 (2004).


242. Milošević Appeal Decision, supra note 241, para. 2.

243. Id. para. 3.

244. Milošević Counsel Decision, supra note 241 (cited in Daryl A. Mundis, Current Developments at the Ad Hoc International Criminal Tribunals, 1 J. INT’L CRIM. JUST. 703, 709–10 & n.51 (2003)).
proceedings in front of the ICTY were of an adversarial nature, "and adversarial—unlike inquisitorial—systems do not impose defence counsel upon an accused who does not want one."\(^{245}\) Finally, the tribunal concluded that imposing unwanted counsel on Milošević would be tantamount to denying him the ability to defend himself.\(^{246}\) The trial chamber held that the right to self-representation was not unlimited, however, and reserved the right to later revisit the issue.\(^{247}\)

The trial that ensued following the ruling was heavily criticized by many in the international legal community.\(^{248}\) Milošević continually disrupted the trial and there were lengthy delays because of Milošević's illness and resulting inability to advocate on his own behalf.\(^{249}\) Milošević's main defense at trial was not that he did not commit the acts, but rather that the tribunal had no authority over him as the former leader of Yugoslavia.\(^{250}\) Such a defense necessarily disrupted the proceedings, because Milošević refused to properly counter charges against him and instead used the advocate's seat as a platform to contest his detention and prosecution.

In September 2004, the tribunal reconsidered its earlier determination and ordered that Milošević be represented by counsel for the remainder of the proceedings against him.\(^{251}\) The tribunal formally based its decision on the constant disruptions caused by Milošević's illnesses and the fear that the trial would never conclude at the present pace.\(^{252}\) As the tribunal stated:

If at any stage of a trial there is a real prospect that it will be interrupted and the integrity of the trial undermined with the risk that it


\(^{246}\) Milošević Counsel Decision, supra note 241, para. 24 (cited in Mundis, supra note 245, at 710).

\(^{247}\) Id. para. 40 (cited in Mundis, supra note 245, at 710).


\(^{249}\) Transcript of Record at 32,357-59, Prosecutor v. Milošević, Case No. IT-02-54 (Sept. 2, 2004) [hereinafter Milošević Transcript] (statement of Robinson, J.) ("[T]he trial was interrupted over a dozen times on account of the ill health of the accused, thereby losing some 66 trial days.").


\(^{251}\) See Milošević Transcript, supra note 249, at 32,391 (Sept. 2, 2004).

\(^{252}\) See id. at 32,358.
will not be conducted fairly, then the Trial Chamber has a duty to put
in place a regime which will avoid that. Should self-representation
have that impact, we conclude that it is open to the Trial Chamber to
assign counsel to conduct the defence case, if the Accused will not
appoint his own counsel.\footnote{Milosevic Counsel Decision, \textit{supra} note 241, para. 33.}

On November 1, 2004, the Appeals Chamber of the ICTY released a decision
based on an interlocutory appeal filed by the appointed defense counsel.\footnote{Milosevic Appeal Decision, \textit{supra} note 241.}
Milo\v{s}evi\v{c} refused to cooperate with his designated counsel, and so defense
counsel requested that the appellate body review the tribunal's decision to
appoint counsel for the defendant, arguing that they could not provide an
effective defense without the defendant's cooperation.\footnote{See Scharf, \textit{supra} note 5.}
In its decision, the appeals chamber laid out a clear test for determining whether a defendant may
proceed to represent himself before the tribunal.\footnote{Milosevic Appeal Decision, \textit{supra} note 241, paras. 11–13.}
After stating that a defendant had the right to represent himself, the appeals chamber held that this
"right may be curtailed on the grounds that a defendant's self-representation is
substantially and persistently obstructing the proper and expeditious conduct of his trial."\footnote{\textit{Id.} para. 13.}
The appeals chamber then held that it was appropriate for counsel
to be appointed to represent Milo\v{s}evi\v{c}, but when Milo\v{s}evi\v{c} was physically
capable of representing himself he must be allowed to do so.\footnote{\textit{Id.} paras. 19–21.}
Thus, despite the numerous delays and tactics on the part of the defendant, which attacked
the legitimacy of the ICTY, the appeals chamber still maintained that
Milo\v{s}evi\v{c} was able to represent himself, displaying the strength of the doctrine
of self-representation.

In another trial before the ICTY, Vojislav \v{S}e\v{s}elj also asserted the right to
self-representation.\footnote{Prosecutor v. \v{S}e\v{s}elj, Case No. IT-03-67-PT, Decision on Prosecution's Motion for
Order Appointing Counsel to Assist Vojislav \v{S}e\v{s}elj with His Defence, para. 2 (May 9, 2003) [hereinafter \v{S}e\v{s}elj Counsel Decision].}
\v{S}e\v{s}elj was a Yugoslav political leader, as well as a law
professor at the University of Belgrade, who was accused of crimes against humanity.\footnote{See Prosecutor v. \v{S}e\v{s}elj, Indictment, paras. 1–3, 17 (Jan. 15, 2003). The indictment
contained allegations that, among other things:

On 23 February 1991, Vojislav \v{S}e\v{s}elj was appointed President of the newly founded
"Serbian Radical Party" ("SRS"). In June 1991, he was elected a member of the
Assembly of the Republic of Serbia. In almost daily rallies and election campaigns, he
called for Serb unity and war against Serbia's "historic enemies", namely the ethnic
Croat, Muslim and Albanian populations within the territories of the former
Yugoslavia. Additional relevant historical and political facts are set out in Annex I to
this indictment. \textit{Id.} para. 4.}
Procedures to Ensure Fairness in Pro Se Criminal Trials

was not unlimited, under the “ICTY and ICTR Statutes, national practice, relevant human rights norms and the jurisprudence of the ad hoc Tribunals.”

The judges then expressed serious concerns about allowing the defendant to represent himself in front of the tribunal:

Notwithstanding the assertions of the accused that he would use ‘legal arguments and hard facts’ to ‘defeat’ the Tribunal, the Trial Chamber noted that ‘good cause for concern’ has been shown, based on the prosecution’s arguments and throughout the initial proceedings in the case, where the accused ‘is in fact increasingly demonstrating a tendency to act in an obstructionist fashion while at the same time revealing a need for legal assistance’.

The tribunal ultimately provided Šešelj with standby counsel to assist in his representation and prevent significant disruption of the proceedings.

Nor are these problems confined to the ICTY. An Israeli court tried Marwan Barghouti for, among other things, membership in a terrorist organization, terrorist activity, murder, and attempted murder. Barghouti is a Palestinian who was then the Secretary General of Fatah. Although Barghouti was initially represented by a team of experienced defense attorneys, he chose to represent himself at trial. The Israeli court attempted to appoint the Israeli public defenders to represent Barghouti, but Barghouti declined any such assistance.

Barghouti made no secret of the reasoning behind his position. He stressed that his decision to forego any trial defense was adopted after careful consultation with his privately retained attorneys. He emphasized that he held no personal resentment against the public defenders who were prepared to assist him. Nevertheless, he explained that he regarded the [Office of the Public Defender] as an extension of the occupying powers of the State of Israel.

Like Milošević, Barghouti was not interested in contesting the criminal charges against him as much as he was determined to challenge the legitimacy of the proceedings. “He wanted to portray himself as a political prisoner and a

\[\text{261. Mundis & Gaynor, supra note 152, at 664.}\]
\[\text{262. Id. at 665 (quoting Šešelj Counsel Decision, supra note 259, paras. 22–23) (footnotes omitted).}\]
\[\text{263. See Šešelj Counsel Decision, supra note 259, para. 7.}\]
\[\text{265. Mann & Weiner, supra note 264, at 115.}\]
\[\text{266. See id. at 118.}\]
\[\text{267. Id.}\]
\[\text{268. Id.}\]
martyr, unjustly prosecuted by an immoral legal system. He did not want his trial to look like a fair proceeding." The court insisted that Barghouti be represented by the public defenders assigned to his case, placing his counsel in the difficult situation of representing a defendant who did not desire representation. The public defenders decided to remain passive at trial, in order to best respect their client's wishes. This led to the Israeli judges assuming a more proactive role in the proceedings.

"Uncharacteristically, they abandoned their attitude of moderate aloofness toward the parties and adopted a critical, if not suspicious, posture toward the prosecution. The judges were constantly interrupting the prosecutor with questions from the bench, openly expressing their doubts about certain parts of the evidence." Thus, although the Israeli system of justice is an adversarial system, just as in the United States, when a defendant chooses to represent himself for political reasons the judges may begin to take on characteristics similar to those exhibited by judges in inquisitorial systems.

In the Special Court for Sierra Leone, defendant Sam Hinga Norman asserted the right to represent himself at trial after dispensing with a team of private trial attorneys. Norman, who was Sierra Leone's Minister of the Interior Affairs at the time, was charged with crimes against humanity and war crimes. The judges of the Court rejected, in part, Norman's request by appointing standby counsel to represent him. In making this determination, the court took into consideration that Norman was being tried jointly with other defendants, the lateness of his request to represent himself, and finally the fact that the right to self-representation is not an unqualified right.

In none of the aforementioned cases did the courts or tribunals deny the defendant a right to self-representation. Nor did the courts revoke such a right entirely, even on significant disruption by the defendant. Rather, the courts limited the defendant's ability to represent himself by appointing standby or amicus curiae counsel, limiting the defendant's right to self-representation but not denying it entirely.

Thus, the issues that arise in the United States when a defendant chooses to represent himself also arise in international arenas when a defendant is granted

269. Id. at 119–20.
270. See id. at 121.
271. Id.
274. Norman Self-Representation Decision, supra note 272, para. 32.
275. Id. paras. 25–27.
the right to proceed without an attorney. As an increasing number of trials with international and political components are brought in courts of law, the issue of self-representation is assuming a greater international characteristic. While most countries do not allow a defendant the unconditional right of self-representation, international tribunals seem to be adopting more features of adversarial systems, including the right to self-representation. Trials with a political component, however, can be particularly problematic when the right to self-representation is invoked. Thus, courts in the United States or abroad, where defendants are granted the right to represent themselves, need to adopt procedures to ensure fairness, consistency, and accuracy of verdicts. Perhaps the best place to start is to look at what judges are already doing to ensure the fairness of pro se criminal trials. Inquisitorial procedures allow a judge more control over criminal proceedings in which a defendant represents himself, and better ensure accuracy of result. Finding ways of consistently incorporating these practices in all pro se criminal trials would help ensure the fairness of the proceedings and the outcomes.

V. ENSURING THE FAIRNESS OF TRIALS IN WHICH A DEFENDANT REPRESENTS HIMSELF

Adversarial trials are a contest between two sides: if the government wins, the accused is found guilty; if the defendant wins, he is acquitted. Proponents of the adversarial system argue that a system pitting two adversaries against each other in a court of law is the best way to determine the guilt or innocence of the party charged. However, because of the contest-like atmosphere of an adversarial system, rules must be in place to ensure that the outcome is fair. Thus, the adversarial system relies on strict compliance with procedural rules and zealous advocacy by all representatives to preserve fairness and ensure that justice prevails.

Defendants who choose to represent themselves are often incapable of asserting control over the proceedings and conforming with the procedural rules essential to an adversarial system. Thus, pro se criminal trials jeopardize the ability of the adversarial system to fairly determine guilt or innocence. However, as noted in Part I of this Article, the Supreme Court has repeatedly reaffirmed the constitutional status of the right of self-representation. Thus, in order to consistently resolve the conflicting ideals of fairness and autonomy in pro se criminal trials, standards need to be adopted to guide courts and ensure the constitutional rights of the defendant are not violated. In developing these standards, it is natural to determine what some courts are already doing to ensure the fairness of proceedings in cases in which a defendant has chosen to represent himself.

As discussed in Part III of this Article, some judges have adopted procedures that resemble those used in the inquisitorial system to assert greater control over pro se criminal trials and ensure the admission of relevant evidence. This transformation is a natural evolution of an adversarial trial when one of the
parties is not able to adequately defend his rights. By asserting greater control over the proceedings and ensuring the admission of probative evidence, regardless of strict compliance with evidentiary rules, judges ensure that the outcome of such a trial is fairer and more likely to result in an accurate verdict. Yet not all judges engage in more proactive behavior in pro se criminal trials.

Consistency between courtrooms is essential to the legitimacy of any system of justice. A defendant tried in one courtroom should not have a significant advantage over a defendant tried in another courtroom, merely because he is in front of a different judge. The same strict adherence to procedural and evidentiary rules that ensure the fairness of proceedings also ensures consistency of outcome. This assumes, however, that procedural and evidentiary rules are being effectively litigated in all courtrooms. Yet when a defendant represents himself it is unlikely that he is competently asserting control over the trial process and effectively utilizing procedural rules. 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.

If recommendations were in place that encouraged all judges to become more proactive in criminal trials and adopt the procedures used by some judges to ensure a fairer outcome, the trials of self-represented defendants would arguably be more consistent and lead to more just verdicts. The power to assert greater control over the trial through added participation, enhanced questioning, and less strict adherence to procedural and evidentiary rules is already in the hands of the judge. Indeed, as already discussed, some judges are currently utilizing these powers to ensure pro se criminal trials lead to fair and accurate verdicts. Guidelines are needed to encourage this proactive behavior and provide direction for judges on how to more actively engage in pro se criminal trials without abandoning their neutrality.

Such recommendations have already been made and adopted in the civil arena in cases involving pro se civil litigants. Scholars studying civil proceedings involving pro se litigants have long noted the unfairness that can result from such trials, and have argued for the adoption of reforms involving inquisitorial practices. These reforms include a more proactive role for judges in pro se litigation, including questioning initiated by judges, and

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276. E.g., Baldacci, supra note 125, at 691 (noting that “defenses of the adversarial system against incursions of inquisitorial-based reforms are rooted in the adversarial system’s presumption that a zealous lawyer will represent each side in a case”); Rebecca A. Albrecht et al., Judicial Techniques for Cases Involving Self-Represented Litigants, JUDGE’S J., Winter 2003, at 16 (suggesting “options for trial judges seeking helpful techniques” for those appearing pro se).
relaxed evidentiary and procedural rules. Indeed, the American Judicature Society has issued recommendations that seem to advocate for the adoption of inquisitorial practices by judges presiding over pro se civil trials. Among the recommended procedures, the Society recommends:

1. Courts should provide self-represented litigants with information and services to enable them to use the court, and courts should secure the resources and staffing to provide those services.

7. Judges should assure that self-represented litigants in the courtroom have the opportunity to meaningfully present their case. Judges should have the authority to insure that procedural and evidentiary rules are not used to unjustly hinder the legal interests of self-represented litigants.

8. All Courts should assist judges in managing cases involving self-represented litigants. The Society further explains that judges could assist pro se litigants by “directly question[ing] witnesses for pro se litigants more frequently than for those represented by counsel, and be[ing] more lenient in the content of opening and closing statements.” Based on these recommendations, some civil courts have adopted practices mimicking those used in inquisitorial systems in order to accommodate pro se litigation without undermining the fairness of the proceedings. A similar strategy should be used in the criminal arena, where the stakes are higher and the right of the defendant to a fair trial all the more important.

Recommendations for judges overseeing criminal trials where defendants represent themselves would allow for greater consistency among courts and encourage judges to be more proactive in the trial than in typical criminal

277. Baldacci, supra note 125, at 693. Scholars have not argued for the wholesale adoption of inquisitorial practices in pro se litigation, rather they have argued that the adoption of some inquisitorial-like procedures would better ensure the fairness of the proceedings. To gain the benefits of independent, judicial questioning during trial, we need not replace purely adversarial evidence gathering with the judge-dominated model of the inquisitorial system. An acceptable middle ground could be the same allocation of interrogating power employed during our voir dire. . . . [T]he judge might conduct the initial interrogation, after which the attorneys would be free to probe for additional details.

Id. (alterations in original) (quoting FRANKLIN STRIER, RECONSTRUCTING JUSTICE: AN AGENDA FOR TRIAL REFORM 256 (1994)).

278. AM. JUDICATURE SOC'Y, supra note 36, at 1, 5.

279. Id. at 4. In explaining these recommendations, the American Judicature Society noted that “[m]any judges currently use individual strategies for handling pro se litigants, but there appears to be no uniformity among judges and courts on managing these cases. Judges need guidance on the most effective and ethically permissible strategies for managing litigation involving self-represented litigants.” Id. at 4–5.
proceedings. In adopting these recommendations, courts could look to practices used in inquisitorial systems and mimicked by some courts overseeing pro se criminal and civil trials in the United States. Thus, the recommendations should include the following provisions:

- Courts presiding over criminal trials in which defendants represent themselves should provide those defendants with resources and information allowing them to better understand and navigate the trial proceedings.
- Courts should ensure that self-represented defendants have the opportunity to meaningfully present their case by ensuring that the issues and arguments made at trial are defined and clarified at the outset of the proceedings.
- Courts should ensure that self-represented defendants are able to present relevant evidence to the finder of fact, and should not allow strict adherence to procedural and evidentiary rules to unjustly prevent defendants from presenting an effective defense.
- Courts should assist self-represented defendants in asking questions of witnesses when necessary to clarify or elicit relevant testimony.
- Courts should ensure that the rights of self-represented litigants are protected by preventing irrelevant and prejudicial information from being presented to the jury, regardless of whether the defendant objects to the admittance of such testimony.
- Courts should instruct the jury that any questioning done by the court in the course of the trial does not reflect the court’s opinion on the evidence in the case, nor the guilt of the defendant.
- Courts should further instruct the jury that any statements made by the defendant while not on the stand (including the defendant’s opening statement and closing argument) are not made under oath, and should not be considered evidence in the case.

These recommendations, similar to those advanced by the American Judicature Society for civil cases, would help ensure consistency and accuracy in criminal prosecutions where a defendant elects to proceed without counsel.

In order to effectively implement these recommendations, judges will need to be better informed of the arguments that will be made in the case prior to its commencement. For a judge to ensure that a witness is effectively questioned, either in direct testimony or cross-examination, he must first understand what the goal of such questioning is. In the French inquisitorial system, the judge is able to effectively control the proceedings and question witnesses because he is informed of all issues, facts, and witnesses at the outset of the proceedings through a dossier. In the American adversarial system, a judge will need to be similarly informed of the issues in a criminal case in order to effectively control the proceedings and ensure that relevant testimony is elicited from witnesses by the pro se defendant. Rather than discovering the issues and facts
of a case as the jury is discovering them, a judge in a pro se criminal trial would be better able to ensure the fairness of the proceedings by knowing in advance what to expect from the prosecution and the defense. Thus, as an essential component of these recommendations, judges should be able to request and receive information prior to trial that will allow the court to be more proactive in the proceedings. At some point before the commencement of a pro se criminal trial, a judge should receive from the prosecution and defense the arguments that will be made at the proceedings. Further, both sides should provide the court with a list of witnesses who will be called at trial, and the testimony that will be elicited from those witnesses. In this way, a judge will be better able to effectuate the recommendations listed above.

Further, the judge would need to be particularly careful to maintain his neutrality as he asserts control over the proceedings and asks witnesses questions. A judge need not abandon his neutrality when he affirmatively participates in a criminal trial. Indeed, "[j]udges in inquisitorial systems engage in a mandated active role without a loss of impartiality." But judges do need to ensure that their participation in the trial does not convey a bias for either side. In order to do this, judges should ask questions designed to elicit relevant information, without conveying opinions on witness credibility or the weight of the evidence. Perhaps the best way to ensure this neutrality without inhibiting a judge from asking questions is to allow a judge to ask preliminary questions of each witness, designed to elicit relevant testimony. This questioning can be followed by questioning from the prosecution and defense. But in this way, the judge will help the finder of fact by ensuring that it has all the relevant information before it, without commenting on the reliability of the evidence or betraying a bias for either side.

Thus, with careful oversight and consistent use, recommendations advocating the use of inquisitorial practices by criminal trial courts would better ensure that pro se criminal proceedings lead to fair and accurate verdicts. Without the adoption of such recommendations, the current practices of courts will lead to unfair and inconsistent results.

Because the adversary system is a contest between two sides, if a competent defendant chooses to put forth his own defense, even one that has little hope in succeeding on the merits, that is his choice as an autonomous participant in the process. The Supreme Court has held that as long as defendants abide by the rules of court and remain within the bounds of the law, they have the right to present their own defense. Indeed, in some rare cases a defendant is in the best position to defend himself at trial. However, while self-representation is a fundamental right in the American adversarial system, trials involving pro se defendants can lead to inefficiency and injustice.

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Perhaps the best option in such cases is to look to the inquisitorial system of justice for a model of how to proceed. A judge who assumes a more proactive role in the trial of a pro se defendant would be better able to keep the proceedings moving forward and avoid unnecessary delays. A defendant would still be able to speak his mind in statements made to the court and in response to questioning by the judge, but the defendant would not be directing the timing or manner of the proceedings, like lawyers are able to do in typical adversarial proceedings. Further, this type of trial would not require the defendant to be familiar with technical evidentiary or procedural rules, because the judge would be permitted a more proactive role in examining witnesses, clarifying and admitting evidence, and requesting further investigation. A judge need not abandon his neutral role in order to take a more active role in the proceedings. Indeed, a more involved judicial officer seems to be one of the ways in which the fairness of such proceedings may be preserved. This model would simply standardize and legitimize the practices that some judges engage in, to a lesser extent, when ensuring a fair trial by assisting pro se defendants.

VI. CONCLUSION

The adversarial system of justice is based on a contest between two parties: the government and the defendant. While the power and resources of the government are significantly greater than those of an individual defendant, procedural rules and rights help level the playing field and afford defendants a better chance to win the contest. These procedural rules and rights are technical, however, and require the knowledge of an expert in order to be preserved and asserted to a defendant’s advantage. Thus, courts in adversarial systems, such as in the United States, provide defendants with counsel to guide them through the proceedings and ensure a just and fair outcome to the trial. It may then seem that the right to represent oneself is antithetical to the adversarial system of justice. Indeed, ideals of individual autonomy often conflict with the desire to ensure a fair trial. Despite this conflict, however, the Supreme Court of the United States and the judges of several international tribunals have determined that a defendant’s autonomy interests outweigh the interest of appointing counsel to ensure a fair trial. However, when a defendant chooses to represent himself, the fairness and even the very legitimacy of the adversarial system are called into question.

One way to handle this dilemma is to borrow some aspects of inquisitorial systems that would enable a judge to embrace a more active role in the proceedings, thereby allowing the defendant a fair trial while still allowing him

281. In addition, the French approach of allowing a defendant to speak without being subject to threat of perjury charges or impeachment would further encourage such defendants to put forward the merits of their “political defense” without allowing such arguments to take over and derail the trial.
to assert his political position. Such a system would work to ensure that the public perceives the proceedings as fair while allowing the defendant an opportunity to put forward his political argument, which, indeed, may be his only defense.

This transformation of a pro se criminal trial has already occurred in many courtrooms. This phenomenon is the natural evolution of a criminal trial in which the defendant chooses to represent himself, and where the efficiency and fairness of the traditional contest-model of the adversarial system begin to break down. Rather than ignoring the phenomenon, or allowing it to continue sporadically in certain courts, recommendations should be adopted that encourage all courts to ensure the fairness of pro se criminal proceedings. By looking to inquisitorial systems of justice and borrowing practices that allow for greater participation of the judge and more relaxed procedural rules in trials in which a defendant represents himself, the American adversarial system of justice would help ensure that the criminal defendant's Sixth Amendment right to represent himself does not undermine his fundamental right to a fair trial.