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COMMENTS

The Permissibility of Shackling or Gagging Pro Se Criminal Defendants

Brooksnay Barrowest

Stories of belligerent criminal defendants abound in television dramas and trial accounts featured in the mainstream press. Cases record countless examples of defendants becoming violent toward courtroom personnel, using obscene or inappropriate language, or threatening judges and witnesses. Methods for dealing with such obstructionist behavior range from verbal warnings to citations for contempt to the use of physical restraints, including handcuffs, leg irons, and gags. In extreme cases, judges may even expel misbehaving defendants from the courtroom. Judges have discretion to use these sanctions to maintain the dignity,

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1 See, for example, United States v Stewart, 20 F3d 911, 912–15 (8th Cir 1994) (court restrained defendant because he had assaulted a Department of Corrections Officer); Scurr v Moore, 647 F2d 854, 855 (8th Cir 1981) (court ordered that defendant wear handcuffs and a body belt inside a coat after he had assaulted a jailer during a recess, inflicting "brutal facial injuries"); United States v Ives, 504 F2d 935, 942–45 (9th Cir 1974), vacated, 421 US 944 (1975), reinstated in part on remand, 547 F2d 1100 (9th Cir 1976) (defendant refused to answer questions, argued with the judge, struck defense counsel on several occasions, and physically attacked the United States Attorneys).

2 See, for example, State v Plunkett, 934 P2d 113, 116 (Kan 1997) (upholding termination of defendant’s self-representation after he maintained a surly, disrespectful attitude throughout the proceeding, became belligerent and used profanity during argument on motions, refused to stand when addressing the court, and stopped answering the judge’s questions); People v Davis, 851 P2d 239, 243–44 (Colo App 1993) (upholding exclusion of defendant from courtroom after he spat in the prosecutor’s face, fought with deputy sheriffs, and physically attacked and shouted obscenities at a prosecution witness).

3 See, for example, Stewart v Corbin, 850 F2d 492, 494–96 (9th Cir 1988) (defendant threatened the trial judge, used abusive language, and intimidated a witness with his conduct).

4 Illinois v Allen, 397 US 337, 343–44 (1970) (holding that constitutionally permissible remedies include binding and gagging the defendant, citing him for contempt, or removing him from the courtroom). See also Tanksley v State, 946 P2d 148, 150–51 (Nev 1997) (finding defendant in contempt for talking back and behaving disrespectfully); Scurr, 647 F2d at 855 (upholding court order that defendant wear handcuffs and a body belt inside a coat after he assaulted a jailer); Stewart, 20 F3d at 915 (affirming lower court’s decision to place defendant in leg irons during trial); Stewart, 850 F2d at 499–500 (affirming decision to gag defendant for repeatedly disobeying court orders and intimidating a witness).

5 Allen, 397 US at 343–44. See also Burks v State, 792 SW2d 835, 837 (Tex Crim App 1990); Ives, 504 F2d at 938.

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order, and decorum of the courtroom and the judicial process.\footnote{Allen, 397 US at 343-44.}

The question of appropriate restraint becomes much more complex, however, when the belligerent party is not only the defendant, but also his own attorney. Can an individual adequately represent himself with his hands cuffed behind his back or one hand cuffed to his chair? Such restraints impede his ability to take notes or move freely. What if it becomes necessary to gag a defendant who represents himself? He can no longer make objections, question witnesses, or address the jury. Whether or not the defendant represents himself, court-imposed restraints can have significant effects on the jury.\footnote{The Supreme Court has said that shackling unmistakably indicates "the need to separate a defendant from the community at large." Holbrook v Flynn, 475 US 560, 568-69 (1986). In Lemons v Skidmore, the Seventh Circuit said that "courts [have] found that the appearance of the defendant in shackles would prejudice the jury, causing them to believe that the person was dangerous." 985 F2d 354, 357 (7th Cir 1993).} Jurors may speculate about what the defendant has done to deserve such punishment. They may interpret the need for restraints as an indication that the court already attaches some level of guilt to the defendant.\footnote{Allen, 397 US at 343-44.}

A court's decision to restrain a pro se defendant involves complex constitutional inquiries. This Comment clarifies the relevant issues and makes recommendations for balancing the competing interests which arise when a pro se defendant disrupts his own trial.

Part I examines the right of self-representation, first established in the landmark case \textit{Faretta v California},\footnote{422 US 806 (1975).} as part of the Sixth Amendment's guarantee of legal counsel in a criminal trial. Part II addresses the appropriate use of restraints at trial, explaining how \textit{Illinois v Allen}\footnote{397 US 337 (1970).} and its progeny affect criminal cases where an obstreperous defendant represents himself. Part III examines cases that have considered the effects of physically restraining a pro se defendant. In each of these cases, the courts emphasized different issues and reached different results. Part IV synthesizes the concerns raised by these courts, and proposes a plan for addressing them.

This Comment proposes three reforms: (1) a formal hearing, outside the presence of the jury, before imposing physical restraints on a pro se defendant; (2) a chance for the defendant to challenge the need for restraints; and (3) mandatory appointment
of standby counsel for all defendants who proceed pro se.\textsuperscript{11} By using these reforms, judges can preserve the dignity of the courtroom and protect the courts from disruption and abuse without infringing on the defendant’s Sixth Amendment rights. This proposal keeps authority squarely with the defendant to conduct his trial as he wishes, unless he forfeits that opportunity by violating established rules.

I. THE RIGHT OF SELF-REPRESENTATION

The Sixth Amendment defines a defendant’s opportunity to present a full defense:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury and . . . , to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.\textsuperscript{12}

Taken together, these rights comprise the right to make a defense in the adversarial system of criminal justice,\textsuperscript{13} and form part of the right to due process that the Fourteenth Amendment guarantees to defendants in state criminal courts.\textsuperscript{14} The Supreme Court has interpreted the Sixth and Fourteenth Amendments of the Constitution to guarantee a person brought to trial in any federal or state court the right to assistance of counsel before a court can correctly imprison him.\textsuperscript{15}

\textsuperscript{11} The term “standby counsel” refers to both advisory counsel for a defendant who represents himself and defense counsel for the defendant whose pro se status has been terminated. Sheila Oliver, Recent Decision, \textit{Criminal Procedure — Right to Standby Counsel of Choice} — United States v. Romano, 849 F.2d 812 (3d Cir. 1988), 62 Temple L Rev 451, 451 n 4 (1989).

\textsuperscript{12} US Const, Amend VI.

\textsuperscript{13} Faretta v California, 422 US 806, 819 (1975).


\textsuperscript{15} This principle emerged from a series of cases decided earlier this century. See Powell v Alabama, 287 US 45, 71 (1932) (failure of trial court to make an effective appointment of counsel in capital offense prosecution denied due process of law where defendants were young, ignorant, illiterate, and surrounded by hostile sentiment); Johnson v Zerbst, 304 US 458, 467–68 (1938) (ruling that Sixth Amendment withholds from federal courts the power to deprive an accused of his life or liberty unless he has or waives the assistance of counsel); Gideon, 372 US at 341–45 (holding that the Sixth and Fourteenth Amendments guarantee the absolute right to assistance of counsel for criminal defendants in both state and federal courts); Argersinger, 407 US at 37 ("[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether . . . petty, misde-
In *Faretta v California*, the Supreme Court elaborated on this right, stating that “[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.” The Court also stated that “the right to self-representation — to make one's own defense personally — is thus necessarily implied by the structure of the Amendment.”

Anthony Faretta faced charges of grand theft in the Los Angeles County Superior Court and requested that the court allow him to represent himself. The judge informed Faretta that he believed the choice to waive counsel and proceed pro se would be a mistake. Then the judge made a preliminary ruling accepting Faretta's waiver of counsel, but indicated that he might reverse this decision “if it later appeared that Faretta was unable adequately to represent himself.” Prior to trial, the judge sua sponte held a hearing to inquire into Faretta's ability to conduct his own defense.

In the sua sponte hearing, the judge questioned Faretta about the hearsay rule and California law governing challenge of jurors, then ruled that Faretta had not made a knowing and intelligent waiver. The judge also ruled that Faretta had no constitutional right to conduct his own defense and appointed the public defender to represent him. Faretta was convicted and sentenced to prison. The California Court of Appeal affirmed the trial judge's ruling that Faretta had no federal or state constitutional right to represent himself. The court denied Faretta's petition for rehearing without opinion, and the California Supreme Court denied review.

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422 US 806 (1975).
17 Id at 819.
18 Id.
19 Id at 807.
20 422 US at 807-08.
21 Id. The judge also told Faretta that he would not receive special favors as a pro se defendant. Id at 808 n 2.
22 Id at 808.
23 Id at 808-10 & n 3.
24 422 US at 808-810.
25 Id at 810. Faretta had previously told the judge that he did not wish to be represented by the public defender because he believed that office was overwhelmed with a heavy case load. Id at 807.
26 Id at 811.
27 Id at 811-12.
28 The California court based its conclusion on California's procedural rule that an indigent criminal defendant had no right to appointed counsel of his choice. 422 US at 812 n 8.
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granted certiorari to consider "whether a state criminal defendant has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so." The Court answered in the affirmative, reversing Faretta's conviction and remanding the case.

A watershed case, Faretta defined self-representation as a constitutionally-guaranteed right, binding on all the states. Nonetheless, this was not the first time that the Supreme Court had addressed the issue of pro se criminal defendants. Writing for the majority in Faretta, Justice Stewart cited federal statutory authority for self-representation, support from state constitutions and state court interpretations of the United States Constitution, and past Supreme Court decisions that supported a criminal defendant's opportunity to represent himself. Stewart then turned to the Sixth Amendment and concluded that forcing counsel on an accused violates the logic of the requirement of assistance of counsel.

At its most basic level, the Faretta decision guarantees a criminal defendant the right to control his own defense. The defendant, not his counsel, has the right to confront witnesses against him, be informed of the nature and cause of the accusation, and be accorded compulsory process for obtaining witnesses in his favor. It follows that the defendant also has the right to accept or reject the assistance of counsel. The Faretta Court admitted that, in most instances, rejection of counsel will have a detrimental effect on a defendant's case, but nevertheless ruled

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29 Id at 807.
30 Id at 835–36.
31 Justice Stewart quoted Section 35 of the Judiciary Act of 1789, "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel . . .," as evidence of long-standing statutory protection of the right of self-representation. 422 US at 812–13. This right is currently codified at 28 USC § 1654 (1994).
33 Comment, Mandatory Advisory Counsel for Pro Se Defendants: Maintaining Fairness in the Criminal Trial, 72 Cal L Rev 697, 701 (1984) ("Essential to the Faretta Court's reasoning was its concern with protecting what it saw as a basic aspect of American justice — the individual autonomy of the defendant.").
that a defendant still must have this option. In short, Faretta holds that "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

The Court did, however, impose several limitations on the right to self-representation. First, a defendant must knowingly and intelligently relinquish the benefits associated with the right to counsel. The purpose of this waiver is not to allow pro se representation based on the defendant's lack of skill as a lawyer, but merely to ensure that the defendant is aware of the dangers and disadvantages of self-representation.

In a lengthy footnote, the Faretta Court further limited the

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38 Id at 834. The Court also noted that in some rare cases the defendant will actually present his case more effectively than counsel could have done, but concluded that "[p]ersonal liberties are not rooted in the law of averages. The right to defend is personal." Id.

39 Id at 819–20.

40 422 US at 835. The circuits currently disagree on exactly what safeguards meet this standard. The majority view, held by seven circuits, maintains that although a colloquy on the record is always preferable, the trial judge may determine the "sufficiency of the waiver from the record as a whole rather than from a formalistic, deliberate, and searching inquiry." United States v Gallop, 838 F2d 105, 110 (4th Cir 1988). See also United States v Hagen, 726 F2d 21, 24–26 (1st Cir 1984); Wiggins v Procunier, 753 F2d 1318, 1320–21 (5th Cir 1985); United States v Bell, 901 F2d 574, 576–77 (7th Cir 1990); Gilbert v Lockhart, 930 F2d 1356, 1358–59 (8th Cir 1991); United States v Kimmel, 672 F2d 720, 721–22 (9th Cir 1982); Strozier v Newsome, 926 F2d 1100, 1104–05 (11th Cir 1991). By giving the trial judge broad discretion to determine waiver, these circuits allow for a more fact-specific, case-by-case analysis of a defendant's decision to proceed without counsel. A court may, however, fail to inquire deeply enough into the defendant's decision to represent himself.

The Third, Tenth, and D.C. Circuits require the trial judge to record a "searching inquiry sufficient to satisfy him that the defendant's waiver was understanding and voluntary." United States v Welty, 674 F2d 185, 189 (3d Cir 1982). See also United States v Padilla, 819 F2d 952, 956–57 (10th Cir 1987); United States v Bailey, 675 F2d 1292, 1300–02 (DC Cir 1982). Similarly, the Second Circuit advocates a "recorded colloquy" between the court and the defendant in which "the accused is informed of his right to an attorney, his right to self-representation, and the decided advantages of competent legal representation." United States v Tompkins, 623 F2d 824, 828 (2d Cir 1980). These standards create a record of the trial judge's inquiry into the defendant's waiver of counsel, which can simplify appeals of waiver.

Most restrictively, the Sixth Circuit exercised its supervisory powers in United States v McDowell to require courts to follow the model inquiry set forth in the Bench Book for United States District Judges. 814 F2d 245, 249–50 (6th Cir 1987). The Bench Book lists fourteen questions for a trial judge to ask a defendant and provides advice to the judge on how to evaluate the defendant's answers. Bench Book § 1.02 at 3–5 (4th ed 1996). The uniformity of these instructions within the Sixth Circuit guarantees that each potential pro se defendant will receive an ample inquiry into his decision before the judge grants permission to proceed. Judges may, however, merely recite the questions without a genuine, in-depth discussion of the waiver of counsel.

This Comment does not explore this controversy further because none of the pro se cases relevant to physical restraints have raised questions of adequacy of waiver. Further Supreme Court attention to this area, however, may affect how courts treat pro se defendants.

41 422 US at 835.
right of self-representation. The Court indicated that the trial judge could “still terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct” or deliberately disrupts his trial. This condition allows judges to protect the courtroom from abuse while preserving defendants’ Sixth Amendment rights.

In the same footnote, Faretta preserved a judge’s ability to appoint standby counsel, even over a defendant’s objections. The Court predicted that standby counsel could serve two purposes. The standby counsel is available if the accused requests help; and can also take over the defense if the court terminates the defendant’s self-representation. Finally, Faretta held that a defendant who elects to represent himself cannot bring an appeal on the basis that the quality of his own defense amounted to a denial of effective assistance of counsel. This holding makes the knowing and intelligent waiver of counsel critical because, in order to successfully claim ineffective assistance, the defendant must assert that he failed to understand the disadvantages of self-representation at the waiver stage, not after a failed defense.

In summary, Faretta yields three important principles. First, Faretta establishes Sixth Amendment rights as essential elements of a defense, connecting them to the guarantee of due process of law. Second, the case rests on the principle of defendant autonomy and control over his defense. Third, Faretta demonstrates that the right of self-representation is not absolute.

II. JUDGES HAVE DISCRETION TO RESTRAIN DEFENDANTS

In Illinois v Allen, a case that preceded Faretta by five years, the Supreme Court established that a criminal defendant who misbehaves can forfeit his Sixth Amendment right to be present at trial. Allen gives judges discretion to remove a defendant in order to maintain the dignity and decorum of the courtroom.

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45 422 US at 834–35 n 46.
46 Id at 818.
47 Id at 819.
48 Id at 834–35 n 46.
50 Id at 343.
51 Id.
An Illinois trial court removed William Allen from his original trial, where he acted as his own attorney, after he exhibited an intent to delay the proceedings and argued with and threatened the judge. The judge warned Allen, saying, "One more outbreak of that sort and I'll remove you from the courtroom," but Allen continued in the same belligerent manner. The judge removed Allen for the remainder of voir dire. After a recess, the judge informed Allen that he could return to the courtroom if he behaved himself and did not interfere with the case. The jury returned, and Allen resumed his disruptive behavior, so the judge ordered that Allen be removed a second time.

The jury convicted Allen of armed robbery, and the Supreme Court of Illinois affirmed the conviction. Allen then filed a petition for a writ of habeas corpus, alleging that the judge had wrongfully deprived him of his constitutional right to remain present throughout his trial. The District Court declined to issue the writ of habeas corpus. The Court of Appeals reversed, and the Supreme Court granted certiorari to consider whether a defendant forfeits his constitutional right to be present at the trial when he "engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial."

In answering that question, the Supreme Court listed three constitutionally permissible ways for judges to handle an ob-

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52 Id at 339–41, citing facts from Allen v Illinois, 413 F2d 232, 233–34 (7th Cir 1969). Allen became disruptive during voir dire, questioning the first juror at great length, then arguing with the judge “in a most abusive and disrespectful manner.” Allen, 413 F2d at 233. After some time the judge asked standby counsel to examine the jurors. Allen responded by telling the judge “when I go out for lunchtime, you're . . . going to be a corpse here.” Id. Allen then tore his attorney's file and threw the papers on the floor. Id.
53 Id at 233–34.
54 After the judge's warning, Allen continued to talk back to the judge, telling him repeatedly: “There's not going to be no trial.” Id at 234.
55 Id.
56 Id.
57 413 F2d at 233–34. Allen had again interrupted the proceedings to tell the court that there was not going to be a trial, and he verbally protested removal of the witnesses. Id.
58 People v Allen, 226 NE2d 1 (Ill 1967).
59 Allen, 397 US at 339. This right arises from the Confrontation Clause of the Sixth Amendment, which reads, “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .” See also Lewis v United States, 146 US 370, 372 (1892) (“A leading principle that pervades the entire law of criminal procedure is that, after indictment is found, nothing shall be done in the absence of the prisoner.”).
60 Illinois v Allen, 397 US at 339.
61 Allen v Illinois, 413 F2d at 235.
62 397 US at 338.
streperous defendant such as Allen: (1) bind and gag him; (2) cite him for contempt; or (3) remove him from the courtroom until he promises to conduct himself properly. The Court left the choice among these options to the judge's discretion, but pointed out that "no person should be tried while shackled and gagged except as a last resort." This conclusion reflected the Court's concern about the harmful effects such restraints could have on the jury's feelings about the defendant, the hindrance to the defendant's ability to communicate with counsel, and the inherent tension between the presence of a shackled and gagged defendant and the dignity of judicial proceedings.

Judges have invoked the options provided in Allen to control disruptive defendants, both represented and pro se, who exhibit widely varying forms of misconduct. The most important questions to emerge from Allen are the extent of restraint appropriate in a particular case and the proper procedure for making that determination.

Some jurisdictions impose restraints only after holding a hearing in which the defendant can contest the necessity of shackling. Moreover, building on the statement in Allen that a defendant should be shackled as a last resort, a number of courts have encouraged the use of less restrictive measures whenever practicable.

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63 Id at 343-44.
64 Id at 344.
65 Id.
66 See, for example, Bostic v State, 531 S2d 1210, 1212-14 (Miss 1988) (upholding trial court's decision to remove represented defendant from the courtroom following disruptive behavior); People v Davis, 851 P2d 239, 243-44 (Colo App 1993) (upholding exclusion of pro se defendant from courtroom after he spat in the prosecutor's face, fought with deputy sheriffs, and shouted obscenities at and physically attacked a prosecution witness).
67 See, for example, United States v Zuber, 118 F3d 101, 103-04 (2d Cir 1997) (upholding the trial court's reliance on United States Marshals Service to help evaluate the need to employ physical restraints); Spain v Rushen, 883 F2d 712, 721 (9th Cir 1989) (the court must "pursue less restrictive alternatives before imposing physical restraints"); Jones v Meyer, 899 F2d 883, 884-85 (9th Cir 1990) (upholding use of shackles only when justified by the need to maintain security and after consideration of less restrictive alternatives).
68 See Lux v United States, 389 F2d 911, 919 (9th Cir 1968) (holding that decision to shacke defendant should be made after affording defendant a right to challenge it); Wilson v McCarthy, 770 F2d 1482, 1485 (9th Cir 1985) (decision to shacke witness for the defense made after a hearing); Elledge v Dugger, 823 F2d 1439, 1450-52 (11th Cir 1987) (defendant was denied due process when he was shackled at sentencing hearing without having an opportunity to contest the necessity of shackling); Kennedy v Cardwell, 487 F2d 101, 110 (6th Cir 1973) (court should hold formal hearing to determine whether defendant should be shackled).
69 See, for example, Woodward v Perrin, 692 F2d 220, 221 (1st Cir 1982) ("[A] judge should consider less restrictive measures before deciding that a defendant should be
Courts take the decision to physically restrain a defendant at trial very seriously. They worry about the effect restraints may have on the jury. This issue becomes especially problematic when the defendant represents himself. In addition, the inherent limitations imposed by restraints impede the physical aspects of presenting a case. It follows that courts should use great caution when employing physical restraints on a pro se defendant in order to avoid prejudicing the jury or unjustifiably hindering the defendant’s opportunity to adequately represent himself.

III. PHYSICAL RESTRAINTS AND PRO SE DEFENDANTS

Only a small number of defendants who were shackled or gagged when representing themselves have claimed on appeal that such action denied them their constitutional rights. The few courts to analyze the issue have responded in different ways. Analysis of three relevant decisions shows the need to clarify the law regarding appropriate judicial responses to obstreperous pro se defendants.

A. Stewart v Corbin

In Stewart v Corbin, the Ninth Circuit held that the trial court’s decision to gag and shackle Alexander Stewart did not violate his right of self-representation. While the appeals court recognized that the gag interfered with Stewart’s right of self-shackled.

The Ninth Circuit, for example, laid out five problems to consider when weighing shackling against other alternatives: (1) shackles may reverse the presumption of innocence by causing jury prejudice; (2) shackles may impair the defendant’s mental faculties; (3) shackles may impede communication between the defendant and his counsel; (4) shackles may detract from the decorum of the judicial proceeding; and (5) shackles may cause pain to the defendant. Spain, 883 F2d at 721.

Exhibiting a physically restrained defendant before the jury is not a per se violation of due process, but certainly raises due process concerns. Tyars v Finner, 709 F2d 1274, 1284 (9th Cir 1983).

For example, a defendant in a leg brace has difficulty getting in and out of his seat for examination of witnesses; a defendant in handcuffs cannot gesture freely or take notes; a defendant shackled to the table or his chair cannot move about the courtroom to approach the witnesses or jury; and a gagged defendant cannot verbalize his arguments, objections, or questions.

850 F2d 492, 493 (9th Cir 1988).

Id at 500.

883 F2d 1469, 1472 (9th Cir 1989) (explaining the “duty of the trial court to examine less restrictive measures” before shackling a defendant); Kennedy v Cardwell, 487 F2d 101, 111 (6th Cir 1973) (“[I]t is an abuse of discretion precipitously to employ shackles when less drastic security measures will adequately and reasonably suffice.”).
representation, it nevertheless held that the interference was necessary.\textsuperscript{76}

Stewart was before an Arizona trial court on an armed robbery charge.\textsuperscript{77} In a pretrial hearing on the prosecution's motion to shackle Stewart during the trial, the court learned that Stewart had escaped from custody twice before, had physically assaulted a deputy at an earlier pretrial hearing, and had engaged in a pattern of disruptive conduct in the courtroom, including yelling at and threatening judges.\textsuperscript{78} On this basis, the trial court concluded that Stewart should be shackled and handcuffed during the trial.\textsuperscript{79}

The decision to gag Stewart followed his deliberate violation of court orders not to refer to a lie detector test and not to mention in front of the jury that the victim had a prior conviction for car theft.\textsuperscript{80} The judge had warned Stewart that, if he violated these orders, the judge would have him gagged.\textsuperscript{81} Before ordering that Stewart be gagged, the trial judge offered instead to place him in a soundproof cell, but Stewart refused.\textsuperscript{82} The judge then appointed defense counsel who "was evidently fully prepared and had been standing by in case appellant's pro [se] rights were terminated for just the type of misconduct that had occurred."\textsuperscript{83}

The jury convicted Stewart, but the Arizona State Court of Appeals reversed the conviction and ordered a new trial on the ground that the circumstances did not justify the extreme measure of shackling Stewart.\textsuperscript{84} The Arizona Supreme Court disagreed and reinstated Stewart's conviction and sentence, holding that the record supported use of shackles and a gag.\textsuperscript{85} Having exhausted his state remedies, Stewart then filed a petition for a

\textsuperscript{76} Id. The court conducted a two-part inquiry, finding first that gagging was required under the circumstances and second that it was a permissible remedy. Id. The court then added that the appointment of standby counsel insulated Stewart's defense from harm. Id.

\textsuperscript{77} Id at 493.

\textsuperscript{78} 850 F2d at 494–95.

\textsuperscript{79} Id at 495.

\textsuperscript{80} Id at 495–96. Stewart began his opening statement to the jury by calling the victim a convicted car thief. Id at 495. The trial court promptly warned Stewart that his behavior was unacceptable, and Stewart responded by blurring out twice that the court had denied him the opportunity to take a lie detector test. Id. Stewart also intimidated a witness, who told the court he was afraid of Stewart and terrified by the courtroom scene. Id at 495–96.

\textsuperscript{81} Id at 495.

\textsuperscript{82} 850 F2d at 496. Stewart refused the offer of a soundproof room because he did not want to be placed where he could not communicate with his attorney or with the jury. Id.

\textsuperscript{83} Id.

\textsuperscript{84} State v Stewart, 676 P2d 1124, 1130 (Ariz App 1983).

\textsuperscript{85} Id at 1114–15, 1118.
The Ninth Circuit concluded that the trial court had not denied Stewart a fair trial under the circumstances, based largely on the trial court’s determination that Stewart’s outrageous behavior and disregard for court orders had made the restraints necessary. The court also emphasized that the appointment of standby counsel sufficiently protected Stewart from further harm, combining these factors, the court rejected Stewart’s argument that the gagging violated his right of self-representation.

B. United States v Stewart

In a later case involving the same defendant, the Eighth Circuit also refused to find that physical restraints at trial had violated Stewart’s right to an impartial jury. In this case, Stewart was charged with assault and retaliation against a witness for punching an Arkansas Department of Corrections officer. Before trial, Stewart filed a motion to dismiss his appointed counsel and represent himself. The District Court granted the motion, but appointed standby counsel. Stewart represented himself at trial while wearing leg irons and prison clothing, and was convicted on the assault charge.

On appeal, Stewart alleged that jury prejudice from seeing him in prison clothing and leg irons violated the Sixth Amendment guarantee of an impartial jury. The Supreme Court had held that a criminal jury must determine guilt or innocence based on the evidence presented at trial, not on irrelevant factors. Stewart argued that the prison clothing and leg irons should fit into the category of prejudicial, irrelevant factors that could taint a jury. The Eighth Circuit pointed out, however, that the possi-

86 Stewart v Corbin, 850 F2d 492, 496 (9th Cir 1988).
87 Id at 499–500. The Ninth Circuit noted that “the issue in the present case [was] not whether in retrospect, the trial court could have handled the matter better, but rather, whether the trial court denied appellant a fair trial under the circumstances.” Id at 497.
88 Id at 500.
89 Id.
90 United States v Stewart, 20 F3d 911, 915–16 (8th Cir 1994).
91 Id at 912–13 Although involving the same defendant discussed in Part III A, the charges in each of Stewart’s cases are separate.
92 Id at 913.
93 Id.
94 20 F3d at 914.
95 Id at 915. See US Const, Amend VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . .”).
97 20 F3d at 915.
bility of prejudice must be balanced against the need to both maintain order in the courtroom and retain custody of incarcerated persons. 98

The Eighth Circuit found that, despite the potential for jury prejudice, the District Court had justifiably required Stewart to wear leg irons for several reasons. 99 First, Stewart was accused of an assault in a courtroom, and even admitted his guilt on this count in front of the jury.100 Second, Stewart was disruptive and disrespectful at his arraignment hearing. 101 Third, Stewart displayed a hostile attitude the court could reasonably believe would lead to disruptive behavior at trial. 102 Having determined that the leg irons were not injurious, the court also found that forcing the defendant to wear prison clothing did not constitute error. 103

Unlike the Ninth Circuit in Stewart's previous case, the Eighth Circuit did not consider whether Stewart's physical restraints denied him his right to represent himself. The Ninth Circuit had discussed this issue, but decided the facts did not rise to such a violation. 104 The Eighth Circuit considered only the Sixth Amendment guarantee of an impartial jury. 105

C. Oses v Massachusetts

A third case, Oses v Massachusetts, 106 reached a different result than either Stewart case. In his state court trial, Thomas Oses waived his right to counsel and conducted his own defense with court-appointed standby counsel present. 107 The jury convicted Oses and, fourteen years later, he brought a petition for a writ of habeas corpus in federal court, alleging a violation of his

98 Id, citing Holbrook, 475 US at 571–72.
99 20 F3d at 915.
100 Id.
101 Id. Stewart disrupted the hearing by refusing to enter a plea, swearing at the judge, and causing the court to recess in order to remove him from the courtroom. Id at 913 n 2.
102 Id.
103 20 F3d at 916. The court stated that the defendant's appearance in prison clothing is less prejudicial than wearing leg irons, and that "[p]rison clothing is inherently prejudicial only if a defendant's appearance does not otherwise inform the jury of other, more prejudicial impermissible factors." Id. In this case, the leg irons provided the same prejudicial effect regardless of the prison clothing — Stewart's appearance would have been no less prejudicial if he had appeared in civilian clothing. Id.
104 Stewart v Corbin, 850 F2d 492, 500 (9th Cir 1988).
105 The options both courts considered in these cases are discussed in more depth in Part IV A.
106 961 F2d 985 (1st Cir 1992).
constitutional rights.\textsuperscript{108} Oses had worn leg irons at times during the trial, and at one point he was placed in wrist manacles.\textsuperscript{109} The court even attempted to gag Oses while the prosecutor cross-examined his mother.\textsuperscript{110} The trial was punctuated throughout by frequent confrontations between Oses and the judge.\textsuperscript{111} The District Court concluded that "[t]hese confrontations served to belittle and demean Oses and his pro se representation before the jury."\textsuperscript{112} The trial judge also excluded Oses from bench and lobby conferences, allowing only his standby counsel to take part.\textsuperscript{113}

In order to assess whether the trial court had violated Oses's Sixth Amendment right of self-representation, the District Court looked to both the extent of actual control Oses retained over his defense and the jury's perception of his status as one representing himself.\textsuperscript{114} Under McKaskle v Wiggins,\textsuperscript{115} a trial court must accord a pro se defendant the appearance of one conducting his own defense in a manner that "affirm[s] the accused's individual dignity and autonomy."\textsuperscript{116} Applying this test, the District Court in Oses found that the misconduct of the trial judge, especially in excluding Oses from bench and lobby conferences, was constitutionally impermissible error.\textsuperscript{117} The court further held that the physical restraints employed to restrict Oses's movement were inconsistent with constitutional principles of pro se representation.\textsuperscript{118} The District Court held that the state court had committed impermissible error by restraining the defendant without sufficient justification, by not inquiring into the least restrictive

\textsuperscript{108} Id at 445–46.
\textsuperscript{109} Id at 448.
\textsuperscript{110} Id at 449. Oses continually interrupted while the prosecutor was cross-examining Oses's mother through a Spanish interpreter, even after the trial judge warned Oses to stop interrupting. Id at 472 n 13 (Appendix A). At one point Oses objected to the cross-examination "on grounds that the prosecutor 'is confusing my mother. My mother is a nervous woman.'" Id at 461.
\textsuperscript{111} For example, during voir dire the judge told Oses to "Act like a lawyer if you want to be a lawyer." 775 F Supp at 461. When Oses was cross-examining a witness about why he had been at Oses's girlfriend's house, the judge suggested that "[m]aybe she was cheating on you." Id. The judge also used slang repeatedly to direct Oses to be quiet, at one point saying to Oses: "Shut up. You seem to have a chronic inability to keep that mouth shut." Id at 461 n 24.
\textsuperscript{112} Id at 449.
\textsuperscript{113} Id at 448.
\textsuperscript{114} 775 F Supp at 456. This test comes from McKaskle v Wiggins, in which the Supreme Court articulated the rights a pro se defendant must enjoy in order to assure vindication of the principles recognized in Faretta. 465 US 168, 178 (1984).
\textsuperscript{116} Id at 178.
\textsuperscript{117} 775 F Supp at 458–59.
\textsuperscript{118} Id at 459–60.
means necessary to maintain security and order, by failing to in-
form the jury that shackling had no bearing on the defendant’s
guilt or innocence, and by failing to employ the standards for
shackling and gagging a criminal defendant set out in Illinois v Allen.119

D. Summary of the Weaknesses in Current Law

The facts in the Stewart and Oses cases differ significantly,
as do the grounds for appeal and the specific holdings.120 How-
ever, they are bound by a common strand. Each court considered
the effect that physical restraints had on the pro se defendant’s
constitutional rights. Since such decisions currently must be
made on a case-by-case basis, courts have very little guidance
regarding how to balance a defendant’s right of self-
representation with the need for fairness and efficiency in the
courtroom. The next Part of this Comment explores what courts
should do when faced with this situation.

IV. PROTECTING A DEFENDANT’S RIGHT OF SELF-
REPRESENTATION

The above cases illustrate the complex balancing a court
must perform when a criminal defendant’s Sixth Amendment
right to self-representation conflicts with the dignity or effective-
ness of the judicial process. The consequence of a mistake is
grave: the defendant is denied due process of law.121 Although
few cases have directly addressed the detrimental effects of
physical restraints on the efficacy of a pro se defense, the poten-
tial injury to the defendant is very real.122 Restraining the defen-
dant may compromise his rights to self representation, an impar-
tial jury, and effective assistance of counsel. The gravity of these
injuries mandates action in order to protect a defendant from im-
properly imposed physical restraints.

Three court-adopted rules could significantly reduce the

120 The most significant factual difference is the role the judge played in Oses’s origi-
nal trial. Nonetheless, the Oses court clearly stated that the physical restraints also vi-o-
lated his Sixth Amendment rights.
121 The court in Oses found the due process violation serious enough to require that a
new trial be ordered or the defendant set free fourteen years after the original conviction.
122 See Abdullah v Groose, 44 F3d 692, 695 (8th Cir 1995), vacated on procedural
grounds by 75 F3d 408 (8th Cir 1996), (concluding that “[t]he shackling was a specific
circumstance creating difficulties of self-representation . . . .”).
threat to pro se defendants' rights: (1) every trial court should hold a hearing and enter findings before imposing restraints on a pro se defendant; (2) the trial court should provide a right to challenge the necessity of those restraints; and (3) the trial court should always appoint standby counsel so that someone is prepared to take over should the defendant relinquish his right of self-representation, either voluntarily or through misconduct.

A. A Pro Se Defendant's Sixth Amendment Rights

By choosing to represent himself, a pro se defendant does not relinquish his right to a fair trial. He simply waives the assistance of court-appointed counsel. Other Sixth Amendment guarantees still apply.\(^{(123)}\) While judges have discretion to restrain criminal defendants who obstruct courtroom proceedings,\(^{(124)}\) doing so can have drastic effects on the fairness of the trial. First, restraining a pro se defendant runs the risk of effectively denying the defendant his right of self-representation. Moreover, the presence of restraints can prejudice the jury against the defendant. Finally, the practical limitations restraints create may amount to denial of effective assistance of counsel. All of these conditions violate the Sixth Amendment guarantees of a fair trial.

1. Infringements on the Right of Self-Representation.

The right of self-representation is not absolute. Once a court has granted a defendant pro se status, however, it should not undermine his ability to represent himself.\(^{(125)}\) The defendant must retain both actual control over his defense and the perception of such control in the eyes of the jury.\(^{(126)}\) Physical restraints can restrict the defendant's body language, movement around the courtroom, and ability to take notes or speak. These tools generally comprise an important part of an attorney's presentation and trial participation. In addition to depriving the defendant of actual control, the visible presence of physical restraints can also

\(^{(123)}\) *Faretta v California*, 422 US 806, 818 (1975) (finding the Sixth Amendment rights essential to adversary system of criminal justice, and part of the due process of law guaranteed by the Fourteenth Amendment).


\(^{(125)}\) See, for example, *Oses v Massachusetts*, 775 F Supp 443, 463 (D Mass 1991).

deny the defendant the appearance of control. The jury sees a defendant who cannot move freely or who needs assistance to perform simple tasks such as presenting evidence to a witness or pointing to exhibits. These conditions effectively destroy the defendant's Faretta rights. In many situations, the court must order restraints, but it should acknowledge that doing so infringes upon the right of self-representation, and therefore should exercise great caution in order to preserve all of the defendant's rights to the greatest extent possible.

2. Jury Prejudice.

The potential for prejudicing the jury offends the basic principles of fairness and justice integral to the American criminal justice system. In Illinois v Allen, the Supreme Court authorized the limited restraint of defendants, but recognized that seeing the defendant shackled and gagged could affect the jury's feelings about him. Shackling is highly disfavored because it may deprive the defendant of the presumption of innocence by signaling to the jury that the court has already determined the defendant is dangerous or uncontrollable. Thomas Oses and Alexander Stewart both challenged their convictions because they believed the restraints imposed on them had prejudiced the jury. Oses, in fact, persuaded the court that the amount of jury prejudice he suffered required reversal of his conviction.

One might counter that the defendant's disruptive or offen-
sive behavior justifies any prejudicial effect that restraints might have. However, defendants do not waive their constitutional rights simply because they disrupt the court. The very idea that disruptive behavior equals guilt contradicts both the presumption of innocence and the Sixth Amendment right to an impartial jury.

The use of restraints is not always prejudicial.\textsuperscript{135} The combination of physical restraints and self-representation, however, warrants judicial caution.\textsuperscript{136} The potential for jury prejudice jeopardizes the right to a fair trial. When the defendant represents himself, he stands to lose the jury's impartial assessment of his defense and of his innocence.

3. Effective Assistance of Counsel.

\textit{Faretta} stated that pro se defendants do not have the option of appealing their convictions on the basis of ineffective assistance of counsel.\textsuperscript{137} Allowing otherwise would create the very strange situation where a defendant could select self-representation and thereby create "a safety net for reversal" based on his inadequate performance.\textsuperscript{138} However, the \textit{Faretta} Court did not explicitly contemplate the problems raised by the physical restraint of a pro se defendant.\textsuperscript{139} Therefore, it may be possible to carve out an exception, allowing appeals when the court adds restraints after the defendant waives counsel.\textsuperscript{140} This exception seems reasonable because the addition of restraints impairs a defendant's ability to represent himself in a way that he could not have anticipated when he waived counsel.

In \textit{Strickland v Washington},\textsuperscript{141} the Supreme Court established a two-pronged test to evaluate claims of ineffective assis-
First, the defendant must prove that his counsel's performance fell below an objective standard of reasonableness. Second, the defendant must show that his counsel's deficient performance actually prejudiced the outcome of his trial. Some circumstances constitute per se prejudice, bypassing the Strickland analysis. The limitations inherent in physical restraints directly affect the pro se counsel's performance. Gagging a pro se defendant, for example, makes him unable to participate in trial, a condition which can be per se prejudicial. Similarly, an attorney's absence during critical stage of trial has been found per se prejudicial and is comparable to removing a defendant from the courtroom. Cases of shackling or handcuffing a defendant to restrict movement are probably not per se prejudicial, but may meet the Strickland test if evaluated on their individual facts.

B. The Need for Court Action

One might suggest that, because so few defendants have challenged their convictions on the grounds that physical restraints denied them a constitutionally guaranteed opportunity to represent themselves, the issue is not important. In fact, just the opposite may be true. The small number of appeals and habeas corpus writs on this issue may result from the pro se defendant's lack of legal sophistication. The defendant can only allege violation of a right if he knows the right exists. The few cases on point can easily become lost in the flood of pro se proceedings.

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142 Id at 687.
143 Id at 687-91. Defense attorneys must promote a meaningful adversarial confrontation in order to satisfy the Sixth Amendment right to effective assistance of counsel. See United States v Cronic, 466 US 648, 656-57 (1984) (discussing defense counsel's role as effective advocate).
144 466 US at 491-96.
145 See, for example, Green v Arn, 809 F2d 1257, 1263 (6th Cir 1987), vacated, 484 US 806 (1987), reinstated on remand, 839 F2d 300 (6th Cir 1988) (counsel's absence during critical stages of trial was per se prejudicial); Martin v Rose, 744 F2d 1245, 1250-51 (6th Cir 1984) (counsel's lack of participation rendered adversarial process unreliable, constituting per se prejudice).
146 Martin, 744 F2d 1245, 1250-51.
147 Arn, 809 F2d 1257, 1263.
148 There is a separate question concerning why "jailhouse lawyers" with a great deal of knowledge and experience in criminal procedure do not bring these appeals. For an explanation of the general characteristics of jailhouse lawyers and the role they play, see Note, Ensuring Meaningful Jailhouse Legal Assistance: The Need for A Jailhouse Lawyer-Inmate Privilege, 1997 Cardozo L Rev 1569, 1570-75.
149 The sparse data on pro se filings in the federal courts indicates that pro se liti-
With so few prisoners bringing these claims, and the mixed outcomes discussed above, judges have broad discretion and very little guidance when confronted with obstreperous defendants who wish to represent themselves. Criminal defendants waive counsel for many different reasons, some understandable and others obstructionist. Judges have the responsibility of promoting justice and protecting constitutional rights. When a criminal defendant elects to proceed pro se, courts must consider a complex interplay of constitutional, social, and ethical concerns. Society demands “that our criminal justice system must determine the truth or falsity of the charges in a manner consistent with fundamental fairness.” In the case of an obstreperous pro se defendant, the mandate to provide a fair trial can directly conflict with the right of self-representation. Neither should supersede the other, yet in the face of a conflict, one must give way. No forum has adequately addressed the tension between the two. The courts must take precautions to protect defendants, and especially prisoner pro se litigants, file in huge numbers. In 1993, for example, pro se appeals comprised 37 percent of all appeals filed in the United States Courts of Appeals (excluding the Federal Circuit). Of those, 66 percent were prisoner petitions, 27 percent were civil appeals (excluding prisoner petitions), 6 percent were criminal appeals, and 2 percent were bankruptcy appeals. Marilyn M. Ducharme, Administrative Office of the United States Courts, Pro Se Appeals: Pro Se Case Processing in the U.S. Courts of Appeals, 1–2 (Nov 1994). The burden of the vast number of frivolous prisoner suits has created hostility to the entire category of lawsuits, potentially obscuring the few meritorious prisoner lawsuits. See Hon. Jon O. Newman, Pro Se Prisoner Litigation: Looking for Needles in Haystacks, 62 Brooklyn L Rev 519, 520 (1996).

150 See Part III.

151 One common reason for waiver is the defendant’s general distrust of the legal system or defense lawyers. See, for example, State v Bauer, 245 NW2d 848, 859 (Minn 1976) (“[T]he defendant’s reason for wishing to dispense with defense counsel was his paranoid distrust of everyone connected with the judicial system.”); Commonwealth v Davis, 573 A2d 1101, 1102 (Pa Super 1990) (“Appellant stated that with regard to attorneys: ‘I don’t trust them.’”). A defendant may also wish to dispose of counsel if he is dissatisfied with the defense attorney’s attention or strategy. See, for example, People v Crandell, 760 P2d 423, 431 (Cal 1988) (en banc) (defendant was upset by the public defender’s advice to plead guilty before investigating the facts); Faretta v California, 422 US 806, 810 (1975) (defendant told the trial judge that he did not wish to be represented by the public defender because that office was too overwhelmed with cases). Sometimes the defendant may move to waive counsel just to frustrate the purposes of the court. Illinois v Allen, 397 US 337, 339–41 (1970) (defendant repeatedly stated that there was not going to be a trial because he, as the defense attorney, was just going to keep arguing).

152 Comment, 47 U Miami L Rev at 900 (cited in note 138).

153 People v McIntyre, 324 NE2d 322, 325 (NY App 1974) (holding that an outburst provoked by court misbehavior does not justify forfeiture of the right of self-representation).

154 The court’s goals include accuracy in determining guilt or innocence, efficiency in processing, and procedural control of the proceedings. The pro se defendant’s lack of legal sophistication can hinder the court’s achievement of these goals, but self-representation is still a guaranteed right upon which courts must not infringe. Comment, 47 U Miami L Rev at 909–11 (cited in note 138).
defendants' constitutional rights even though the individuals are not pursuing enforcement of those rights on their own.

C. Three Procedural Safeguards

Currently, when the question of appropriate restraints for the defendant arises, trial judges have sufficient discretion to accommodate the circumstances of each case. For guidance, judges often look to cases where defendants have behaved similarly, but past decisions are seldom persuasive because the judges must base their determinations on the specific circumstances at hand. Due to factual differences between cases and the unique position of the trial judge as the best person to assess them, discretion remains the best way to deal fairly with belligerent defendants. Still, a few standard practices for dealing with pro se defendants might help further uniformity, efficiency, and fairness.

1. A Mandatory Hearing.

Holding an in camera hearing to evaluate restraining measures will help preserve the dignity of the courtroom and avoid any unnecessary prejudicial effect on the jury. Following the hearing, the judge should make a record of his findings, explaining his reasons for rejecting or imposing restraints. Unfortunately, some courts have decided against requiring a formal hearing and findings before issuing an order to shackle the defendant, although a few jurisdictions do require such measures.

The hearing can serve several purposes. First, the judge can use the hearing to warn the defendant about the consequences of

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156 For example, past escape from custody often provides sufficient basis for shackling a defendant during a subsequent trial. Stewart v Corbin, 850 F2d 492, 494–95 (9th Cir 1988) (testimony at pretrial shackling hearing indicated that the defendant was an escape risk); Wilson v McCarthy, 770 F2d 1482, 1485 (9th Cir 1985) (shackling proper where there is a serious threat of escape).
157 Holding the hearing before trial begins is always preferable because it prevents the jury from noticing implementation of or increase in restraints during the trial. Stewart, 850 F2d at 498. Sometimes, however, a defendant will not exhibit problematic behavior until after the trial begins. Accordingly, whenever possible, the court should halt proceedings and remove the jury so that the court can hear the question of appropriate restraints without any unnecessary jury prejudice.
158 Jones v Meyer, 899 F2d 883, 886 (9th Cir 1990) ("[W]e have never held, and we refuse to hold now, that a trial court must conduct a hearing and make findings before ordering that a defendant be shackled.").
159 See, for example, United States v Theriault, 531 F2d 281, 285 (5th Cir 1976); Zygadlo v Wainwright, 720 F2d 1221, 1222 n 3 (11th Cir 1983).
disruptive behavior. The defendant then has the opportunity to consider his actions and agree to the judge’s requirements for future conduct. Of course, such a conversation will not always convince a defendant to reform his behavior, but it may benefit defendants who are willing to comply. After such a hearing, the court may impose restraints, confident that the defendant received adequate warning of potential detrimental consequences. A court could also use the hearing to present the defendant with a contractual arrangement. The defendant could agree to maintain certain standards of decorum, and in return, the court would agree to refrain from imposing restraints. If the defendant violates the agreed-upon rules of conduct, he automatically forfeits his pro se status and becomes subject to restraints.¹⁶⁰

This system has the benefit of formalism, preserving the defendant’s autonomy.¹⁶¹ The defendant has the opportunity to participate in and respond to a rules-oriented system, furthering rule of law virtues like predictability, notice, and open decision making.¹⁶² Development of a standardized agreement, however, will be difficult, given the wide discretion judges currently employ. The terms will have to define unacceptable behavior and set appropriate default restraints. A court could either adopt a form contract by local rules, or could make individual contracts responsive to individual circumstances.

This Comment proposes a strict rule that a court hold a hearing, but does not propose standardized reasons for restraining a defendant. Judges should maintain discretion to respond to various circumstances. Requiring the judge to record his findings, however, will further uniformity and guide future decisions. These findings may also help resolve challenges to restraints which might arise on appeal. Thus, the record requirement can guide judges who must determine the appropriate level of restraint as well as defendants who are able to conform their behavior to acceptable standards.

2. An Opportunity to Challenge the Need for Restraints.

At the hearing to determine appropriate restraints, the judge should allow the defendant an opportunity to challenge the need

¹⁶⁰ The court would need to have standby counsel available to take over the case if the defendant misbehaves.

¹⁶¹ In Faretta, the Court recognized that there are relevant interests for both society and the individual, but held that when these interests collide, the principle of defendant autonomy prevails. Faretta v California, 422 US 806, 832–34 (1975).

for restraints. In this way, the defendant can object to the imposition of restraints without prejudicing the jury. The defendant may believe his conduct was justified or may have realized his mistakes and wish to correct them. At the hearing, he can present his position, which should then be included in the required record along with the judge’s findings and reasoning. The defendant thus has the opportunity to argue that he is significantly different from defendants requiring restraints, preserving some discretion within the rule of a mandatory hearing and automatic default agreements.

3. Mandatory Standby Counsel for all Pro Se Defendants.

The trial court should appoint standby counsel as a matter of course when a defendant invokes his Sixth Amendment right of self-representation in order to protect the defendant’s interest and the interests of the court. By doing so, the court can reduce the harm to a pro se defendant’s constitutional rights, should it become necessary to shackle or gag him.

In Faretta, the Supreme Court approved appointment of standby counsel as an option for courts. Courts have generally treated this option as discretionary, not as a right to which defendants are entitled. However, courts can appoint standby counsel, even over the defendant’s objection. Courts have held that neither presence nor unsolicited participation of standby counsel necessarily interferes with a defendant’s Faretta rights. The proper inquiry should focus on “whether the defendant had a fair chance to present his case in his own way.” The standby counsel is restrained by two factors: (1) the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury; and (2) participation by standby counsel without the defendant’s consent should not be allowed to destroy the

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163 This is not an original idea, but courts have not practiced it on a wide scale. See, for example, Elledge v Dugger, 823 F2d 1439, 1450–52 (11th Cir 1973) (holding that defendant was denied due process when he was shackled without having an opportunity to contest the necessity of shackling).

164 This system resembles a rule of law ideal described by Cass Sunstein — privately adaptable rules. Sunstein, 83 Cal L Rev at 1016–20 (cited in note 162).

165 Faretta v California, 422 US 806, 834 n 46 (1975).

166 McKaskle v Wiggins, 465 US 168, 183 (1984) (Faretta does not require trial judge to permit “hybrid representation”); Locks v Sumner, 703 F2d 403, 407–08 (9th Cir 1983) (explaining that no court has found an absolute right to advisory counsel).


168 In McKaskle, for example, the Court allowed substantial involvement of standby counsel, even over the defendant’s objection, so long as the defendant’s general control remained intact. Id at 183.

169 Id at 177.
jury's perception that the defendant is representing himself.\textsuperscript{170}

Appointing standby counsel in all pro se criminal cases will not frustrate these requirements. In fact, if standby counsel must take over, he may actually further these purposes. Because the standby counsel will have been present throughout the trial, he may have a relationship with the defendant and some understanding of how the defendant wants his defense conducted.

True, some problems with forcing standby counsel on an unwilling defendant remain. Defendants who are hostile to the judicial process in general may resent the intrusion even if the standby counsel does not interfere.\textsuperscript{171} Judges may also be more inclined to behave like the trial judge in \textit{Oses}, ignoring the defendant in favor of his standby counsel.\textsuperscript{172} However, a clear rule that the court must include the defendant as long as he represents himself should resolve this problem.\textsuperscript{173}

Critics may also object to additional administrative costs of compensating mandatory standby counsel. The total costs, however, should not exceed those the court needs to meet the requirement that all indigent defendants have access to an attorney, as required by \textit{Gideon v Wainwright}.\textsuperscript{174} Because defendants in state and federal courts already have the right to court-appointed counsel before being imprisoned, appointing standby counsel will not impose any additional financial burdens. The burden is already in place, alleviated only by the pro se defendant who does not receive standby counsel.

The benefits of appointing standby counsel outweigh the costs of doing so.\textsuperscript{175} As long as the standby counsel limits his participation within the confines of \textit{McKaskle}\textsuperscript{176} and \textit{Faretta},\textsuperscript{177} his presence helps both the pro se defendant and the court.\textsuperscript{178} Not only can standby counsel provide the defendant with advice on

\textsuperscript{170} Id at 178–79. Of course, these considerations disappear if a defendant loses his right to self-representation through misconduct or voluntary relinquishment.
\textsuperscript{171} Comment, 72 Cal L Rev at 718 (cited in note 35).
\textsuperscript{172} See, for example, \textit{Oses v Massachusetts}, 775 F Supp 443, 458–59 (D Mass 1991); \textit{United States v McDermott}, 64 F3d 1448, 1454 (10th Cir 1995).
\textsuperscript{173} Indeed, courts still could include a defendant in bench conferences after he has lost his pro se status, given the \textit{Faretta} Court's emphasis on defendant control of his defense, 422 US at 834, and the defendant's obvious wish to control his defense. Doing so may be unreasonably burdensome, however, if the defendants involved are shackled to immovable objects.
\textsuperscript{174} 372 US 335 (1963).
\textsuperscript{175} For an analysis of the benefits of mandatory standby counsel, see Comment, 72 Cal L Rev at 697 (cited in note 35).
\textsuperscript{176} 465 US 168.
\textsuperscript{177} 422 US 806.
\textsuperscript{178} For a discussion of the proper role of mandatory standby counsel, see id at 807–16.
courtroom procedure, he can also take over if the defendant loses his right to continue representing himself. In this way, courts further judicial efficiency, protect the dignity of the courtroom from disruptive defendants, and avoid violating the defendant's constitutional rights. The appointment of standby counsel can safeguard both the court and the defendant.¹⁷⁹

CONCLUSION

The propriety of imposing physical restraints on a pro se defendant reaches the core tension of our criminal justice system. The challenge is to optimally balance the rights of the defendant as guaranteed by the Constitution with the obvious need to maintain an orderly judicial process. Defendants who are shackled or gagged at trial generally have behaved in ways that warrant this treatment — frequently either violent behavior, verbal disruption, or a prior escape attempt. If courts allowed such conduct, they would compromise their ability to administer justice. Nevertheless, shackling or gagging a defendant is a drastic measure with serious consequences. Therefore, courts should undertake it cautiously, providing ample protection to the defendant. Protections should include a hearing on the record to determine the need for restraints, with an opportunity for the defendant to challenge the charge. The court should also appoint standby counsel, potentially benefiting both the defendant and the court. In this way, judges will retain the ability to enforce order in the courtroom, and defendants will have a fair chance to avail themselves of their right of self-representation.

¹⁷⁹ See, for example, United States v Gonzales–Quezada, 108 F 3d 1386, 1387 (9th Cir 1997), cert denied, 117 S Ct 2467 and 118 S Ct 121 (1997) (finding no violation of defendant's right to self-representation when standby counsel took over after the court terminated the defendant's pro se status due to disruptive behavior).