

# ENSURING FAIRNESS OR JUST CLUTTERING UP THE COLLOQUY? TOWARD RECOGNITION OF PRO SE DEFENDANTS' RIGHT TO BE INFORMED OF AVAILABLE DEFENSES

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## ABSTRACT

*This Article argues that the criminal law principle of legality, commonly known as nulla poena sine lege, and due process principles support the recognition of a duty to inform pro se defendants of legally recognized defenses to the criminal charges brought against them. The obligation to provide such information regarding possible defenses, once mandated by the Supreme Court's decision in Von Moltke v. Gillies (1948), was eliminated in Iowa v. Tovar (2004). The Article criticizes the ruling in Tovar, and argues that the values underlying the principle of legality, due process, and fairness—namely, notice, foreseeability, the right to fair warning, an adequate opportunity to prepare, and a full and fair hearing—support the recognition of the duty to advise pro se defendants of legally recognized defenses.*

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*Nulla poena sine exceptionum scientia.*<sup>1</sup>

I. INTRODUCTION

Imagine if judges in criminal cases gave the following advisement to pro se, or self-representing, defendants who plead not guilty and demand trial:

I understand you have discharged your appointed counsel because you believe he has not been effective. Since the court refuses to appoint another attorney, you certainly have a constitutional right to self-representation. But I must first advise you that you have a right to counsel at every stage of these proceedings. You have the right to a jury or judge trial, at which the state will have the burden of proving your guilt beyond a reasonable doubt. You have the right to be informed of the charges against you, the elements of those charges, and the range of possible penalties if you are found guilty of any of them. At trial, you have the right to be confronted by your accusers, and the right to subpoena witnesses for your defense.

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1. This Latin phrase, meaning “no punishment without knowledge of defenses,” summarizes the argument made in this Article.

However, if you choose to represent yourself at trial and present your own defense, you will be required to comply with the law, including all rules of procedure and evidence. You will *not* be entitled to assistance or instruction from the court regarding the laws, or the rules of procedure and evidence, or how to find them. And, while you will have the affirmative burden of persuading the jury—by a preponderance of the evidence—that you are not guilty because of a legally recognized defense, you have no right to know what those defenses are or the elements of those defenses, which you will be obligated to prove.

Why would any defendant who has elected voluntarily to proceed pro se, or has been forced to do so due to dissatisfaction with appointed counsel, invoke his or her Sixth Amendment right to self-representation<sup>2</sup> and go to trial under these conditions? It is not surprising that many such defendants believe the so-called adversarial system is a “stacked deck”—rigged to further criminal case processing through guilty pleas, rather than adversarial trials.<sup>3</sup> Many people might say that to provide information to unrepresented defendants that sets forth the charges against them, but denies them information about available defenses, is something to be expected only in a country that does not follow notions of due process of law, the rule of law, or the principle of legality.

But, according to the U.S. Supreme Court, advisements like this, even coupled with additional warnings regarding the dangers and disadvantages of proceeding pro se, are the only constitutionally required safeguards.<sup>4</sup> Is the information that is being deprived essential to the preparation required for a meaningful hearing and fair trial, which are guaranteed by the Due Process Clause?<sup>5</sup> In the case of pro se defendants who indicate their desire to plead guilty to the charges against them, why do we only require judges to advise them of the charges against them, the elements thereof, the penalties therefor, and the dangers and disadvantages of proceeding pro se, yet deny them access to information about the legally recognized defenses

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2. U.S. CONST. amend. VI.

3. See Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, LAW & SOC'Y REV., June 1967, at 26, 32–38 (noting how defendants view defense attorneys as being in collusion with the court and prosecutors to process cases expeditiously, without regard to a defendant's guilt or innocence).

4. See *Iowa v. Tovar*, 541 U.S. 77, 93–94 (2004).

5. See U.S. CONST. amends. V, XIV.

to the charges against them?

One can understand the lack of necessity in informing represented defendants of available defenses, because their attorneys can perform that function. But, unless they have a jailhouse lawyer friend, pro se defendants in general would have no clue about finding, let alone applying, the relevant statutes establishing a finite number of legally recognized defenses—not to mention the rules of criminal procedure or evidence, or case law for that matter.<sup>6</sup> Most people would find it ludicrous if our justice system denied attorneys access to criminal statutes such that they would be unable to learn, raise, and affirmatively prove the legally recognized defenses to the charges against their respective clients. Nevertheless, that is the current situation facing anyone electing to invoke his or her Sixth Amendment right to self-representation in American criminal courts,<sup>7</sup> and it is the unfairness of the practice to which this Article is addressed.

This Article argues that all pro se defendants, whether intending to plead guilty or go to trial, are entitled to advisement *inter alia* of the legally recognized defenses for the criminal charges brought against them. According to the Supreme Court, such advisement is permissible only if states require judges to provide it under state law, but it is not constitutionally required under a Sixth Amendment right-to-counsel theory.<sup>8</sup> This Article, however, argues that advisement of available defenses is a right justifiable on another legal ground—the criminal law principle of legality. This reasoning, which furthers adjudicative fairness, has not yet been considered in this context within Supreme Court jurisprudence.

Part II of this Article reviews the history of the advisement requirement (i.e., the colloquy) as it pertains to waiver of constitutional rights generally and waiver of the right to counsel in particular. This Part describes the duties of the judiciary to conduct an inquiry with any defendant who wishes to waive his or her Sixth Amendment right to assistance of counsel in order to ensure the waiver is knowingly and

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6. See Kennedy Cabell, Note, *Calculating an Alternative Route: The Difference Between a Blindfolded Ride and a Road Map in Pro Se Criminal Defense*, 36 LAW & PSYCHOL. REV. 259, 261 (2012) (“Pro se defendants consume an excessive amount of judicial resources because they typically have no knowledge pertaining to trial strategy, legal rules, or [c]ourtroom procedure.” (footnote omitted)).

7. See *Tovar*, 541 U.S. at 93–94.

8. *Id.*

intelligently made,<sup>9</sup> and a further inquiry—the so-called *Faretta* hearing—to determine whether the defendant is “aware of the dangers and disadvantages of self-representation, so that . . . [the] choice is made with eyes open.”<sup>10</sup>

Part III describes the Supreme Court’s previous recognition of a pro se defendant’s right to information regarding “possible defenses,” as established in *Von Moltke v. Gillies*.<sup>11</sup> This Part reviews the gradual dilution of the right as subsequent federal and state court decisions questioned the ruling on various grounds. This Part also provides a detailed discussion on the Court’s decision fifty-six years later in *Iowa v. Tovar*.<sup>12</sup> The Court held that, under the Sixth Amendment, an unrepresented defendant seeking to enter a guilty plea is not entitled to be advised that two benefits of counsel are: (1) the possibility that he or she may be aware of defenses that the defendant may overlook, and (2) that counsel may be able to secure a plea agreement more favorable than that offered to the defendant proceeding pro se.<sup>13</sup> A critique of *Tovar* is presented, arguing that the decision is flawed on multiple grounds.

Part IV reviews current federal and state practice insofar as carrying out the *Faretta* hearing requirement. This Part describes the current requirements of Federal Rule of Criminal Procedure 11,<sup>14</sup> and the *Benchbook for U.S. District Court Judges*<sup>15</sup> for conducting waiver colloquies. Part IV also examines state high court decisions post-*Tovar*, state rules, and state court bench books with respect to requirements for pro se advisement regarding defenses.

Part V argues that the criminal law principle of legality forms the basis of pro se defendants’ rights: not merely to be informed that counsel would be beneficial by being able to identify possible defenses, but to be directly informed of all legally available defenses to their pending criminal charges. This Part proposes that expansion of the principle of legality as the

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9. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

10. *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)) (internal quotation marks omitted).

11. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

12. *Tovar*, 541 U.S. at 77.

13. *Id.* at 81.

14. FED. R. CRIM. P. 11.

15. FED. JUDICIAL CTR., *BENCHBOOK FOR U.S. DISTRICT COURT JUDGES* (5th ed. 2007).

foundation for such a right of access is consistent with modern scholarship suggesting the principle is a method of improving the quality of justice. This Part concludes with a critique of the present rule prohibiting pro se defendants from raising any claim of self-ineffectiveness on appeal.

Part VI addresses the various arguments opponents might make in opposition to the proposal made here to advise pro se defendants of available defenses. It addresses the objections that in granting such advisement judges would lose their impartiality; that to do so would “clutter[] up the [waiver-of-counsel] colloquy”;<sup>16</sup> and that there is no social interest in advising pro se defendants of defenses if they want to plead guilty.

Part VII then discusses implementation of the pro se defendant’s right to be informed of available defenses. It notes how the right can be implemented with ease and can form the part of the existing colloquy in which courts engage daily with pro se defendants.

The Article concludes with the idea that fairness, justice, and the appearance of justice will be enhanced if pro se defendants are provided information about available defenses; therefore, this right should be recognized by all state and federal courts.

## II. OVERVIEW OF THE LAW ON PRO SE DEFENDANT ADVISEMENT

Courts are required to make a determination that criminal defendants who waive their fundamental Sixth Amendment right to counsel and represent themselves, or who are compelled financially to do so by a decision to deny them appointed counsel,<sup>17</sup> do so knowingly, intelligently,

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16. Transcript of Oral Argument at 10, *Tovar*, 541 U.S. 77 (No. 02-1541) [hereinafter Transcript of Oral Argument], available at [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/02-1541.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/02-1541.pdf).

17. There are many reasons why a defendant might willingly proceed pro se, such as a belief that he or she can do a better job in presenting his or her defense, or the belief that the case is simple enough that the defendant—as a literate, rugged individualist—can handle it himself or herself, or due to the defendant’s dislike of lawyers in general. See Beverly W. Snukals & Glen H. Sturtevant, Jr., *Pro Se Litigation: Best Practices from a Judge’s Perspective*, 42 U. RICH. L. REV. 93, 99–100 (2007) (discussing the “legion” of reasons that pro se litigants choose to represent themselves). Yet, much of the case law involving pro se defendants concerns claims an attorney was ineffective, the trial court refused to appoint substitute counsel, and the defendants were thereby forced to proceed pro se. See, e.g., *United States v. Smith*, 640 F.3d 580, 596 (4th Cir. 2011) (denying a defendant substitute counsel after defendant

and voluntarily.<sup>18</sup> Likewise, courts have an obligation to ensure that, before such defendants are permitted to represent themselves, they know the dangers and disadvantages of self-representation and are competent to represent themselves (without regard to their technical legal knowledge).<sup>19</sup> This means there are essentially two determinations that must take place. The Sixth Amendment right to the assistance of counsel requires the first,<sup>20</sup> and the Sixth Amendment's correlative right to self-representation requires the second.<sup>21</sup> In practice, these inquiries are generally combined.<sup>22</sup>

#### *A. Waiver of the Right to Counsel*

The importance of the assistance of a lawyer to a criminal defendant was enshrined in the Sixth Amendment, but it was not until 1932 that the Supreme Court in *Powell v. Alabama* recognized the right to the assistance of counsel in capital cases.<sup>23</sup> In that case, Justice Sutherland eloquently

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and his appointed counsel had a dispute); *United States v. McLeod*, 55 F.3d 322, 324–25 (11th Cir. 1995) (forfeiting a defendant's right to counsel after the defendant was abusive towards his former appointed counsel); *United States v. Stringer*, No. S 10 Cr. 632(GEL), 2012 WL 11269, at \*5–6 (S.D.N.Y. Jan. 3, 2012) (requiring a defendant to proceed with his present appointed counsel or proceed pro se after defendant requested new counsel due to claims that his present counsel was ineffective weeks before trial); *People v. Ware*, 943 N.E.2d 1194, 1197 (Ill. App. Ct. 2011) (upholding a court's refusal to assign a defendant another public defender after the defendant told the court that he did not feel that the appointed public defender had his best interests in mind); *State v. Thompson*, 290 P.3d 996, 1012–13 (Wash. Ct. App. 2012) (declaring a defendant was not entitled to new appointed counsel after there was a breakdown in communications between the defendant and the present counsel).

18. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969); *Johnson v. Zerbst*, 304 U.S. 458, 468 (1938).

19. See, e.g., *Faretta v. California*, 422 U.S. 806, 835 (1975).

20. Among other things, the Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence.” U.S. CONST. amend. VI.

21. See *Faretta*, 422 U.S. at 819 (“Although not stated in the [Sixth] 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.” (footnote omitted)).

22. See, e.g., *id.*

23. *Powell v. Alabama*, 287 U.S. 45, 71 (1932); see also *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (declaring the Sixth Amendment guarantee of counsel a fundamental right made obligatory upon the states by the Due Process Clause of the Fourteenth Amendment). In *Gideon*, the Court made the observation that “in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.” *Id.* at

acknowledged the difficulties facing an unrepresented defendant:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. 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 ha[s] 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.<sup>24</sup>

The right to counsel recognized in *Powell* for defendants charged with a capital offense was not based on the Sixth Amendment; rather, it was based on the requirements of the Due Process Clause of the Fourteenth Amendment, because the absence of counsel was deemed so prejudicial to the defendants as to render their trial fundamentally unfair.<sup>25</sup> Counsel was considered essential when the defendant was “incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like.”<sup>26</sup>

Indeed, the Court has recognized that the right to counsel is so important that it must be enforced at all “critical stages of the proceedings,” which can be at any point after the formal charges have been brought.<sup>27</sup> This includes the custodial arrest stage,<sup>28</sup> post-charging

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344. The implication is that, by definition, pro se defendants cannot have a fair trial, which is of course an overgeneralization. However, the language reflects the reality that the justice system is so complex that a lay person needs representation, or some form of assistance, to be assured of a fair trial. *See id.*; cf. Jona Goldschmidt, *Judicial Assistance to Self-Represented Litigants: Lessons from the Canadian Experience*, 17 MICH. ST. J. INT'L L. 601, 617–21 (2008–2009) (describing the Canadian judicial duty of reasonable assistance to civil litigants and criminal defendants).

24. *Powell*, 287 U.S. at 68–69.

25. *See id.* at 71.

26. *Id.*

27. *United States v. Wade*, 388 U.S. 218, 224–25 (1967) (internal quotation marks omitted).

28. *See Miranda v. Arizona*, 384 U.S. 436, 444–45 (1966). A requirement of a waiver of the right to counsel at any critical stage of the proceedings is not considered



questioning whether or not an accused is under arrest,<sup>29</sup> and every stage of the adversary proceedings. The latter includes the right to counsel at arraignments,<sup>30</sup> hearings on the entry of a guilty plea,<sup>31</sup> preliminary hearings,<sup>32</sup> at trial,<sup>33</sup> sentencing,<sup>34</sup> and for appeals as of right.<sup>35</sup>

Due to the importance of the right to counsel at all of these stages, it has long been held that a waiver of the right must be made knowingly and intelligently.<sup>36</sup> Any waiver of counsel must be by the intelligent choice of the defendant and will not be presumed from a silent record.<sup>37</sup> The determination of whether a waiver is intelligently made “must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.”<sup>38</sup>

For purposes of the waiver inquiry itself, as distinguished from the so-called *Faretta* hearing, on the issue of whether pro se status should be granted,<sup>39</sup> courts establish a defendant has knowingly, intelligently, and voluntarily waived the right to counsel by making sure the defendant understands exactly which rights he or she is waiving.<sup>40</sup> This determination must also assess whether the defendant understands the danger in waiving

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more difficult to effectuate than a waiver of one’s Fifth Amendment right against self-incrimination. *Patterson v. Illinois*, 487 U.S. 285, 297–98 (1988). The Court in *Patterson* held that there is no substantial difference between the benefits of a lawyer to the defendant in a custodial interrogation setting as compared to post-indictment questioning. *Id.* at 299.

29. See *Montejo v. Louisiana*, 556 U.S. 778, 787–88 (2009) (finding police badgering of suspects at any stage falls within Sixth Amendment protections); *Rhode Island v. Innis*, 446 U.S. 291, 300–01 (1980) (extending Sixth Amendment protection to any suspect under questioning or its “functional equivalent”).

30. See *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961).

31. See *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

32. See *White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam).

33. See *Geders v. United States*, 425 U.S. 80, 91 (1976); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

34. See *Mempa v. Rhay*, 389 U.S. 128, 137 (1967) (requiring an attorney for a proceeding that could be labeled as a parole revocation or deferred sentencing).

35. See *Douglas v. California*, 372 U.S. 353, 357–58 (1963).

36. See, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 464, 467–68 (1938).

37. *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969).

38. *Johnson*, 304 U.S. at 464.

39. See *infra* Part II.B.

40. See, e.g., *Johnson*, 304 U.S. at 464–65 (noting that protecting the right to counsel “imposes [a] serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused”).

that right, including the loss of the other constitutional rights that would not be protected without the benefit of counsel.<sup>41</sup>

### B. Faretta Hearing Requirements

In addition to a determination of whether a defendant's waiver of the right to assistance of counsel is made knowingly, intelligently, and voluntarily,<sup>42</sup> a *Faretta* inquiry is required when the defendant elects, or is forced under the circumstances, to defend him or herself.<sup>43</sup> The inquiry is mandated by *Faretta v. California*, in which the Supreme Court held that the Sixth Amendment "grants to the accused personally the right to make his defense."<sup>44</sup> "It is the accused, not counsel, who must be informed of the nature and cause of the accusation . . ."<sup>45</sup> *Faretta* also held that the right to self-representation was not absolute; rather, the request to permit self-representation must be unequivocally and timely made.<sup>46</sup>

"When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo these relinquished benefits."<sup>47</sup> The trial judge must ensure the defendant is 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."<sup>48</sup> While the court must ensure the waiver of counsel is made knowingly and intelligently, it is not necessary that the accused "have the skill and experience of a lawyer in order competently and intelligently to choose self-representation."<sup>49</sup> A defendant's "technical legal knowledge" is

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41. See, e.g., *Faretta v. California*, 422 U.S. 806, 835 (1975) (recognizing that an accused should be aware of the dangers and disadvantages of foregoing the right to counsel).

42. See *Johnson*, 304 U.S. at 464.

43. See *Faretta*, 422 U.S. at 806.

44. *Id.* at 819.

45. *Id.* (quoting U.S. CONST. amend. VI) (internal quotation marks omitted).

46. See *id.*

47. *Id.* at 835 (citations omitted).

48. *Id.* (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)) (internal quotation marks omitted).

49. *Id.* The Court later held that the trial judge is not obligated to provide the defendant with personal instructions on courtroom procedure, nor help him or her perform and required legal "chores" that defense counsel would normally carry out. *Martinez v. Court of Appeal of Cal., Fourth Appellate Dist.*, 528 U.S. 152, 162 (2000)

irrelevant to whether his waiver of the right to counsel is voluntary.<sup>50</sup> In addition, the Court held that once the decision to self-represent is made and permission is given to do so, the defendant “cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.”<sup>51</sup>

The importance of self-representation was reaffirmed in *McKaskle v. Wiggins*.<sup>52</sup> In *McKaskle*, the trial court appointed standby counsel over the objection of the defendant, who expressed a desire to represent himself.<sup>53</sup> The Supreme Court held that the appointment of standby counsel—who did not substantially interfere with the presentation of the defendant’s case—did not violate the defendant’s constitutional right to self-representation.<sup>54</sup>

The Court in *McKaskle* made repeated references to the pro se defendant’s ability to present his own defense.<sup>55</sup> It 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 accused and to allow the presentation of what may, at least occasionally, be the

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(quoting *McKaskle v. Wiggins*, 465 U.S. 168, 183–84 (1984)) (internal quotation marks omitted).

50. *Faretta*, 422 U.S. at 836. The most comprehensive collection of state case law on the subject enumerates the various tests state courts have established to determine whether an election to self-represent is made knowingly and intelligently. See John S. Herbrand, Annotation, *Accused’s Right to Represent Himself in State Criminal Proceeding—Modern State Cases*, 98 A.L.R.3d 13 (1980). The list includes advisement that self-representation would be detrimental; that all technical rules of substantive, procedural, and evidentiary law must be followed; that the prosecution will be represented by an experienced attorney; that an inquiry be conducted into the defendant’s intellectual capacity; that the defendant be advised of possible penalties; that the defendant be made aware that disruption of the trial may cause a revocation of the right to self-representation; and that he cannot later complain about inadequate representation. *Id.* §§ 2[a], 10[a]–18[c]. Nowhere are possible defenses listed. See *id.*

51. *Faretta*, 422 U.S. at 835 n.46 (internal quotation marks omitted). The Author challenges this holding later in this Article. See *infra* notes 406–09 and accompanying text.

52. *McKaskle*, 465 U.S. 168.

53. *Id.* at 170–72. Despite his repeated requests to proceed pro se, the defendant also requested counsel and accepted the help of counsel at varying times. See *id.*

54. *Id.* at 184.

55. See *id.* at 174–76.

accused's best possible defense."<sup>56</sup> The Court explained:

A defendant's right to self-representation plainly encompasses certain specific rights to have his voice heard. The *pro se* defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial.<sup>57</sup>

The Court added that, in a jury trial, participation by standby counsel "is more problematic"<sup>58</sup>:

It is here that the defendant may legitimately claim that excessive involvement by counsel will destroy the appearance that the defendant is acting *pro se*. This, in turn, may erode the dignitary values that the right to self-representation is intended to promote and may undercut the defendant's presentation to the jury of his own most effective defense.<sup>59</sup>

Nowhere in *Faretta*, *McKaskle*, or subsequent decisions did the Court discuss the defendant's right of access to information regarding legally recognized defenses. Perhaps it did not need to because its own pre-*Faretta* precedent had already done so.

### III. THE RISE AND FALL OF THE RIGHT TO ADVISEMENT OF POSSIBLE DEFENSES

#### A. Sixth Amendment Right to Advise of Possible Defenses

In *Von Moltke v. Gillies*, the Supreme Court considered a case involving a German national who had emigrated to the United States with her husband in 1926 and was arrested by the FBI in 1943 for being a

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56. *Id.* at 176–77. The Court went on:

In determining whether a defendant's *Faretta* rights have been respected, the primary focus must be on whether the defendant had a fair chance to present his case in his own way. *Faretta* itself dealt with the defendant's affirmative right to participate, not with the limits on standby counsel's additional involvement.

*Id.* at 177.

57. *Id.* at 174.

58. *Id.* at 181.

59. *Id.* at 181–82.

“dangerous enemy alien.”<sup>60</sup> After being held incommunicado and interrogated for eight days, the defendant was brought before an Enemy Alien Hearing Board, at which she was denied counsel.<sup>61</sup> About a month after her arrest she was brought to court for an arraignment on a charge of conspiring to violate the Espionage Act of 1917, at which time the court delayed the arraignment and appointed counsel for her and a codefendant.<sup>62</sup> They were soon returned to the courtroom, and the judge requested that an attorney present in the courtroom assist them.<sup>63</sup> The attorney advised them to stand mute during the arraignment, while a not guilty plea was entered for them.<sup>64</sup> “He did not even see the indictment, did not inform [the defendant] as to the nature of the charge against her or as to her possible defenses, and did not inquire if she knew the punishment that could be imposed for her alleged offense.”<sup>65</sup>

The defendant was then returned to jail and awaited appointed counsel’s arrival.<sup>66</sup> In addition to speaking to FBI agents, she was visited by two lawyers that her husband had sent, but they advised her that they could not represent her.<sup>67</sup> They, too, “did not attempt to explain to her the implications of these charges, or to advise her as to any *possible defenses* to them, or to inform her of the potential punishments under the indictment.”<sup>68</sup> Three days later, the FBI agents brought her to the assistant district attorney, and the defendant agreed to plead guilty; she was allowed to speak to her husband about whether to plead guilty, and he advised her not to do anything before seeing an attorney.<sup>69</sup> Nine days later, she pleaded guilty “without having talked to any lawyer in the meantime except the FBI agent-attorneys.”<sup>70</sup>

Because the court-ordered attorney never showed up, the defendant had numerous conversations with the agents about whether to plead

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60. Von Moltke v. Gillies, 332 U.S. 708, 711 (1948) (quoting the defendant’s description about her detention) (internal quotation marks omitted).

61. *Id.* at 712.

62. *Id.* at 709, 712.

63. *Id.* at 712–13.

64. *Id.* at 713.

65. *Id.*

66. *See id.*

67. *Id.* at 714.

68. *Id.* (emphasis added).

69. *Id.* at 714–15.

70. *Id.* at 715.

guilty.<sup>71</sup> One agent erroneously advised her that her mere presence during an ongoing conspiracy would be evidence of her guilt.<sup>72</sup> Despite a judge who was new to the case and had reservations about the defendant's lack of counsel, the defendant was allowed to sign a waiver of counsel form and plead guilty after being asked a series of routine questions during a five-minute interlude in an ongoing trial.<sup>73</sup>

In January 1944, the defendant moved to withdraw her guilty plea, but even though counsel was appointed for her for this purpose, the trial court dismissed her motion as untimely.<sup>74</sup> No appeal was made, but after reconsideration of her habeas corpus petition, the Sixth Circuit affirmed the dismissal on the same grounds.<sup>75</sup>

The Supreme Court reversed, noting that had the defendant been properly represented, appointed counsel "might have rendered her invaluable aid in calling to the court's attention any mitigating circumstances that might have inclined him to fix a lighter penalty for her."<sup>76</sup> Counsel would have had an obligation "to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered."<sup>77</sup> Moreover, it was "the solemn duty of a federal judge before whom a defendant appears without counsel to make a thorough inquiry and to take all steps necessary to ensure the fullest protection of this constitutional right at every stage of the proceedings."<sup>78</sup> The Court held that the trial court had a "serious and weighty responsibility" to determine whether a defendant has made an "intelligent and competent waiver" of counsel.<sup>79</sup> Given the strong presumption against waiver of the constitutional right to

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71. *Id.* at 713, 716. The defendant in this case discussed such matters as whether she could get a fair trial if all her codefendants pleaded guilty, what plea to enter to minimize the adverse publicity that was to be expected, and how to ensure that her husband would be able to return to his old employment prior to the start of the case. *Id.* at 716–17.

72. *Id.* at 716.

73. *Id.* at 717.

74. *Id.* at 718–19.

75. *Id.* at 719 n.4.

76. *Id.* at 721.

77. *Id.*

78. *Id.* at 722 (citations omitted).

79. *Id.* at 723 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938)) (internal quotation marks omitted) (citing *Adams v. United States ex rel. McCann*, 317 U.S. 269, 270 (1942)).

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*Right to Be Informed of Available Defenses*

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counsel,

[A] judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, *possible defenses* to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.<sup>80</sup>

The opinion went on to note that the case

graphically illustrates that a mere routine inquiry—the asking of several standard questions followed by the signing of a standard written waiver of counsel—may leave a judge entirely unaware of the facts essential to an informed decision that an accused has executed a valid waiver of his right to counsel.<sup>81</sup>

If more than a routine inquiry were undertaken, the trial judge would have learned of the defendant's "perplexity and doubt," and the "uncertainty which was obviously just below the surface of [the defendant's] statements to the judge."<sup>82</sup> The court remanded the case to the district court to conduct a hearing on whether the defendant did "competently, intelligently, and with full understanding of the implications, waive her constitutional right to counsel."<sup>83</sup>

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80. *Id.* at 723–24 (emphasis added).

81. *Id.* at 724.

82. *Id.* at 725.

83. *Id.* at 727. Justice Frankfurter wrote a separate opinion, which was joined by Justice Jackson, in which they argued the case should be remanded for a fact-finding hearing on the substance of the defendant's conversations with the FBI agents, and whether their answers to her legal questions were misleading and contributed to her waiver of counsel. *Id.* at 727–31 (Frankfurter, J., separate opinion). Justice Frankfurter noted that the complexity of the law of conspiracy made it "more difficult [for] comprehension by the laity than that which defines other types of crimes." *Id.* at 728. In this case, a guilty plea was made with an erroneous understanding of the law, without advice of counsel, and without "a searching inquiry by the court into the understanding

The Court in *Von Moltke* was concerned both with the fact that the defendant had not received the representation to which she was constitutionally entitled, and with the district judge's failure to conduct a thorough inquiry that it said is necessary to accept a waiver of the right to counsel.<sup>84</sup> Yet, the italicized language in the quotation above cannot be ignored. The Court expressly held that "possible defenses to the charges" should be discussed with a defendant who seeks to enter an uncounseled plea.<sup>85</sup> The reference cannot be dismissed as obiter dicta because it relates directly to the Sixth Amendment issue raised in the case—the sufficiency of the colloquy of the district court judge who accepted the defendant's guilty plea.<sup>86</sup> The *Von Moltke* decision, however, did not describe the manner in which possible defenses would be discussed with an accused who seeks to enter a plea without counsel.

Federal and state courts post-*Von Moltke* handed down numerous rulings involving the sufficiency of the waiver inquiry conducted by the trial judge.<sup>87</sup> In many of these cases, circuit courts began to question the binding effect of Justice Black's language in *Von Moltke* regarding possible defenses.<sup>88</sup> Commentators have noted that, while the Court invalidated the

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that lay behind it, as having been made on the necessary basis of informed, self-determined choice," according to Justice Frankfurter. *Id.* at 728–29. The dissenters, Justice Burton, Chief Justice Vinson, and Justice Reed, argued that the defendant's plea and judgment thereon are entitled to the presumption of regularity, that the U.S. attorney and FBI agents involved were "meticulous" in safeguarding the defendant's rights, and that she "freely, intelligently and knowingly waived her constitutional rights." *Id.* at 737–39 (Burton, J., dissenting) (quoting the trial court in *Ex parte Von Moltke*, 72 F. Supp. 994, 995, 997 (E.D. Mich. 1946), *aff'd sub nom.*, *Von Moltke v. Gillies*, 161 F.2d 113 (6th Cir. 1947), *rev'd*, 332 U.S. 708 (1948)) (internal quotation marks omitted).

84. *Id.* at 722 (plurality opinion).

85. *Id.* at 724.

86. *See id.* at 720–26.

87. *See, e.g.*, *Collins v. United States*, 206 F.2d 918, 922 (8th Cir. 1953) (doubting whether the *Von Moltke* plurality made a binding declaration regarding a court's required line of questioning when accepting a waiver of the right to counsel); *Ex parte James*, 240 P.2d 596, 603 (Cal. 1952) (following the elements of inquiry set forth in *Von Moltke*); *State v. Klessig*, 564 N.W.2d 716, 721–22 (Wis. 1997) (engaging in an in-depth analysis of the state's waiver of counsel colloquy and requiring at least four areas of inquiry).

88. *See, e.g.*, *Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969) (finding that *Von Moltke* suggests a "standard of perfection" not readily achieved by trial courts); *Spanbauer v. Burke*, 374 F.2d 67, 72–73 (7th Cir. 1966) (collecting federal caselaw reflecting the divisions in the district and circuit courts on the binding effect



petitioner's guilty plea, there was no opinion of the Court.<sup>89</sup> Rather, Justice Black, in enumerating the elements of a proper waiver of counsel inquiry, spoke "for four members of the Court who were of the view that petitioner's guilty plea had to be overturned because [s]he had not competently waived counsel."<sup>90</sup>

Initially, courts questioned whether *Von Moltke* even stated an

absolute rule of law that no waiver of counsel can or will be permitted to exist unless the trial court has expressly made [a] statement in the courtroom to a prisoner of his right to such assistance, or whether it is entitled to be read as rather being emphasize of a precautionary and responsible rule of practice on the part of the trial judge, which ought as a protection to the prisoner to be scrupulously observed.<sup>91</sup>

As will further be discussed, the circuits' views regarding this duty have been raised in both majority and dissenting opinions.<sup>92</sup>

Some majority opinions addressing the issue of sufficiency of waiver held that, even with a failure to inquire as to certain circumstances enumerated in *Von Moltke*, there was no reversible error due to the defendant's experience in the criminal justice system.<sup>93</sup> Others held that

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and interpretation of the advisements (including information about possible defenses) required by the plurality in *Von Moltke*).

89. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 78–79 n.b (5th ed. 1980).

90. *Id.*

91. *Collins*, 206 F.2d at 922 (holding that the *Von Moltke* advisement elements are not binding and that each case is a matter of "appraising, on all the probative elements and circumstances of each particular situation, whether as a matter of knowledge and intent on the part of the prisoner, there existed in fact a competent intelligent waiver . . . of the assistance of counsel").

92. *See, e.g., United States ex rel. Miner v. Erickson*, 428 F.2d 623, 634 (8th Cir. 1970) (Lay, J., dissenting) (indicating that Justice Black's instructions were clear regarding the inquiries to be made before a waiver of counsel should be accepted by the court); *Spanbauer*, 374 F.2d at 72–73 (finding in the majority opinion that the circuits do not strictly apply *Von Moltke*).

93. *See, e.g., Cox v. Burke*, 361 F.2d 183, 185–86 (7th Cir. 1966) (holding that a waiver inquiry was sufficient notwithstanding the trial judge's failure to inquire about the defendant's education, comprehension of the nature of the crime and the proceedings, the range of possible penalties, or the fact "that a lawyer might discover defenses or mitigating circumstances not apparent to [the defendant]," when the defendant was "acquainted with the criminal process, had previous experience with the consequences of a guilty plea, had prison experience, and had knowledge of the

“the fact that [the defendant] was . . . ‘an experienced litigant,’ cannot, without more,” establish that his decision to proceed pro se, “was knowingly and intelligently made.”<sup>94</sup>

In addition to questioning whether the advisement of defenses requirement in *Von Moltke* was a strict requirement or merely a guide—with the knowing and intelligent standard being the ultimate test—courts have increasingly raised additional objections to it.<sup>95</sup> Some courts are against the duty to advise of possible defenses primarily on grounds that such a duty is limited to the context in *Von Moltke*—a guilty plea hearing.<sup>96</sup> “Such colloquy has no place in a case where guilt is denied and an offer of counsel is rejected. Attempts to relate it to such a case would seem to subject the defendant to a questionable pretrial probing of his defenses.”<sup>97</sup>

A series of cases from the Eighth Circuit reflect the various views of the judiciary toward this duty. In *Michener v. United States*, while denying a violation of a right-to-counsel claim and affirming a conviction, the Eighth Circuit questioned the Supreme Court’s holding in *Von Moltke*, which presented judges with a duty to advise defendants of their possible defenses:

Nor is it the duty of the trial court judge to explain and set out for an accused the possible defenses he might adduce to the charges against him. If an accused were represented by counsel, it most obviously is not the duty nor the privilege of the judge to suggest or explain possible defenses in behalf of accused. And upon finding a competent, intelligent and intentional waiver of counsel, it is not then any the more the duty of the trial judge to advise an accused respecting possible defenses. It is the responsibility of the court that the accused has been informed of his right to counsel and to appoint counsel if

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benefits of counsel”).

94. *United States v. Welty*, 674 F.2d 185, 191 (3d Cir. 1982) (footnote omitted) (citations omitted).

95. *See, e.g., Arnold v. United States*, 414 F.2d 1056, 1058 (9th Cir. 1969) (concluding that the court does not have an obligation to advise the defendant on a defense unless a guilty plea is entered without the advice of counsel as in *Von Moltke*); *Hodge v. United States*, 414 F.2d 1040, 1044 (9th Cir. 1969) (noting that when guilt is denied there is no duty for the trial judge to discuss the consequences of waiving the right to counsel); *Michener v. United States*, 181 F.2d 911, 918 (8th Cir. 1950) (questioning a judge’s duty to advise defendants on possible defenses).

96. *See, e.g., Hodge*, 414 F.2d at 1044.

97. *Id.*

accused is unable to procure one and if the accused so desires. But it is not the duty or the responsibility of the trial judge to give legal advice to an accused, or to any party in any federal proceeding.<sup>98</sup>

Later, the Eighth Circuit in *LaPlante v. Wolf* noted the possible threat to a defendant's right against self-incrimination if judges were required to follow the *Von Moltke* advisement of defenses element literally:

A literal compliance with the quoted portion of the *Von Moltke* opinion would require the District Judge to "give a short course in constitutional law and judicial procedure." Those who have struggled with the inculcation of these rudiments in first-year law students will be keenly aware of the problems involved. Moreover, in the context before us the legal principles must be explained and digested in a matter of minutes, or possibly days if the court has a light docket, rather than the months ordinarily allotted. But an even greater difficulty is presented by the fact that we have, not a willing student and a skilled teacher, but an accused, with all of his constitutional protections, and a Judge, with all of his constitutional obligations. We tend to share the concerns expressed by Judges Ely and Hufstедler . . . that the trial court, in order to acquire information as to "possible defenses," may risk infringement on the accused's constitutional right against self-incrimination. In the light of these and similar considerations there is much support for the view that the federal courts have looked to the substance of the *Von Moltke* formulations, and not to its formulas.<sup>99</sup>

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98. *Michener*, 181 F.2d at 918 (citing *Holmes v. United States*, 126 F.2d 431, 433 (8th Cir. 1942)). In *Arnold v. United States*, the Ninth Circuit also found the trial court had no duty to advise defendants of an insanity defense:

The *Von Moltke* case suggests a standard of perfection. Applied literally, there could never be a competent waiver of the assistance of counsel inasmuch as few, if any, judges, and perhaps not even lawyers, could deliver an impromptu dissertation in every case covering all possible included offenses, the range of allowable punishments, all possible defenses to the charges and circumstances in mitigation thereof. We view the language of the *Von Moltke* opinion as directory to the trial courts, emphasizing the importance of careful inquiry before a waiver of the assistance of counsel is accepted. It does not require a hypothetical lecture on criminal law for the edification of the defendant. It is sufficient if basic rights appearing from the then record before the court are discussed.

*Arnold*, 414 F.2d at 1058 (citations omitted).

99. *LaPlante v. Wolff*, 505 F.2d 780, 782–83 (8th Cir. 1974) (citations

In *United States v. Erickson*, Judge Lay's dissenting opinion referred to the necessity of following the elements of pro se advisement announced in *Von Moltke*.<sup>100</sup> In a case in which the majority had found a valid waiver, he wrote:

Any waiver of counsel must be "understandingly and wisely" made. In order for an accused to do so, a trial judge should determine if the accused fully appreciates any "possible defenses to the charges" and whether there are any "mitigating circumstances" which a lawyer might present on his behalf. The accused should be informed and should demonstrate an understanding of what the law recognizes as mitigating factors and possible defenses under the circumstances.<sup>101</sup>

He argued that the record failed to show that the defendant:

was informed that in South Dakota a statutory defense of intoxication may be asserted in any criminal case to rebut evidence of "intent"; or that evidence existed which would show a police officer found him so intoxicated the next day that he did not bother to explain anything to him because he said he was too drunk to understand.<sup>102</sup>

Judge Lay noted that a panel of his court in *Michener v. United States* had found no duty to advise of possible defenses when the accused had made "a competent, intelligent and intentional waiver of counsel."<sup>103</sup> He wrote, however, that he "cannot agree with this appraisal of the law of 'waiver.' The cart is placed before the horse."<sup>104</sup>

Then, dissenting again in *United States v. Warner*, Judge Lay wrote that "if the accused does not demonstrate an ability to fully understand the complexity of the charge or the possible defenses involved, then the trial court should reject his waiver and appoint counsel."<sup>105</sup> And in *Salazar v.*

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omitted) (quoting W. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 63 (1955)) (quoting *Spanbauer v. Burke*, 374 F.2d 67, 72 (7th Cir. 1966)) (internal quotation marks omitted).

100. *United States ex rel. Miner v. Erickson*, 428 F.2d 623, 634 (8th Cir. 1970) (Lay, J., dissenting).

101. *Id.* (footnote omitted).

102. *Id.* at 637 (footnote omitted).

103. *Id.* at 634 n.4 (quoting *Michener*, 181 F.2d at 918) (internal quotation marks omitted).

104. *Id.*

105. *United States v. Warner*, 428 F.2d 730, 742 (8th Cir. 1970) (Lay, J., dissenting) (citing *United States ex rel. Miner*, 428 F.2d at 631-39 (Lay, J., dissenting)).

*Sigler*, he wrote:

As I observed in *Miner*, this places the cart before the horse. The *Michener* statement should be openly rejected as establishing a patently erroneous constitutional standard of waiver. Implicit in the inquiry as to a “competent, intelligent and intentional waiver” is whether the accused understands possible defenses which counsel might make on his behalf. One cannot make a valid waiver without the proper ingredients of inquiry which serve to determine the waiver. To find that waiver of counsel exists and then say that after it exists there is no duty to advise an accused respecting possible defenses is a contradiction I do not understand.<sup>106</sup>

As late as 1981, there were still some circuit courts that declared there was a duty to advise a defendant seeking to waive counsel of possible defenses.<sup>107</sup> In *Sober v. Crist*, for example, the Ninth Circuit commented in a footnote that “[t]he accused should be made aware of possible defenses, at least where the attorney or court is made aware of facts that would constitute such a defense.”<sup>108</sup> Then, the Tenth Circuit commented in *United States v. Williamson* on the latter statement and held:

We can think of no reason why a judge would be aware of possible defenses to a charge unless he is made aware of them by the defendant in the course of establishing a factual basis for the plea. Even then, the judge would be unable to suggest all possible defenses. We hold that due process, in and of itself, does not require any such thing.<sup>109</sup>

Here, the court used the reasoning Judge Lay criticized in his Eighth Circuit dissents,<sup>110</sup> and in effect, held that only the innocent are entitled to knowledge of possible defenses.<sup>111</sup> The majority in *Williamson* reasoned that because the defendant “had admitted all three elements of the offense,” the court could not “discern any reason for the judge to have

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106. *Salazar v. Sigler*, 441 F.2d 834, 838 n.2 (8th Cir. 1971) (Lay, J., dissenting) (citations omitted).

107. *See, e.g., Sober v. Crist*, 644 F.2d 807, 809 n.3 (9th Cir. 1981).

108. *Id.* (emphasis added) (citing *Thundershield v. Solem*, 565 F.2d 1018, 1028 (8th Cir. 1977)).

109. *United States v. Williamson*, 806 F.2d 216, 222 (10th Cir. 1986).

110. *See Salazar*, 441 F.2d at 838 n.2 (Lay, J., dissenting); *Warner*, 428 F.2d at 742 (Lay, J., dissenting); *United States ex rel. Miner*, 428 F.2d at 634 (Lay, J., dissenting).

111. *See Williamson*, 806 F.2d at 222.

delved further into possible defenses.”<sup>112</sup>

In addition to waiver cases, application of the *Von Moltke* duties of advisement also arose in the context of claims of ineffective assistance of counsel.<sup>113</sup> For example, the Ninth Circuit found ineffective assistance of counsel when counsel “did not discuss possible defenses with [the client]; indeed, [counsel] did not discuss the facts of the case with [the client] at all.”<sup>114</sup> In contrast—and emblematic of the differences of opinion among judges regarding the advisement of defenses issue—is *United States v. Decoster*, a case in which the D.C. Circuit initially found ineffectiveness of counsel in the attorney’s complete failure to conduct any investigation relevant to preparing a defense.<sup>115</sup> However, the panel’s decision to reverse the conviction was reversed upon rehearing.<sup>116</sup>

The reversal of the panel’s decision prompted a vigorous dissent from Judge David L. Bazelon, joined by Chief Judge J. Skelly Wright.<sup>117</sup> The dissenting opinion opened with a strong critique of the problem concerning incompetent legal assistance for the poor.<sup>118</sup> Then, the dissenters raised a point that is relevant to the discussion and analysis below of *Iowa v. Tovar*,

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112. *Id.*

113. *See, e.g.,* *Wilson v. Rose*, 366 F.2d 611 (9th Cir. 1966).

114. *Id.* at 613 (footnote omitted).

115. *United States v. Decoster*, 624 F.2d 196, 200 (D.C. Cir. 1976), *judgment entered en banc*, 598 F.2d 311 (D.C. Cir. 1979).

116. *See id.*

117. *See id.* at 264 (Bazelon, J., dissenting).

118. *See id.* The dissent wrote:

[The defendant] was denied the effective assistance of counsel guaranteed by the Sixth Amendment because he could not afford to hire a competent and conscientious attorney. [The defendant’s] plight is an indictment of our system of criminal justice, which promises “Equal Justice Under Law,” but delivers only “Justice for Those Who Can Afford It.” Though purporting to address the problem of ineffective assistance, the majority’s decision ignores the sordid reality that the kind of slovenly, indifferent representation provided [the defendant] is uniquely the fate allotted to the poor. Underlying the majority’s antiseptic verbal formulations is a disturbing tolerance for a criminal justice system that consistently provides less protection and less dignity for the indigent. I cannot accept a system that conditions a defendant’s right to a fair trial on his ability to pay for it. Like Justice Black, I believe that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” The Constitution forbids it. Morality condemns it.

*Id.* (fourth alteration in original) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956)).

the Supreme Court's latest decision on the possible advisement of defenses issue.<sup>119</sup> They observed the same flaw Judge Lay criticized:

In the end, the majority's conclusion that [the] appellant was not denied the effective assistance of counsel rests on their perception that the record contains overwhelming evidence of appellant's guilt. [U]ltimately, "there was a total failure of appellant to show that it was likely that counsel's deficiencies had any effect on the outcome of [the] trial." The logic of their position seems to be as follows: If the accused was probably guilty, then nothing helpful could have been found even through a properly conducted investigation. Thus, any violation of that duty—no matter how egregious—was inconsequential and hence excusable.<sup>120</sup>

The dissent went on to note that the majority's reasoning was further flawed because "[i]t assumes the value of investigation is measured only by information it yields that will exonerate the defendant."<sup>121</sup> Rather, a lawyer's investigation may reveal that a plea of guilty is in the defendant's best interest: "In many cases . . . perhaps the most valuable function that defense counsel can perform is to advise the defendant candidly that a thorough investigation—conducted by his own representative and seeking any glimmer of exonerating evidence—has turned up empty."<sup>122</sup>

State courts were equally divided in their interpretation of the extent to which the advisement elements set forth in *Von Moltke* were binding and whether they applied to cases involving a not guilty plea.<sup>123</sup> Some early state cases followed the advisement elements set forth in *Von Moltke*, indicating that a waiver of the right to counsel must be scrutinized more

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119. See discussion *infra* Part III.B; see also *Iowa v. Tovar*, 541 U.S. 77 (2004).

120. *Decoster*, 624 F.2d at 286 (Bazelon, J., dissenting) (alterations in original) (footnotes omitted).

121. *Id.* at 287.

122. *Id.*

123. See, e.g., *Ex parte James*, 240 P.2d 596, 603 (Cal. 1952) (holding that a purported waiver may not be accepted unless the accused "understands the nature of the charge, the elements of the offense, the pleas and defenses which may be available, or the punishments which may be exacted" (quoting *People v. Chesser*, 178 P.2d 761, 765 (Cal. 1947)) (internal quotation marks omitted) (citing *Uveges v. Pennsylvania*, 335 U.S. 437, 440–41 (1948))); *Commonwealth v. Fillippini*, 310 N.E.2d 147, 149–50 (Mass. App. Ct. 1974) (noting that although it was unclear whether *Von Moltke* applied when the defendant waived his right to counsel and proceeded to trial, the *Von Moltke* requirements had been met in Fillippini's situation).

closely in proportion to the increased severity and complexity of the charges.<sup>124</sup>

References in federal and state decisions to the duty to advise defendants of possible defenses in the post-*Faretta* era reflect the same range of opinion as those issued during the post-*Von Moltke* era. On the one hand, there are cases rejecting the claim of entitlement to advisement of defenses when there is no specific litany or checklist required during the *Faretta* waiver inquiry; so long as the waiver and self-representation decisions were made knowingly and intelligently, they are considered valid.<sup>125</sup> The Sixth Circuit took a similar position, but specifically concluded that “[t]here is no mention in these guidelines of any requirement that the judge inform the defendant of possible defenses.”<sup>126</sup>

On the other hand, other courts have continued to cite the *Von Moltke* advisement elements with approval, including the duty to advise pro se defendants of possible defenses, especially when defendants sought to plead guilty.<sup>127</sup> One court commended the trial judge for his admirable

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124. See, e.g., *Ex parte James*, 240 P.2d at 603; *People v. Hardin*, 24 Cal. Rptr. 563, 566–68 (Dist. Ct. App. 1962) (reversing the acceptance of waiver of an eighteen-year-old illiterate defendant when the trial judge failed to determine the defendant’s capacity to self-represent and to advise the defendant of the apparent availability of a defense).

125. See, e.g., *Vargas v. Abbott*, 71 F. App’x 23, 25–26 (10th Cir. 2003).

126. *United States v. Kerr*, 50 F. App’x 230, 237 (6th Cir. 2002) (citing *United States v. Miller*, 910 F.2d 1321, 1324 (6th Cir. 1990), *cert. denied*, 498 U.S. 1094 (1991)).

127. See, e.g., *Shafer v. Bowersox*, 329 F.3d 637, 651 (8th Cir. 2003); *Nelson v. Alabama*, 292 F.3d 1291, 1297 (11th Cir. 2002) (applying factors substantially similar to *Von Moltke* elements without citing directly to *Von Moltke*); *Fowler v. Collins*, 253 F.3d 244, 249 (6th Cir. 2001); *Middleton v. State*, 563 S.E.2d 543, 544–45 (Ga. Ct. App. 2002) (requiring factors substantively similar to *Von Moltke* elements). In *Shafer*, the court also addressed the state’s argument against the viability of the *Von Moltke* opinion generally, based on its plurality approval. *Shafer*, 329 F.3d at 651. The court disagreed:

The facts of the case have not limited the impact of *Von Moltke*, however, for the Supreme Court has cited *Von Moltke* in a number of subsequent cases. Our court has also had occasion to consider *Von Moltke* in the course of deciding cases. In *Wilkins v. Bowersox*, we observed that in *Von Moltke* “the Supreme Court established the requirement that a judge’s inquiry regarding waiver of counsel must be comprehensive and probing.” Moreover, there are other Supreme Court precedents which clearly establish the knowing, voluntary, and intelligent rule.

*Id.* at 651 (quoting *Wilkins v. Bowersox*, 145 F.3d 1006, 1013 n.5 (8th Cir. 1998))



colloquy in which possible defenses were discussed.<sup>128</sup> There are even cases in which courts criticized a trial judge for failing to discuss possible defenses.<sup>129</sup>

Cases in which a substantial portion of the opinion is devoted to a claim of inadequate advisement of defenses are rare. One example, however, is *Government of the Virgin Islands v. Charles*, in which the pro se defendant suffered from a mental condition, but was competent to stand trial.<sup>130</sup> Defense counsel entered into a stipulation with the government that the case should be presented at a bench trial upon a stipulation of facts, which included a psychiatrist's opinion that the defendant was psychotic at the time of the crime and legally insane.<sup>131</sup> The defendant discharged his attorney, who planned to raise an insanity defense, because the defendant wanted to claim self-defense instead; the defendant believed his attorney was "hostile" to his wishes.<sup>132</sup>

On appeal from his conviction on grounds that his waiver of counsel was not knowingly and intelligently made, the court first reviewed the scope of the required *Faretta* inquiry<sup>133</sup> as including "an inquiry regarding the defendant's reasons for the [self-representation] request;" the defendant's awareness "of the dangers of self-representation;" the

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(citations omitted).

128. See *United States v. Taylor*, 183 F.3d 1199, 1203–04 (10th Cir. 1999) ("The court advised [the defendant] of the nature of the charges against him, the range of allowable punishments and possible defenses, and thoroughly discussed the risks of proceeding *pro se*."); see also *People v. Sanders*, 743 N.Y.S.2d 618, 620 (App. Div. 2002) (affirming the trial judge's decision permitting a defendant to proceed pro se after the judge discussed, among other things, the possible defenses to a charge of first-degree rape).

129. See, e.g., *Wilkins*, 145 F.3d at 1012 ("The record reveals that at no time did the state court explain to [the defendant] his possible defenses to the charges against him, nor did the court inform him of lesser included offenses or the full range of punishments that he might receive."); *United States v. Taylor*, 113 F.3d 1136, 1141 (10th Cir. 1997) ("At no time did the trial court discuss with [the defendant] any possible defenses to the charges against him or circumstances that might serve as mitigating factors.").

130. *Gov't of Virgin Is. v. Charles*, 72 F.3d 401, 403 (3d Cir. 1995). Modernly, the defendant in this case would be considered a "gray area" defendant—a term coined by Justice Breyer to describe defendants who are competent to stand trial, not insane, but have some form of mental illness. See *Indiana v. Edwards*, 554 U.S. 164, 172 (2008).

131. *Charles*, 72 F.3d at 403.

132. *Id.* at 403–04.

133. See *supra* Part II.B.

defendant's understanding of "the nature of the charges, the range of possible punishment, *potential defenses*, technical problems that the defendant may encounter; and any other facts important to a general understanding of the risks involved."<sup>134</sup>

In finding the trial court's rulings on competency and waiver of counsel not clearly erroneous, the Third Circuit noted that the trial judge had conducted an inquiry that was "especially thorough and probing."<sup>135</sup> The inquiry relating to defenses included, first, a question about the defendant's awareness of the nature of the charge against him of first-degree murder, followed by the court's question: "And your defense to that is?"<sup>136</sup> The defendant answered:

CHARLES: My actions [were] done in self-defense.

THE COURT: All right. And you understand what self-defense means?

CHARLES: Yes. Preservation comes first.<sup>137</sup>

When the court then asked if he had "done any reading of the law in this area," the defendant answered that he had "learned a little bit, but [hadn't] done much reading about it."<sup>138</sup> He added, "I don't even think I have to go through those books to win this case."<sup>139</sup> The court then "made sure that [the defendant] was aware of the possibility of pleading insanity" by asking the defendant whether he discussed the matter with his attorney, to which the defendant stated that he did, but also that he had rejected that defense.<sup>140</sup>

134. *Charles*, 72 F.3d at 404 (emphasis added) (citing *Gov't of V.I. v. James*, 934 F.2d 468, 470–71, 473 (3d Cir. 1991)). Note the language used—"potential" defenses, as distinguished from *Von Moltke's* reference to "possible" defenses—and the claim made in this Article that pro se defendants should be informed of "available" defenses. Compare *id.*, with *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948), and *infra* Part VI.

135. *Charles*, 72 F.3d at 406.

136. *Id.* at 407.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* Circuit Judge Lewis, concurring, commented that the case illustrated the difficulty of granting pro se status to defendants who "may be marginally sane," but "barely competent." *Id.* at 411 (Lewis, J., concurring). He questioned the wisdom of *Godinez v. Moran*, which permits such rulings, citing Justice Blackmun's dissent in that case: "[A] defendant who is utterly incapable of conducting his own defense cannot be

The case illustrates not only the Third Circuit's concern with whether potential defenses had been discussed with the pro se defendant, but it also finds that merely informing a defendant of one or more defenses is inadequate.<sup>141</sup> Providing the names of the defenses, without defining them or describing their specific elements, does not give the defendant adequate information to make it possible for him or her to present a meaningful defense.<sup>142</sup>

An example of a relevant post-*Faretta* state opinion that discussed defenses is *People v. Lopez*, in which the trial judge granted the defendant's request to proceed pro se at his sentencing hearing.<sup>143</sup> The

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considered 'competent' to make such a decision, any more than a person who chooses to leap out of a window in the belief that he can fly can be considered competent to make such a choice." *Id.* (quoting *Godinez v. Moran*, 509 U.S. 389, 416 (1993) (Blackmun, J., dissenting)) (internal quotation marks omitted). Judge Lewis pointed out that defendants who "might have reasonable insanity defenses or other avenues of defense to pursue—usually wind up either on death row or serving life sentences." *Id.* at 412. He proposed another competency evaluation to determine a defendant's capacity for self-representation, weighing the various characteristics of the defendant and the case:

A defendant who waives his or her Sixth Amendment right to counsel should not be left naked and unprotected by the Constitution. The Due Process Clause of the Fourteenth Amendment is supposed to prevent the government from obtaining a criminal conviction through a procedure that fails to meet the standards of due process of law. . . . The fact that the defendant acts as his or her counsel does not alter the nature of his or her due process rights.

*Id.* at 412–13. Judge Lewis' position that permitting a "paranoid, delusional defendant to elect to represent himself at trial, pursue an ill-advised defense, and ultimately be sentenced to life imprisonment . . . is deeply disturbing and ultimately impugns the integrity of our criminal justice system," was eventually adopted by the Supreme Court. *Id.* at 413 (quoting *Godinez*, 509 U.S. at 417 (Blackmun, J., dissenting)) (internal quotation marks omitted); see *Indiana v. Edwards*, 554 U.S. 164, 178 (2008) (changing the federal standard to one mirroring Judge Lewis' concurrence in *Charles*). However, *Edwards* itself is not without criticism. See Jona Goldschmidt, *Autonomy and "Gray-Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J. L. & SOC. POL'Y 130, 177 (2011) (arguing that the autonomy and dignity of the individual require that reasonable judicial assistance to pro se defendants and other forms of assistance be provided).

141. See *Charles*, 72 F.3d at 407. Although the court found that the information provided was adequate, the court's reproduction of the trial exchange demonstrates its concern with the sufficiency of the inquiry. See *id.*

142. See *id.*

143. *People v. Lopez*, 138 Cal. Rptr. 36, 40 (Ct. App. 1977). Aside from the traditional review of rights being waived and the general dangers and disadvantages of

court of appeals reversed the sentence due to the insufficiency of the court's *Faretta* colloquy conducted before it granted the defendant's pro se status.<sup>144</sup> The court did "not wish to appear pedantic" and did not "intend to establish any horrendously complex or rigid standards."<sup>145</sup> Rather, the court hoped to "set forth certain suggestions on how to protect the record when a defendant chooses to go it alone."<sup>146</sup>

The court included the following in its suggested list of items to be discussed during a *Faretta* colloquy:

Perhaps some exploration into the nature of the proceedings, the possible outcome, *possible defenses* and possible punishments might be in order. While this may seem to be sliding back into pre-*Faretta* practices, it will serve to point up to defendant just what he is getting himself into and establish beyond question that he knows what he is

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proceeding pro se, the court suggested a colloquy including warnings that the defendant: (1) may conduct a defense ultimately to his own detriment; (2) will receive "no special indulgence" for non-compliance with rules of court; (3) "will get no help from the judge"; (4) will face a professional prosecutor who "will give him no quarter" in what "will definitely not be a fair fight. It would be Joe Louis vs. a cripple, or Jack Nicklaus vs. a Sunday hacker"; (5) will receive no more library privileges than those available to other pro se inmates; and (6) will be unable to later claim inadequacy of representation. *Id.* at 39–40.

144. *Id.* at 40.

145. *Id.* at 38.

146. *Id.* Before reciting its suggestions for a *Faretta* colloquy, the court of appeals made these observations of pro se defendants and the importance of making a proper record:

Whether the [defendant] is a naive character who sincerely believes he can represent himself better than can a lawyer, a cagey loser who is going to try to reduce the trial to a shambles in the hope that somehow reversible error will creep in, a free soul with a touch of ham, or simply someone who wants to have some fun with the judicial establishment, the trial judge must recognize that the first ground on appeal is probably going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision. Such are the facts of life. Therefore, pragmatically, and defensively, in addition to the legal necessity of establishing that a defendant voluntarily and intelligently reaches this decision, the trial court should also protect itself—and the record. . . . Retrials are time-consuming, expensive, [and] traumatic to the personnel involved and a matter of considerable concern to the public.

*Id.*

doing and his choice is made with eyes open.<sup>147</sup>

While the court did not refer to any particular enumerated warning, the comment regarding “sliding back into pre-*Faretta* practices”<sup>148</sup> is most likely directed to the issue of defenses, as it is a foregone conclusion that the nature of the proceedings and potential consequences and penalties would necessarily be required.<sup>149</sup> This decision reflects the courts’ continuing denigration of the importance of information about possible defenses in the post-*Faretta* era, which began earlier in the post-*Von Moltke* era.

As courts were increasingly ignoring the duty to advise pro se defendants of possible defenses as discussed in the plurality opinion in *Von Moltke*<sup>150</sup>—which was not even mentioned later in *Faretta*<sup>151</sup>—the Supreme Court handed down several additional cases involving waiver of counsel. *Godinez v. Moran* held that the standard for competency to stand trial is the same as the standard to plead guilty or to waive counsel (knowing and voluntary); the competency at issue is the competency to waive the right, not the competency to perform as counsel.<sup>152</sup> In *Patterson v. Illinois*, the Court adopted a pragmatic approach, permitting a simplified waiver inquiry for postindictment questioning.<sup>153</sup> The Court relied upon the latter the next time it addressed the issue of the nature and scope of advisements to pro se defendants seeking to plead guilty.<sup>154</sup>

#### B. Iowa v. Tovar and the Elimination of Advisement of Possible Defenses

The Supreme Court’s most recent pronouncement on the nature of the *Faretta* inquiry and the related issue of a pro se defendant’s access to

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147. *Id.* at 39 (emphasis added) (quoting *Faretta v. California*, 422 U.S. 806, 835 (1975)) (internal quotation marks omitted).

148. *Id.*

149. *See generally* *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (suggesting the proper colloquy for self-representation must involve a discussion of possible defenses).

150. *Id.*

151. *Faretta*, 422 U.S. 806.

152. *Godinez v. Moran*, 509 U.S. 389, 399–400 (1993).

153. *Patterson v. Illinois*, 487 U.S. 285, 293, 298 (1988) (holding that a pretrial waiver of counsel at a suppression hearing need not be accompanied by the same rigorous warnings required at trial).

154. *See* *Iowa v. Tovar*, 541 U.S. 77, 89–90 (2004).

defenses information is found in *Iowa v. Tovar*.<sup>155</sup> In 1996, Tovar entered a pro se plea of guilty to operating a motor vehicle while intoxicated (OWI) after waiving a list of rights enumerated by the trial judge.<sup>156</sup> At his first appearance on that charge, the judge indicated on a form that Tovar had appeared without counsel, was informed of his rights, and was given a copy of the complaint.<sup>157</sup> At the arraignment, the court noted that Tovar again appeared without counsel.<sup>158</sup> Tovar stated he would represent himself, and that he wanted to plead guilty.<sup>159</sup> After ascertaining he had not been promised anything or threatened to enter a guilty plea, the court conducted a colloquy with him, explaining that the guilty plea would constitute a waiver of many constitutional rights.<sup>160</sup> Before eliciting a factual basis for the plea, the court further described the potential penalties an OWI conviction carried and the elements of the OWI offense.<sup>161</sup> The court thereupon found that Tovar's plea was made voluntarily and with a full understanding of the consequences of the plea.<sup>162</sup>

While driving to court for the OWI arraignment, Tovar was stopped and charged with driving with a suspended license.<sup>163</sup> The sentencing on the OWI was later held concurrently with the arraignment on the suspended license charge.<sup>164</sup> At that hearing, Tovar again requested to represent himself, and the court engaged in essentially the same colloquy with him as it did at the previous OWI plea hearing.<sup>165</sup> The court accepted his plea and sentenced Tovar on both charges.<sup>166</sup>

Two years later, in 1998, Tovar was convicted of OWI for a second time, but this time he was represented by counsel.<sup>167</sup> Then, in 2000, Tovar

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155. *Id.* at 87–94.

156. *Id.* at 82–83. Tovar had signed a form waiving his *Miranda* rights before making his first appearance. *Id.* at 82.

157. *Id.*

158. *See id.*

159. *Id.* at 82–83.

160. *Id.* The Court conducted the colloquy required by Iowa Rule of Criminal Procedure 8. *Id.* No mention of possible defenses was included. *See id.*

161. *Id.* at 83–84.

162. *Id.* at 84.

163. *Id.* at 84 n.5.

164. *Id.* at 84.

165. *Id.* The list did not include any reference to possible defenses or the benefits of an attorney being able to identify defenses that may be available. *See id.*

166. *Id.* at 84–85.

167. *Id.* at 85.

was charged with his third OWI, which also occurred while his license was revoked, making his new charge eligible for sentence enhancement.<sup>168</sup>

To avoid this result, Tovar's attorney filed a motion to bar use of the 1996 OWI conviction on grounds that Tovar's waiver of his right to counsel was not knowing, intelligent, and voluntary because he was never made aware of "the dangers and disadvantages of self-representation."<sup>169</sup> In denying the motion, the trial court pointed out that because the offense charged was one that "is readily understood by laypersons and the penalty is not unduly severe, the duty of inquiry which is imposed upon the court is only that which is required to ensure an awareness of [the] right to counsel and a willingness to proceed without counsel in the face of such awareness."<sup>170</sup> Tovar was then found guilty of OWI and driving while barred, and he was sentenced for each crime.<sup>171</sup> On appeal, the Iowa Court of Appeals affirmed, but the Iowa Supreme Court, on a 4–3 vote, reversed and remanded the case for the entry of judgment without any consideration of the defendant's first OWI conviction.<sup>172</sup>

The Iowa Supreme Court majority acknowledged that the dangers of proceeding pro se at a guilty plea hearing were different than those facing a pro se defendant at trial, and that the inquiries at these stages should be different.<sup>173</sup> The state supreme court held that the 1996 case warnings were constitutionally inadequate; the warnings should have included information about the usefulness of an attorney, in addition to the dangers of self-representation.<sup>174</sup> Specifically, "[t]he trial judge [must] advise the defendant generally that there are defenses to criminal charges that may not be known to laypersons and that the danger in waiving the assistance of counsel in deciding whether to plead guilty is the risk that a viable defense will be overlooked."<sup>175</sup> The defendant should also be advised that an attorney will provide an independent opinion on whether, given the facts

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168. *Id.*

169. *Id.* (quoting language from the defendant's motion) (internal quotation marks omitted).

170. *Id.* at 86 (alteration in original) (quoting the application to petition for certiorari) (internal quotation marks omitted).

171. *Id.*

172. *State v. Tovar*, 656 N.W.2d 112, 113, 121 (Iowa 2003).

173. *Id.* at 119.

174. *Id.* at 121.

175. *Id.*

and law of the case, it is “wise to plead guilty.”<sup>176</sup> The dissenting justices argued that the majority’s approach was inconsistent with *Patterson v. Illinois*, which rejected any rigid approach to the waiver colloquy, and instead adopted a pragmatic approach that considered the particular stage of the trial in question in deciding the scope and content of the colloquy.<sup>177</sup>

The Supreme Court reversed the Iowa Supreme Court’s decision, holding that the Sixth Amendment does not require the two warnings involving the benefits of counsel (i.e., identifying possible defenses and guidance in plea negotiations).<sup>178</sup> It should be noted that the ruling in *Tovar* does not involve a judge *refusing* to inform a pro se defendant of possible defenses; rather, the case before the Supreme Court had to do with a judge *failing* to inform the pro se defendant of certain benefits of counsel, including that viable defenses could be overlooked during self-representation.<sup>179</sup> The argument in this Article goes far beyond the question of advisement about these benefits of counsel. It argues that pro se defendants have a right to information regarding defenses that an attorney would have if they were represented. Therefore, it is necessary to critique *Tovar* since it will be the primary precedent that opponents of the proposal made here will rely upon.<sup>180</sup>

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176. *Id.*

177. *Id.* at 122 (Carter, J., dissenting); *see also* *Patterson v. Illinois*, 487 U.S. 285, 298 (1988). The dissenters in the Iowa Supreme Court’s decision argued:

It is true that there are other adverse consequences that might arise from proceeding without counsel. A search for these consequences leads the court into speculation concerning unidentified potential defenses that an able lawyer might have advanced. I submit that it is not reasonable to ignore the consequences of a voluntary guilty plea based on that type of speculation.

*Tovar*, 656 N.W.2d at 122 (Carter, J., dissenting).

178. *Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

179. *See id.*

180. One court has held:

[T]he court’s concern about its responsibility to advise a defendant about specific defenses has been put to rest by the United States Supreme Court. [T]he law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances—even though the defendant may not know the *specific detailed* consequences of invoking it.

*State v. Deaver*, No. 2008AP2223-CR, 2009 WL 3189353, at \*6 (Wis. Ct. App. Oct. 7, 2009) (second alteration in original) (quoting *Tovar*, 541 U.S. at 92) (internal quotation marks omitted).



A brief digression to the oral argument in *Tovar*<sup>181</sup> will not only give one an appreciation of the reasoning given by the court, but also discloses some surprising comments made by the justices regarding several issues arising in the case. In reference to the scope of required warnings to be given to defendants seeking to waive their right to counsel and plead guilty (as distinguished from those who wish to do so just before a motion to suppress hearing or trial), the Justices debated the extent to which defendants understand, or should understand, the benefits of counsel at a plea hearing.<sup>182</sup> Would it be “useful” for defendants to be advised that attorneys have *any* benefit at this stage, or is a reference to their right to appointment of counsel sufficient?<sup>183</sup>

Justice Kennedy said that it would be “useful for the defendant to know that if he had an attorney, the attorney might take a look at . . . the sobriety tests,” might negotiate a plea to a lesser charge or plead with the judge for a reduced sentence.<sup>184</sup> Attorneys, he noted, play “a very important role.”<sup>185</sup> In response, the Iowa Attorney General, Tom Miller, argued, “if we go into all the useful things that an attorney can do . . . then . . . it’s almost an endless list. . . . And then we’re *cluttering up the—the colloquy*. It’s already a—a rather long colloquy.”<sup>186</sup>

Chief Justice Rehnquist then asked: “[I]f the defendant represents to the court that the factual basis for the plea is there, that he committed the offense charged, why is there any great interest in trying to persuade him

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181. Transcript of Oral Argument, *supra* note 16. Because neither the official transcript of the oral argument nor the Westlaw version contain the identities of the Justices asking questions of counsel, all subsequent references to the oral argument will also include the Oyez.org audio recording. Oral Argument, *Iowa v. Tovar*, 541 U.S. 77 (2004) (No. 02-1541) [hereinafter Oral Argument], available at [http://www.oyez.org/cases/2000-2009/2003/2003\\_02\\_1541#sort=ideology](http://www.oyez.org/cases/2000-2009/2003/2003_02_1541#sort=ideology).

182. See Transcript of Oral Argument, *supra* note 16; Oral Argument, *supra* note 181.

183. Transcript of Oral Argument, *supra* note 16, at 3; Oral Argument, *supra* note 181, at 2:37. As Justice Scalia put it, “[t]he problem here is he was told that he had a right to counsel, but it wasn’t said, boy you know, you’d really be stupid to turn it down.” Transcript of Oral Argument, *supra* note 16, at 7; Oral Argument, *supra* note 181, at 6:34.

184. Transcript of Oral Argument, *supra* note 16, at 8–9; Oral Argument, *supra* note 181, at 8:20.

185. Transcript of Oral Argument, *supra* note 16, at 9; Oral Argument, *supra* note 181, at 8:53.

186. Transcript of Oral Argument, *supra* note 16, at 10 (emphasis added); Oral Argument, *supra* note 181, at 9:34.

not to do that?”<sup>187</sup> Naturally, the attorney general agreed, doubting that the “system is served” by requiring a judge to advise the defendant that an attorney could provide an assessment of whether to plead guilty or advise him regarding “the question of defenses.”<sup>188</sup> To provide information regarding the right to counsel to the extent required by the Iowa Supreme Court, the attorney general said, is “not a particularly helpful litany.”<sup>189</sup>

Noting that the Iowa Supreme Court had created a “laundry list” of admonishments for pro se defendants seeking to plead guilty, Justice O’Connor wanted to know whether the attorney general thought there was any “baseline requirement that the court advise the defendant in making a plea that he has a right to counsel and the attorney could be helpful in making that decision.”<sup>190</sup> He responded by stating that the defendant need only be advised that he has a “right to counsel.”<sup>191</sup> Justice Scalia then asked: “He doesn’t have to be told that counsel would be helpful?”<sup>192</sup> The attorney general replied: “He doesn’t have to be told. An individual knows that.”<sup>193</sup>

The Solicitor General of the U.S., as *amicus curiae*, then addressed the Court, arguing that the Iowa Supreme Court’s warnings were “either vacuous or misleading, depending on how they’re interpreted.”<sup>194</sup> According to the Solicitor General:

If they are accurately interpreted as generalizations about the criminal justice process, they really say nothing more than that[,] as a class[,] lawyers know more about the law than people who are not

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187. Transcript of Oral Argument, *supra* note 16, at 10; Oral Argument, *supra* note 181, at 10:16.

188. Transcript of Oral Argument, *supra* note 16, at 10–11; Oral Argument, *supra* note 181, at 10:33.

189. Transcript of Oral Argument, *supra* note 16, at 11; Oral Argument, *supra* note 181, at 10:54.

190. Transcript of Oral Argument, *supra* note 16, at 11; Oral Argument, *supra* note 181, at 10:58.

191. Transcript of Oral Argument, *supra* note 16, at 11; Oral Argument, *supra* note 181, at 11:23.

192. Transcript of Oral Argument, *supra* note 16, at 11; Oral Argument, *supra* note 181, at 11:34.

193. Transcript of Oral Argument, *supra* note 16, at 12; Oral Argument, *supra* note 181, at 11:36.

194. Transcript of Oral Argument, *supra* note 16, at 20; Oral Argument, *supra* note 181, at 20:34.

lawyers, and it's at least possible that consulting with a lawyer would improve your chances in this criminal prosecution. And I think any defendant who is aware that he has the right to counsel would be aware of those facts, would be aware of at least the possibility that a lawyer could help him and the certainty that a lawyer would know more about the charges than he would.

On the other hand, if the defendant misunderstands these warnings as directed to him personally as [a] suggestion that there is actually a meritorious defense in his own case, then the defendant may be given an artificial disincentive to plead guilty and in the case of a non-indigent defendant may be led to spend his own funds consulting with a lawyer when in fact no valid defense exists.<sup>195</sup>

The Solicitor General repeatedly analogized to the potential of defendants being entitled to advisement regarding the fact that there may be a possibility of suppression of evidence or the possibility of negotiating with the prosecution for a reduced charge.<sup>196</sup> If required, "a lot of defendants are going to be given false hope because the possibility that those modes of procedure might succeed would vary enormously."<sup>197</sup> When Justice Kennedy pointed out that the same argument could be made for all

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195. Transcript of Oral Argument, *supra* note 16, at 20–21; Oral Argument, *supra* note 181, at 20:39. The Solicitor General later pointed out that the inquiry required of a defendant seeking to plead guilty under Federal Rule of Criminal Procedure 11 "mentions several constitutional rights that an individual gives up by pleading guilty, but it doesn't mention the possibility of suppressing evidence and it doesn't mention the possibility of plea bargaining." Transcript of Oral Argument, *supra* note 16, at 22; Oral Argument, *supra* note 181, at 23:00; *see also infra* Part IV.A. Thus, he argued, "it would be odd to think that you could have a constitutionally valid waiver even though the defendant was not informed of those substantive possibilities but would, nevertheless, have to be informed of the assistance that a lawyer might provide." Transcript of Oral Argument, *supra* note 16, at 22; Oral Argument, *supra* note 181, at 23:11. The contradiction would indeed exist, but that does not lessen the fact that trial fairness for pro se defendants would be enhanced were advisement on these two issues (constitutional violations and the benefits of plea bargaining) to become constitutionally required. Canadian judges already have a duty to provide reasonable assistance to self-represented defendants and civil litigants, including the raising of "Charter issues," referring to the Canadian Charter of Rights and Freedoms. *See* Goldschmidt, *supra* note 23, at 618–19.

196. Transcript of Oral Argument, *supra* note 16, at 18–27; Oral Argument, *supra* note 181, at 17:35–28:18.

197. Transcript of Oral Argument, *supra* note 16, at 24; Oral Argument, *supra* note 181, at 25:41.

the rights in the Rule 11 colloquy, the Solicitor General responded by distinguishing between the things “that will actually happen in any criminal trial if the defendant decides not to plead guilty”; “things that are likely to occur in virtually any criminal trial” and the concept of “suppression of evidence or talking about plea bargaining.”<sup>198</sup> He concluded: “[I]f you give that advice in every case, it’s often going to be misleading.”<sup>199</sup> Moreover, he argued, to give such warnings in some cases and not others places judges in “an untenable position,” because they will not have the advantages of a standardized colloquy, “a safe harbor, to give them some assurance that if they provide standardized advice in every case, that’s going to be enough.”<sup>200</sup> And for the judge to have to decide “the likelihood of a successful plea negotiation . . . would really make the trial judge’s life much more difficult.”<sup>201</sup> He raised the possibility that a judge could be reversed for not having provided these admonitions, which “would really cause disruption” in the criminal justice system.<sup>202</sup>

Tovar’s counsel argued that the Iowa Supreme Court warnings would not be unduly burdensome or time consuming.<sup>203</sup> Justice Scalia sarcastically raised the public interest argument against the warnings again:

What you ought to know, however, is that if you got an attorney, he might find some gimmick that would allow you not to be convicted of this crime even though you have committed it. You should know that because it’s your right, you know, to know that you can get off even when you’re guilty. Now, is this something that we really want to encourage? . . . We want to encourage people to—to confess . . . to pay what used to be called their just debt to society. Why do we want to encourage them to—to hire a lawyer so that they’ll get off on a—on an

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198. Transcript of Oral Argument, *supra* note 16, at 25; Oral Argument, *supra* note 181, at 26:02.

199. Transcript of Oral Argument, *supra* note 16, at 25; Oral Argument, *supra* note 181, at 26:02.

200. Transcript of Oral Argument, *supra* note 16, at 26; Oral Argument, *supra* note 181, at 27:37.

201. Transcript of Oral Argument, *supra* note 16, at 26; Oral Argument, *supra* note 181, at 27:55.

202. Transcript of Oral Argument, *supra* note 16, at 27; Oral Argument, *supra* note 181, at 28:17.

203. See Transcript of Oral Argument, *supra* note 16, at 46; Oral Argument, *supra* note 181, at 52:08.

irrelevancy?<sup>204</sup>

The Court's unanimous decision that followed in *Tovar* mirrors the substance of the attorney general's and Solicitor General's arguments:

Given "the particular facts and circumstances surrounding [this] case," it is far from clear that warnings of the kind required by the Iowa Supreme Court would have enlightened Tovar's decisions whether to seek counsel or to represent himself. In a case so straightforward . . . the admonitions at issue might confuse or mislead a defendant more than they would inform him: The warnings the Iowa Supreme Court declared mandatory might be misconstrued as *a veiled suggestion that a meritorious defense exists* or that the defendant could plead to a lesser charge, when neither prospect is a realistic one. If a defendant delays his plea in the vain hope that counsel could uncover a tenable basis for contesting or reducing the criminal charge, the prompt disposition of the case will be impeded, and the resources of either the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.

. . . States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful. We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution.<sup>205</sup>

### C. Comments on Iowa v. Tovar

Before proceeding to examine current federal and state waiver inquiry practice and the post-*Tovar* state cases to determine whether any courts acted on the Supreme Court's invitation to require more detailed advisements, several observations about the *Iowa v. Tovar* decision are in order.<sup>206</sup> First, the Court's reasoning is tautological in a sense. In the

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204. Transcript of Oral Argument, *supra* note 16, at 47; Oral Argument, *supra* note 181, at 52:33.

205. *Iowa v. Tovar*, 541 U.S. 77, 93–94 (2004) (alteration in original) (emphasis added) (citations omitted) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

206. A twist on the subject of the right of states to establish a more detailed waiver colloquy appears in *People v. Crampe*, 957 N.E.2d 255, 263–64 (N.Y. 2011). In *Crampe*, the New York high court found a waiver inquiry at a pretrial suppression hearing invalid because it lacked warnings about the specific dangers of proceeding pro se, including advisement of the importance of a lawyer in the adversarial system. *Id.* at 257, 263–64. In its petition for a writ of certiorari to the Supreme Court, the case was

decision the Court was reviewing, the Iowa Supreme Court had addressed a claim made under the Sixth Amendment, and not under the state constitution, statutory law, court rules, or decisional law.<sup>207</sup> Tovar's brief did, however, cite and discuss the Iowa Supreme Court's previous opinion in *State v. Cooley*.<sup>208</sup> The court in *Cooley* had made the following observation with respect to the question of whether a decision finding waiver of counsel was knowingly and intelligently made was reviewable for harmless error or was a structural error:

[M]any of the criteria we might use to determine the existence of harmless error are not conducive to post-trial scrutiny. Some factors, like the nature of the charges, the education level of the defendant, and the defendant's experience with the legal system are easily reviewable at any point prior, or subsequent, to trial. Subjective factors, however, such as the defendant's reasons for forgoing an attorney, defendant's legitimate understanding of the charges and the consequences of a guilty verdict, *as well as a knowledge of available defenses* and the procedures that will be employed during trial, cannot be assessed under a harmless error analysis. Regardless of an accused's experience, these factors are unique to every proceeding and will weigh heavily in the determination of a defendant's ability to proceed pro se.<sup>209</sup>

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consolidated with another case on appeal, and the state raised the following issue: "May a state court afford more protection to a defendant's right to counsel at a suppression hearing than the Sixth Amendment requires when doing so infringes the defendant's specifically invoked Sixth Amendment right to self-representation?" Petition for Writ of Certiorari at i, *New York v. Wingate*, 132 S. Ct. 1746 (2012) (No. 11-872), 2012 WL 121145, at \*1. It is a rare case indeed in which the state voices its concern with the rights of a pro se defendant; the concern is in fact a clever guise for an attack on a decision that requires more detailed advisements than required in *Tovar*. Compare *Tovar*, 541 U.S. at 93-94, with *Crampe*, 957 N.E.2d at 263-64. Fortunately, on March 19, 2012, the state's petition was denied. See *Wingate*, 132 S. Ct. at 1746.

207. See *State v. Tovar*, 656 N.W.2d 112, 116 (Iowa 2003). Tovar's brief in the Iowa Supreme Court cited the Sixth Amendment, and referred to his "constitutional right to counsel" having been violated, but did not rely upon any state constitutional provision. Appellant's Brief and Argument at 9, *Tovar*, 656 N.W.2d 112 (No. 01-1558), 2002 WL 33808634, at \*9 (quoting *State v. Cooley*, 608 N.W.2d 9, 15 (Iowa 2000)).

208. Appellant's Brief and Argument, *supra* note 209, at 9, 12; see also *Cooley*, 608 N.W.2d at 15.

209. *Cooley*, 608 N.W.2d at 18 (emphasis added). *Cooley* had also cited the *Von Moltke* language indicating that a valid waiver can only be made with the defendant's apprehension of the possible defenses to the charges. *Id.* at 15; see also *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

Thus, the Iowa Supreme Court had, prior to the *Tovar* decision, already accepted *Von Moltke*'s reference to advisement of possible defenses via a judicial decision and was not among those state high courts that had interpreted the latter case narrowly.<sup>210</sup>

The Supreme Court reversed the Iowa Supreme Court, holding that advisements regarding the benefits of counsel (in identifying defenses and negotiating a plea) were *not* required by the Sixth Amendment, but held that states could establish such a rule if they chose to do so under state law.<sup>211</sup> The Iowa Supreme Court had in fact already established by judicial decision in *State v. Cooley* that waiver of counsel is invalid without an inquiry into the possible defenses required in *Von Moltke*.<sup>212</sup> Because the Iowa Supreme Court had already held that a waiver required an inquiry into possible defenses, its ruling in *Tovar*—that one of the required warnings to a pro se defendant seeking to plead guilty is that one of the benefits of counsel is identification of possible defenses—is perfectly consistent with that position. Moreover, in *Tovar*, the Iowa Supreme Court stated:

Not only was there an absence of any dialogue concerning the value of having an attorney when pleading guilty, there was no colloquy with [the defendant] that alerted him to the dangers and disadvantages of entering a guilty plea without the advice of counsel. Importantly, the court did not warn [the defendant] that he might have legal defenses to the charge that he, as a layperson, would not recognize.<sup>213</sup>

The Iowa Supreme Court did not expressly rely upon any state constitutional or statutory provision, or court rule in its opinion. However, the court previously stated in *State v. Cooley* that a valid waiver required an inquiry into possible defenses.<sup>214</sup> It is unclear, however, why the Supreme Court did not simply reverse the Iowa Supreme Court's opinion on Sixth Amendment grounds, and also remand with instructions to clarify whether it will still require advisements regarding the benefits of having

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210. See *Cooley*, 608 N.W.2d at 15.

211. See *Tovar*, 541 U.S. at 94 (“We note, finally, that States are free to adopt by statute, rule, or decision any guides to the acceptance of an uncounseled plea they deem useful. We hold only that the two admonitions the Iowa Supreme Court ordered are not required by the Federal Constitution.” (citations omitted)).

212. See *Cooley*, 608 N.W.2d at 15; see also *Von Moltke*, 332 U.S. at 724.

213. *State v. Tovar*, 656 N.W.2d 112, 120 (Iowa 2003).

214. *Cooley*, 608 N.W.2d at 15.

counsel as a means of identifying possible defenses, or achieving a more favorable negotiated plea under state law.

Even more curious is the Iowa Supreme Court's failure to take up the Supreme Court's invitation to do so. Instead, upon remand, the Iowa Supreme Court, in a short, two-paragraph order, vacated its previous opinion in conformity with the Supreme Court's decision.<sup>215</sup> The court could have, by its own initiative, included such a clarification in its decision to preserve its ruling for state practice; however, the court did not address the issue.<sup>216</sup> This was a lost opportunity for the Iowa Supreme Court to establish what it thought were appropriate admonitions to a pro se defendant seeking to plead guilty. Presumably, had the state supreme court chosen to do so, pro se defendants demanding trial would be entitled at least to those admonitions and probably more under *Patterson v. Illinois*'s pragmatic approach to the scope of required advisements.<sup>217</sup>

Even odder is the fact that this court later, in *State v. Allen*, declined to "interpret the Iowa Constitution to afford more protection than the federal constitution with respect to the use of prior uncounseled misdemeanor convictions."<sup>218</sup> The issue in *Allen* was the use of an uncounseled conviction for sentence enhancement purposes—the same issue found in *Tovar*.<sup>219</sup> Thus, the Iowa Supreme Court seems to have ruled itself into a corner and cannot now, without overruling *Allen*, return to its former position, requiring pro se defendants to receive admonitions regarding the benefits of counsel for identifying defenses and plea bargaining.<sup>220</sup>

A much more fundamental problem with *Tovar* is the Justices seem to have overlooked the axiom that "equal justice for all" is the bedrock principle of a constitutional democracy.<sup>221</sup> It goes without saying, and

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215. See *State v. Tovar*, No. 01-1558, 2004 WL 1110387, at \*1 (Iowa June 1, 2004).

216. See *id.*

217. See *Patterson v. Illinois*, 487 U.S. 285, 298 (1988); see also *Cooley*, 608 N.W.2d at 15 (citing to *Patterson* in its discussion regarding the proper waiver colloquy).

218. *State v. Allen*, 690 N.W.2d 684, 690 (Iowa 2005).

219. *Id.* at 686 & n.1 (noting the underlying issue is a third-offense aggravated misdemeanor); *Iowa v. Tovar*, 541 U.S. 77, 85 (2004) (noting the underlying issue is a third-offense felony).

220. See *Cooley*, 608 N.W.2d at 15 (adhering to the *Von Moltke* elements).

221. See Alan W. Houseman, *The Future of Civil Legal Aid: Initial Thoughts*,



without necessity of citation, that constitutional rights in the criminal justice system are afforded to all persons before the court, both the innocent and the guilty. Given the foundational nature of this principle, one would never expect the Supreme Court—as a body established to protect individual liberty—or any individual Justice to give greater weight to the need for expeditious case processing in cases when a defendant wants to enter an uncounseled guilty plea than to the protection of a defendant’s constitutional rights.<sup>222</sup> Justice Scalia indicated at oral argument in *Tovar* that there is no social interest favoring advisement of pro se defendants who want to plead guilty that an attorney might benefit them in learning about possible defenses of which they may not be aware.<sup>223</sup> This was also the position taken by the dissenters in the Iowa Supreme Court opinion.<sup>224</sup>

The *Tovar* opinion expresses the Court’s agreement with the United States, as amicus curiae, that *Tovar*’s case was “so straightforward” that any admonitions about defenses or plea negotiation “might confuse or mislead” a defendant, who might also misconstrue them as a “veiled suggestion that a meritorious defense exists,” or that he could plead to a

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13 U. PA. J. L. & SOC. CHANGE 265, 265 (2009–2010). The equal protection issue is beyond the scope of this Article, but it is worth noting that two circuits have found pro se litigants do not constitute a “protected class” under the Equal Protection Clause or 42 U.S.C. § 1985. See *Posr v. Court Officer Shield No. 207*, 180 F.3d 409, 419 (2d Cir. 1999); *Eitel v. Holland*, 787 F.2d 995, 1000 (5th Cir. 1986).

222. This is especially true since the Court’s turn toward protection of non-economic and fundamental rights in the post-*Lochner* era and the adoption of the selective incorporation doctrine. See Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 290–336 (1982) (discussing the adoption, principles, and continued relevance of the selective incorporation doctrine).

223. Transcript of Oral Argument, *supra* note 16, at 46–47; Oral Argument, *supra* note 181, at 52:13.

224. See *State v. Tovar*, 656 N.W.2d 112, 121–22 (Iowa 2003) (Carter, J., dissenting). The dissenters in *State v. Tovar* stated:

The result reached in the opinion of the court is an extreme measure that unnecessarily depreciates the consequences of a criminal conviction based on defendant’s solemn confession of guilt in open court. . . . To permit a collateral attack on the earlier conviction in the present litigation should only be permitted on a convincing showing that defendant was not guilty with regard to the first OWI conviction or that some compelling federal authority requires that it be disregarded for sentencing enhancement purposes. Neither of these circumstances exists in the present case.

*Id.* (emphasis added).

lesser charge “when neither prospect is a realistic one.”<sup>225</sup> Strange as it may seem, the Court seems to be taking on the role of an advocate and deciding for the defendant that he had no “realistic” defenses.<sup>226</sup> Moreover, the Court ignores the multitude of potential defenses that may be raised by competent defense counsel in OWI cases.<sup>227</sup> The Court’s logic seems to be that if a judge prejudges a case and decides that a defendant has no “realistic” defenses, then there’s no point in requiring the judge to advise the defendant to consult an attorney before entering a guilty plea because the attorney might be beneficial in identifying defenses.<sup>228</sup> This is not the kind of reasoning one would expect from the Supreme Court, much less any other court. Apropos is Justice Goldberg’s comment in *Escobedo v. Illinois*: “No system worth preserving should have to *fear* that if an accused is permitted to consult with a lawyer, he will become aware of, and

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225. Iowa v. Tovar, 541 U.S. 77, 93 (2003).

226. See *id.*

227. Contrary to the Court’s assumption that Tovar’s case was “straightforward,” and that there was no “realistic” possibility of any meritorious defense to the OWI charge, Tovar had many defenses available to him. See *id.* The charge was based upon the breathalyzer test results, and there are well-known defenses customarily raised in such cases, including challenges to the manner in which the test was administered, the training and licensure of the operator, the calibration and required inspections for the device, not to mention possible Fourth Amendment and *Miranda* issues. See *id.* at 82; see also, e.g., MASS. CONTINUING LEGAL EDUC., A PRACTICAL GUIDE TO TRYING DWI CASES IN NEW HAMPSHIRE § 1.2.4 (Mark L. Stevens ed., 2010) (discussing challenges to the conditions of a highway when a field sobriety test was administered); *id.* § 1.3.6 (recommending discovery of documents related to “certification of the breath test device, as well as the maintenance and use logs for the breath test machine”). In *State v. Deaver*, the Wisconsin Court of Appeals in a similar situation stated:

At oral argument, [the defendant] noted that only a layperson would consider an OWI case “straightforward” or “clear-cut.” Defense attorneys recognize the complexities of OWI law, including: implied consent procedures, sobriety test reliability issues, constitutional issues regarding search and seizure, and other factors affecting the strength of the State’s case against a particular defendant. [The defendant’s] characterization of the 1998 OWI as straightforward reveals he did not know the disadvantages of self-representation; on the contrary, his testimony shows that he presumed his guilt. As [the defendant] apparently understood things, there were no defenses or mitigating circumstances in an OWI case, one simply entered a plea after talking to the district attorney.

*State v. Deaver*, No. 2008AP2223-CR, 2009 WL 3189353, at \*3 (Wis. Ct. App. Oct. 7, 2009).

228. See *Tovar*, 541 U.S. at 93.

exercise, these rights.”<sup>229</sup> Likewise, no system of justice should reserve its rights and liberties for those who opt to stand trial (the “innocent”), rather than those seeking to enter an uncounseled guilty plea (the “guilty”).

Another problem with the *Tovar* decision is that its denigration of the need for counsel for pro se defendants seeking to plead guilty does not seem to be consistent with the Court’s past precedents, especially with regard to plea negotiations and hearings.<sup>230</sup> These are considered critical stages in the prosecution process, triggering the right to counsel.<sup>231</sup>

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229. Escobedo v. Illinois, 378 U.S. 478, 490 (1964) (footnote omitted).

230. See, e.g., Powell v. Alabama, 287 U.S. 45, 68–69 (1932) (describing the important role of criminal defense counsel). As the Supreme Court stated in *Gideon v. Wainwright*:

That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The Court has likewise found counsel a requirement in misdemeanor cases when a sentence of imprisonment is possible. See *Argersinger v. Hamlin*, 407 U.S. 25, 36–37 (1972). In *Argersinger*, the Court stated:

There is evidence of the prejudice which results to misdemeanor defendants from this “assembly-line justice.” One study concluded that “[m]isdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.”

We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial.

*Id.* (footnote omitted) (quoting AM. CIVIL LIBERTIES UNION, LEGAL COUNSEL FOR MISDEMEANANTS, PRELIMINARY REPORT 1 (1970)). Justices Powell and Rehnquist, concurring, wrote: “Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap, will be incapable of defending themselves.” *Id.* at 47 (Powell, J., concurring).

231. See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 (2008) (explaining that once a proceeding is deemed a critical stage of a criminal proceeding, counsel must be

In holding that a preliminary hearing was a “critical stage” of a prosecution, which triggered the right to assistance of counsel, the Court determined that the “guiding hand” of counsel is “essential” in order to protect against an erroneous or improper prosecution.<sup>232</sup> Examination of witnesses “may expose fatal weaknesses in the State’s case that may lead the magistrate to refuse to bind the accused over.”<sup>233</sup> By doing so, the defendant “can more effectively discover the case” and “make possible the preparation of a proper defense,” and can argue for the necessity of an early psychological examination or bail.<sup>234</sup>

In *Halbert v. Michigan*, the Court addressed the necessity of counsel in first-tier, discretionary appeals to the Michigan Supreme Court from guilty or *nolo contendere* pleas.<sup>235</sup> The Court held:

Navigating the appellate process without a lawyer’s assistance is a perilous endeavor for a layperson, and well beyond the competence of individuals, like [the defendant], who have little education, learning disabilities, and mental impairments. Appeals by defendants convicted on their pleas may involve “myriad and often complicated” substantive issues, and may be “no less complex than other appeals.” One who pleads guilty or *nolo contendere* may still raise on appeal constitutional defects that are irrelevant to his factual guilt, double jeopardy claims requiring no further factual record, jurisdictional defects, challenges to the sufficiency of the evidence at the preliminary examination, preserved entrapment claims, mental competency claims, factual basis claims, claims that the state had no right to proceed in the first place, including claims that a defendant was charged under an inapplicable statute, and claims of ineffective assistance of counsel.<sup>236</sup>

In *Missouri v. Frye*, the Court held that as part of the defendant’s

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timely appointed); *see also, e.g.*, *Hamilton v. Alabama*, 368 U.S. 52, 54–55 (1961) (describing an arraignment in which a plea is entered as a critical stage under Alabama law). “In this case, . . . the degree of prejudice can never be known. Only the presence of counsel could have enabled th[e] accused to know all the defenses available to him and to plead intelligently.” *Id.* at 55.

232. *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *see also White v. Maryland*, 373 U.S. 59, 60 (1963) (per curiam).

233. *Coleman*, 399 U.S. at 9.

234. *Id.*

235. *Halbert v. Michigan*, 545 U.S. 605, 621 (2005).

236. *Id.* at 621–22 (citations omitted) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 145 (2004) (Ginsberg, J., dissenting)) (internal quotation marks omitted).

Sixth Amendment right to effectiveness of counsel, defense lawyers have a duty to communicate formal plea offers from the prosecution to their client when acceptance of the offer may be favorable to the accused.<sup>237</sup> The Court described plea bargaining as “central to the administration of the criminal justice system.”<sup>238</sup> This means “defense counsel have responsibilities in the plea bargain process” that include passing on prosecution plea offers.<sup>239</sup>

In *Lafler v. Cooper*, a companion case to *Frye*, the Court addressed an ineffectiveness of counsel claim.<sup>240</sup> Counsel had advised the defendant not to accept a plea bargain offered by the prosecution based on an erroneous understanding of the law.<sup>241</sup> The defendant then proceeded to trial and received a sentence more severe than that first offered by the prosecution.<sup>242</sup> In the course of its decision, the Supreme Court noted that the right to counsel under the Sixth Amendment extends to the plea-bargaining process, during which the defendant is entitled to effective representation.<sup>243</sup> In a later portion of the opinion, the Court stated: “The constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without

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237. Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012).

238. *Id.* at 1407. The Court noted:

Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. . . . Because ours “is for the most part a system of pleas, not a system of trials,” it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.”. . . In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

*Id.* (alterations in original) (citations omitted) (quoting *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012)) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

239. *Id.* at 1407–08.

240. *Lafler*, 132 S. Ct. at 1382–83.

241. *Id.* at 1383. Counsel erroneously advised the defendant that he could not be convicted of assault with intent to murder if the victim had been shot below the waist. *Id.*

242. *Id.*

243. *Id.* at 1384.

counsel's advice."<sup>244</sup>

The Court's view in *Iowa v. Tovar* was that the pro se defendant was not in need of counsel's assistance in identifying possible defenses or negotiating a favorable plea agreement, and this contradicts the language in the aforementioned cases, which highlights the importance of counsel's ability to raise possible defenses.<sup>245</sup> Apparently, because the defendant in *Tovar* (1) represented himself and made uncounseled admissions of guilt, and (2) had, in the Court's opinion, no "realistic" possibility of having any defense to the charge against him,<sup>246</sup> the Court held that for *him* the stage of the proceedings was not deemed as critical (or critical at all) as the represented defendants in *Frye* and *Lafler*.<sup>247</sup> All of the language in *Faretta* and *McKaskle* about protecting the autonomy and dignity of the pro se defendant in making his or her own defense<sup>248</sup> was swept aside by the ruling in *Tovar*.

In effect, the Court grants greater rights in the plea bargaining stage to represented defendants than to pro se defendants. If effective counsel is expected to be accurate in informing a defendant of possible defenses,<sup>249</sup> why doesn't a pro se defendant also have an equal right to receive information about legally recognized defenses?<sup>250</sup> This disparate treatment of represented defendants and defendants who invoke their constitutional right to self-representation raises genuine equal protection problems.<sup>251</sup>

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244. *Id.* at 1385.

245. Compare *Iowa v. Tovar*, 541 U.S. 77, 93–94 (2004), with *Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012), and *Lafler*, 132 S. Ct. at 1385.

246. See *Tovar*, 541 U.S. at 93.

247. See *Frye*, 132 S. Ct. at 1404; *Lafler*, 132 S. Ct. at 1383–84.

248. *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984); *Faretta v. California*, 422 U.S. 806, 834 (1975).

249. See *Lafler*, 132 S. Ct. at 1383 (noting that the reason counsel was ineffective was his inaccuracy with regard to possible defenses).

250. See *infra* notes 406–09 and accompanying text (discussing a pro se defendant's right to be effective in making his defense).

251. As noted earlier, courts have rejected the proposition that pro se defendants are a protected class for purposes of federal civil rights and race conspiracy claims under 42 U.S.C. § 1983 and § 1985. See *supra* note 221. This may not, however, bar pro se defendants from claiming a denial of equal protection on grounds that they are denied their fundamental right to a fair trial by the Court's refusal to provide them with the advisements in question, which the Court implied might be given were pro se defendants demanding trial. See *Douglas v. California*, 372 U.S. 353, 357–58 (1963) (holding that the state was violating equal protection rights of indigent prisoners who were denied appointed counsel to assist in first appeals granted as a matter of right);

Lastly, the Court in *Tovar* used several justifications to deprive pro se defendants of their right to be advised that an attorney may be beneficial in identifying possible defenses and negotiating a plea, in addition to the previously-discussed rationale.<sup>252</sup> The Court also held that, to provide such advisements, “the prompt disposition of the case will be impeded, and the resources of the State (if the defendant is indigent) or the defendant himself (if he is financially ineligible for appointed counsel) will be wasted.”<sup>253</sup> What is so disappointing is, not only that the Court has improperly placed prompt case processing and judicial economy ahead of the protection of defendants’ due process rights to liberty and Sixth Amendment rights to present their own defense,<sup>254</sup> but that this was a unanimous decision. The liberal side of the Court, it might be argued, was “asleep at the switch” on this one.

#### IV. CURRENT FEDERAL AND STATE ADVISEMENT REQUIREMENTS

##### *A. Rule 11 of the Federal Rules of Criminal Procedure*

Rule 11 of the Federal Rules of Criminal Procedure provides a suggested colloquy for federal courts to follow when considering and

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Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that the state was denying equal protection to prisoners by refusing to provide trial transcripts without charge to indigent prisoners).

252. Iowa v. Tovar, 541 U.S. 77, 93 (2004) (fearing that this kind of colloquy may be perceived as “a veiled suggestion that a meritorious defense exists or that the defendant could plead to a lesser charge”).

253. *Id.* (citations omitted).

254. See *Faretta v. California*, 422 U.S. 806, 819 (1975). The late Professor Dworkin’s distinction between “policy” and “principles” comes to mind. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 23 (1967), reprinted in PHILOSOPHY OF LAW 134, 139 (Joel Feinberg & Hyman Gross eds., 5th ed. 1995). The former is a standard that sets up a goal to be reached, “generally an improvement in some economic, political, or social feature of the community . . . [A] ‘principle’ [is] a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.” *Id.* Dworkin goes on to explain a standard such as “automobile accidents are to be decreased” as an example of a policy, and “no man may profit by his own wrong” as an example of a principle. *Id.* Regrettably, the lofty, justice-related principles the Court recited in *Faretta* and *McKaskle*, about upholding the dignity and autonomy of the individual by recognizing the constitutional right to self-representation, have given way to a crass concern for a policy of expeditious case processing. See *McKaskle v. Wiggins*, 465 U.S. 168, 176–77 (1984); *Faretta*, 422 U.S. at 834.

accepting a guilty plea.<sup>255</sup> However, the rule does not make any distinction between represented and pro se defendants.<sup>256</sup>

[T]he court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range,

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255. FED. R. CRIM. P. 11(b)(1).

256. *See id.*



possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.<sup>257</sup>

No reference to defenses is made in Rule 11.<sup>258</sup> Nor are defenses referred to in the portions of the American Bar Association's (ABA) *Standards for Criminal Justice* relevant to guilty pleas.<sup>259</sup> Those standards do, however, provide that "[a] defendant should not be called upon to plead until an opportunity to retain counsel has been afforded or, if eligible for appointment of counsel, until counsel has been appointed or waived."<sup>260</sup> They further provide that,

[w]hen a defendant has properly waived counsel and tenders a plea of guilty or nolo contendere, the court should not accept the plea unless it is reaffirmed by the defendant after a reasonable time for deliberation, set by rule or statute, after the defendant received the advice from the court required in Standard 14-1.4.<sup>261</sup>

Thus, while the ABA Standards do not refer to defenses specifically, they do require judges to allow the pro se defendant seeking to plead guilty an opportunity to retain counsel and "a reasonable time for deliberation" with counsel or others.<sup>262</sup> Neither opportunity was afforded to the defendant in *Tovar*,<sup>263</sup> and the Supreme Court had no problem with the

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257. *Id.*

258. *See id.*

259. STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY (3d ed. 1999).

260. *Id.* Standard 14-1.3(a).

261. *Id.* Standard 14-1.3(b).

262. *Id.* Standard 14-1.3.

263. Note also these additional principles in the ABA's Standards for Criminal Justice relevant to the defendant in *Tovar*:

(a) A defendant should be permitted, at the defendant's election, to proceed in the trial of his or her case without the assistance of counsel after the trial judge makes thorough inquiry and is satisfied that the defendant:

(i) has been clearly advised of the right to the assistance of counsel, including the right to the assignment of counsel when the defendant is so entitled;

(ii) is capable of understanding the proceedings; and

(iii) has made an intelligent and voluntary waiver of the right to

trial judge in that case accepting an uncounseled plea without time for deliberation based on the court's interest in prompt case processing.<sup>264</sup>

### B. *The U.S. Judges' Benchbook*

Another source for the contents of the waiver inquiry is the federal judges' Benchbook.<sup>265</sup> If a defendant does not wish counsel, the Benchbook advises that "[t]he accused has a constitutional right to self-representation. Waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards and disadvantages of self-representation."<sup>266</sup>

Further, the Benchbook provides that if the defendant wishes to represent himself or herself, judges "should ask questions similar to the following:"

1. Have you ever studied law?
2. Have you ever represented yourself in a criminal action?
3. Do you understand that you are charged with these crimes: [*state the crimes with which the defendant is charged*]?
4. Do you understand that if you are found guilty of the crime charged in Count I, the court must impose an assessment of \$100 and could sentence you to as many as \_\_\_ years in prison, impose a term of

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counsel.

(b) When a defendant undertakes to represent himself or herself, the court should take whatever measures may be reasonable and necessary to ensure a fair trial.

STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-3.6 (3d ed. 2000).

264. Iowa v. Tovar, 541 U.S. 77, 83, 93 (2004).

265. FED. JUDICIAL CTR., *supra* note 15. The Benchbook's Preface states:

[T]he material in the *Benchbook* represents only the *Benchbook* Committee's recommended approaches for dealing with specific situations. While the information provided is deemed to be accurate, responsible, and valuable, it is not intended to serve as authority and should not be cited as such. And because circuit law may vary, especially on procedures, judges should always check the requirements of their circuit's law.

*Id.* at iii.

266. *Id.* § 1.02(C), at 6.

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*Right to Be Informed of Available Defenses*

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supervised release that follows imprisonment, fine you as much as \$\_\_\_\_, and direct you to pay restitution?

[Ask the defendant a similar question for each crime charged in the indictment or information.]

5. Do you understand that if you are found guilty of more than one of these crimes, this court can order that the sentences be served consecutively, that is, one after another?

6. Do you understand that there are advisory Sentencing Guidelines that may have an effect on your sentence if you are found guilty?

7. Do you understand that if you represent yourself, you are on your own? *I cannot tell you or even advise you how you should try your case.*

8. Are you familiar with the Federal Rules of Evidence?

9. Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, *you must abide by those very technical rules, and that they will not be relaxed for your benefit?*

10. Are you familiar with the Federal Rules of Criminal Procedure?

11. Do you understand that those rules govern the way a criminal action is tried in federal court, that *you are bound by those rules, and that they will not be relaxed for your benefit?*

[Then say to the defendant something to this effect:]

12. I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. *You are not familiar with the law.* You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

13. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?

14. Is your decision entirely voluntary?

[If the answers to the two preceding questions are yes, say something to the following effect:]

15. I find that the defendant has knowingly and voluntarily waived the right to counsel. I will therefore permit the defendant to represent himself [herself].

It is probably advisable to appoint standby counsel, who can assist the defendant or can replace the defendant if the court determines during trial that the defendant can no longer be permitted to proceed pro se.<sup>267</sup>

Thus, the Benchbook provides that judges should advise the defendant of the pending charges but not information about defenses.<sup>268</sup> The judge is to inform defendants that the court will provide no assistance to them in trying their case and that no rules of evidence or procedure will be relaxed for them, regardless of their unfamiliarity with the law.<sup>269</sup> This surely has a chilling effect on a defendant's right to exercise the constitutional right of self-representation. It does nothing to ensure that pro se defendants have a level playing field against the prosecution in so far as giving them access to the most important information they need—information regarding the nature and elements of legally recognized defenses.

### C. State High Courts' Decisions Post-Tovar

As noted earlier, the Supreme Court in *Tovar* held that the Sixth Amendment does not require pro se defendants seeking to plead guilty to the charge(s) against them be informed that the benefits of an attorney include identifying possible defenses and negotiating a favorable plea agreement.<sup>270</sup> At the same time, the Court held that states that chose to adopt such an advisement requirement under state law were free to do so.<sup>271</sup>

Research discloses that some state high courts do indeed follow the holding in *Von Moltke*, which requires, as part of their waiver-of-counsel

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267. *Id.* § 1.02(C), at 6–8 (alterations in original) (emphasis added).

268. *See id.*

269. *See id.*

270. *Iowa v. Tovar*, 541 U.S. 77, 93–94 (2004); *see also supra* Part III.B.

271. *Tovar*, 541 U.S. at 94.

advisement, that defendants be informed of “possible defenses.”<sup>272</sup> The only case that comes close to taking up the invitation in *Tovar* is *Hopper v. State*,<sup>273</sup> in which the court initially held:

[W]e exercise our supervisory power to require that in the future a defendant expressing a desire to proceed without counsel is to be advised of the dangers of going to trial as required by *Faretta*, and also be informed that an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary and procedural problems in the prosecution’s case. Such an advisement will require minimal additional time or effort at the initial hearing, and may encourage defendants to accept counsel. The effect of this advice will undoubtedly vary from case to case, but we do not believe it will impose significant burdens on the judicial process. To the extent this additional information causes fewer defendants to proceed pro se, participation of counsel in this process may encourage plea bargains as frequently as it causes delay.<sup>274</sup>

On rehearing, however, the Indiana Supreme Court backtracked, holding, first, that there is no requirement under *Tovar* of any “formulaic language or magic words” in a waiver-of-counsel advisement.<sup>275</sup> Second, the defendant claimed a lack of advisement as to the benefit of having an attorney, but the court refused to make such advisement a mandatory rule in all cases, preferring instead the “totality of circumstances” approach used by federal courts.<sup>276</sup> The modified test as announced by the court stated: “Was the defendant’s decision to forgo counsel or to plead guilty voluntary and intelligent? Taken as a whole, did the encounter afford a defendant due process, or was it seriously unfair in some respect?”<sup>277</sup>

In his dissent, Justice Rucker argued the court’s original opinion was sound and there were no grounds for a rehearing.<sup>278</sup> As to the court’s

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272. Von Moltke v. Gillies, 332 U.S. 708, 724 (1948).

273. Hopper v. State, 934 N.E.2d 1086, 1088 (Ind. 2010), *reh’g granted*, 957 N.E.2d 613, 621 (Ind. 2011).

274. *Id.*

275. *Hopper*, 957 N.E.2d at 621 (citations omitted).

276. *Id.* at 622. “[The defendant] never offer[ed] evidence that he would have received a better deal with advice of counsel or that he would have accepted counsel if the judge had told him that lawyers were so much better at plea bargaining.” *Id.* at 623 (footnote omitted).

277. *Id.*

278. *See id.* at 624–25 (Rucker, J., dissenting).

retrenchment, he wrote:

I am hard pressed to understand why the majority apparently thinks it is a bad thing or otherwise inappropriate simply to provide pro se—and likely indigent—defendants with such a modest advisement as: “an attorney is usually more experienced in plea negotiations and better able to identify and evaluate any potential defenses and evidentiary or procedural problems in the prosecution’s case.” Indeed except for its straw man argument the majority does not even attempt to refute our observations that “[s]uch an advisement will require minimal additional time or effort” and “we do not believe it will impose significant burdens on the judicial process.” As one commentator has observed, “Substantive criminal law contains many complexities—intent standards, jurisdictional provisions, defenses, and so forth. The defendant may be ‘guilty’ in a layman’s sense, and so be willing to confess, and yet may have a viable defense that he ought to invoke, or may be pleading guilty to the wrong grade of crime.”

The value of a *Hopper* advisement goes well beyond the direct benefits related to the charged crime and protecting a defendant’s constitutional rights. Uncounseled pro se defendants may very well plead guilty even to certain misdemeanor offenses that carry devastating collateral consequences ranging from deportation, to eviction from public housing, to barriers in employment. These are the very types of considerations that could have a significant bearing on whether a pro se defendant is wisely deciding to enter a plea of guilty. The modest *Hopper* advisement would be a valuable step in addressing these, and other, real-life consequences. I do not disagree that a *Hopper* advisement is not necessarily required by the Sixth Amendment or by the Indiana Constitution. Nor do I advocate that the lack of an advisement would automatically result in reversal of a defendant’s conviction. But the advantages of giving such an advisement, especially at the initial hearing stage of the proceedings, far outweigh any disadvantages of doing so.<sup>279</sup>

Two Kentucky cases regarding defenses are worth noting.<sup>280</sup> First, in *Depp v. Commonwealth*, the majority found the *Faretta* warnings given to

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279. *Id.* (footnotes omitted) (citations omitted) (quoting *Hopper*, 934 N.E.2d 1086, 1088 (Ind. 2000)) (quoting William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 830 (1989)).

280. *See Depp v. Commonwealth*, 278 S.W.3d 615 (Ky. 2009); *Hill v. Commonwealth*, 125 S.W.3d 221 (Ky. 2004).

the defendant were adequate because the trial judge had “implicitly” found the defendant’s waiver of counsel to be knowingly, intelligently, and voluntarily given, without having made an explicit finding to that effect.<sup>281</sup> The court adopted the pragmatic approach, rejecting a “rigid, formulaic” approach to the waiver colloquy issue.<sup>282</sup> It modified its previous decision in *Hill v. Commonwealth*,<sup>283</sup> which the *Depp* court characterized as having announced “a bright-line approach.”<sup>284</sup>

This Court, in *Hill*, reiterated the *Faretta* holding that an accused was entitled to self-representation, or in that instance, co-representation. More specifically, however, the Court commented that this right was accompanied by the right to be informed by the trial court of the dangers inherent in doing so. The Court determined that the trial court must hold a hearing at which the defendant must testify that his choice is voluntary, knowing and intelligent; the trial court must warn the defendant of the dangers of relinquishing the benefits of an attorney; and the trial court must make a finding on the record that the waiver is voluntary, knowing and intelligent.<sup>285</sup>

One is hard-pressed to understand how the foregoing advisement would be viewed by the majority in *Depp* as a rigid requirement.<sup>286</sup> Acknowledging that the Court in *Tovar* invited states to establish advisement criteria more detailed than required under the Sixth Amendment, the majority cryptically wrote: “if we do so, it should be meaningful.”<sup>287</sup> The court then rejected the appellant’s contention that his waiver advisement rights, as announced in *Hill*, were more expansive than under the Sixth Amendment.<sup>288</sup>

In his dissent, Chief Justice Minton argued that “the colloquy

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281. *Depp*, 278 S.W.3d at 619.

282. *Id.* at 618–19.

283. *Hill*, 125 S.W.3d at 228 (finding structural error in a trial court’s failure to conduct *Faretta* hearing warnings when defendant invoked his right to hybrid representation).

284. *Depp*, 278 S.W.3d at 618.

285. *Id.*

286. *Id.* at 618, 619.

287. *Id.* at 619 (“To reverse simply because the trial court did not specifically state that the waiver was ‘voluntary, knowing and intelligent’ does nothing to ensure that the defendant had the opportunity to make such a waiver. Only the *record* can do that.”).

288. *See id.*

between the trial court and [the defendant] did not contain a thorough warning by the trial court of the benefits [the defendant] would relinquish if he persisted in his desire to proceed without an attorney.”<sup>289</sup> In so doing, he cited language from *Corpus Juris Secundum*, which contains “many of the typical facets of a proper colloquy”.<sup>290</sup>

The court should generally hold a discussion with the accused. In accordance with the rules concerning what the accused must know in order to make a valid waiver, the court generally should expressly advise the accused of the disadvantages or dangers of self-representation, the fact that the accused must follow technical rules and rules of criminal procedure and evidence, the nature of the charges and possible penalties, *defenses* or mitigating factors, the right to counsel, and the right to self-representation.<sup>291</sup>

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289. *Id.* at 623 (Minton, C.J., dissenting).

290. *Id.* at 624.

291. *Id.* at 624 n.9 (emphasis added) (quoting 22 C.J.S. *Criminal Law* § 377 (2008)) (internal quotation marks omitted). The dissent also quoted the remainder of the section:

The court should advise the accused of the technical problems the accused may encounter in acting as his or her own counsel and risks he or she takes if the defense is unsuccessful, that the lack of knowledge of the law may impair the accused’s ability to defend himself or herself, and that his or her dual role as attorney and accused might hamper effectiveness of his or her defense, and of the difficulties in acting as his or her own counsel. The defendant should be advised that, *in addition to defenses*, the defendant has rights that, if not timely asserted, may be lost permanently, and that if errors occur and are not timely objected to, objection to these errors may be lost permanently. When a defendant seeks to represent himself, the district court should inquire of the defendant about the complexity of the case to ensure that the defendant understands his or her decision and, in particular, the difficulties he or she will face proceeding in proper person. Accordingly, if a defendant willingly waives counsel and chooses self-representation with an understanding of its dangers, including the difficulties presented by a complex case, he or she has the right to do so. In addition, before allowing the criminal defendant to waive right to counsel, the court should specifically advise the defendant that it would be unwise not to accept assistance of counsel.

*Id.* (emphasis added) (footnotes omitted) (citations omitted) (quoting 22 C.J.S. *Criminal Law* § 377). Chief Justice Minton’s footnote also references a Sixth Circuit case “setting forth in an appendix a guideline for federal trial judges to follow in situations where a defendant expresses a desire for self-representation.” *Id.* (citing *United States v. McDowell*, 814 F.2d 245, 251–52 (6th Cir. 1987)).



Two years after *Depp*, the Kentucky Supreme Court decided *Commonwealth v. Harwell*, another case involving the alleged failure of a trial judge to conduct a proper *Faretta* waiver inquiry.<sup>292</sup> In *Harwell*, after reiterating the principle announced in *Tovar* (trial courts are not required “to adhere to a formula or script when conducting a *Faretta* hearing”), the court went on to not only cite *Von Moltke*, but to quote that decision’s language, holding that a valid waiver of counsel was one that was made “with an apprehension of” the defendant’s “possible defenses.”<sup>293</sup> It did so without referencing state law as the basis of its ruling.<sup>294</sup>

In an opinion reviewing two consolidated pro se cases, the Maine Supreme Court in *State v. Watson* first described the law of pro se advisements from other jurisdictions, which included the admonition that “it is risky for persons untrained in the law to represent themselves because, unlike lawyers, they are not trained to identify possible defenses, follow the rules of procedure and the rules of evidence, or conduct a trial.”<sup>295</sup> The court found that the defendant knowingly, intelligently, and voluntarily waived his right to counsel.<sup>296</sup> In the companion case of *State v. Blumberg*, the court reversed the conviction, holding that the defendant “did not receive any warnings or information related to the inherent risks of proceeding to trial without counsel.”<sup>297</sup> The court noted that, “[f]ar from being mere formalisms, these communications assure that the right to representation by counsel retains its vitality as a cornerstone of our shared concept of justice.”<sup>298</sup> Like the other state high court cases described above, nothing in this opinion indicated any reliance upon state law.

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292. *Commonwealth v. Harwell*, No. 2009-SC-000333-MR, 2011 WL 1103112, at \*6–7 (Ky. Mar. 24, 2011).

293. *Id.* at \*7 (quoting *Von Moltke v. Gilles*, 332 U.S. 708, 724 (1948)) (internal quotation marks omitted).

294. *See id.* at \*6–7.

295. *State v. Watson*, 900 A.2d 702, 710–11 (Me. 2006).

296. *Id.* at 713–14. The finding was based upon the court’s application of the rule that “*Faretta*-related information to a defendant may be calibrated to the defendant’s individual circumstances,” which included his college degree, demonstrated understanding of his right to counsel at his court appearances, a lengthy discussion with the court and prosecutor regarding the pending charges, and persistence in his demand for self-representation after receiving a “detailed explanation from the trial court regarding the requirements of the trial process.” *Id.* However, the dissenters argued the warnings failed to include information about the “perils and pitfalls of self-representation.” *Id.* at 715 (Silver, J., dissenting).

297. *Id.* at 714 (majority opinion).

298. *Id.* at 715.

A number of intermediate appellate court decisions have also continued to require advisement or some discussion of possible defenses.<sup>299</sup> There are cases in which the right to advisement of defenses is required; however, it is considered harmless error if it is not given and the record discloses an otherwise valid waiver.<sup>300</sup> Others find that, while a statute or procedural rule requires the advisement of defenses, the holding in *Tovar* means that state courts no longer need to comply with the state rule.<sup>301</sup>

This review of post-*Tovar* state court decisions reveals that no state high court has expressly taken up the Supreme Court's invitation to interpret its own law on waiver of counsel more broadly than the Court did in interpreting the Sixth Amendment. Moreover, while a handful of state courts give lip service to and quote the *Von Moltke* language requiring advisement of possible defenses, they fail to go so far as to make

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299. See, e.g., *State v. Garibaldi*, 726 N.W.2d 823, 827 (Minn. Ct. App. 2007) (finding a colloquy inadequate when it failed to include advisement "that there may be defenses, that there may be mitigating circumstances" (quoting MINN. R. CRIM. P. 5.02, subd. 1(4)) (internal quotation marks omitted)); *State v. Vaughn*, No. 04-04-1749, 2007 WL 414221, at \*8 (N.J. Super. Ct. App. Div. Feb. 8, 2007) (noting trial court erred by failing to advise defendant of possible defenses). But see *State v. Schwandt*, No. 2011AP2301-CR, 2012 WL 1698487, at \*4 (Wis. Ct. App. May 16, 2012). In *Schwandt*, the court held that advisement as to dangers and disadvantages of proceeding pro se "does not mean that the circuit court accepting the waiver must brainstorm from the bench and advise the defendant of any imaginable defense." *Id.* The court added: "[T]he law does not require that a defendant understand every possible type of defense. Rather, the defendant must understand the role counsel could play in the proceeding." *Id.* (citing *Pickens v. State*, 292 N.W.2d 601 (Wis. 1980), *overruled by*, *State v. Klessig*, 564 N.W.2d 716 (Wis. 1997)).

300. See, e.g., *State v. Glass*, No. 10AP-558, 2011 WL 6147023, at \*9 (Ohio Ct. App. Dec. 8, 2011) (finding a waiver inadequate because it failed to include an inquiry regarding defendant's understanding of potential defenses, but it was not reversible error because the record as a whole showed the defendant was "extensively involved" in his own defense of selective prosecution); *State v. Banks*, No. 09-CA-57, 2010 WL 2521201, at \*2 (Ohio Ct. App. June 22, 2010) (finding waiver inadequate because the inquiry failed to include discussion of possible defenses; therefore, the trial court "did not meet the minimum standard" for accepting a valid waiver).

301. See, e.g., *State v. Deaver*, No. 2008AP2223-CR, 2009 WL 3189353, \*5-6 (Wis. Ct. App. Oct. 7, 2009) (citing a Wisconsin procedure regarding advisements which contains the admonition that "[a] lawyer may find that you have a defense to the charge or that there are facts which may result in a lighter penalty," but noting that "the court's concern about its responsibility to advise a defendant about specific defenses has been put to rest by the United States Supreme Court," in *Tovar* (quoting WIS JI-CRIMINAL SM-30) (internal quotation marks omitted) (citing *Iowa v. Tovar*, 541 U.S. 77, 124 (2004))).

advisement an actual requirement under state law.

#### *D. State Court Rules*

Surprisingly, few state procedural rules or statutes exist to guide judges in conducting a waiver of counsel or a *Faretta* hearing. Some states only require a specific colloquy for acceptance of guilty pleas, but not for *Faretta* inquiries.<sup>302</sup> Presumably, judges in states without a specific waiver of

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302. See, e.g., S.D. CODIFIED LAWS § 23A-7-4 (2004 & Supp. 2012). Montana has one of the most detailed colloquy required by court rule for guilty pleas:

(1) Before accepting a plea of guilty or nolo contendere, the court shall determine that the defendant understands the following:

(a)(i) the nature of the charge for which the plea is offered; (ii) the mandatory minimum penalty provided by law, if any; (iii) the maximum penalty provided by law, including the effect of any penalty enhancement provision or special parole restriction; and (iv) when applicable, the requirement that the court may also order the defendant to make restitution of the costs and assessments provided by law;

(b) if the defendant is not represented by an attorney, the fact that the defendant has the right to be represented by an attorney at every stage of the proceeding and that, if necessary, an attorney will be assigned pursuant to the Montana Public Defender Act, Title 47, chapter 1, to represent the defendant;

(c) that the defendant has the right: (i) to plead not guilty or to persist in that plea if it has already been made; (ii) to be tried by a jury and at the trial has the right to the assistance of counsel; (iii) to confront and cross-examine witnesses against the defendant; and (iv) not to be compelled to reveal personally incriminating information;

(d) that if the defendant pleads guilty or nolo contendere in fulfillment of a plea agreement, the court is not required to accept the terms of the agreement and that the defendant may not be entitled to withdraw the plea if the agreement is not accepted . . . ;

(e) that if the defendant's plea of guilty or nolo contendere is accepted by the courts, there will not be a further trial of any kind, so that by pleading guilty or nolo contendere the defendant waives the right to a trial; and

(f) that if the defendant is not a United States citizen, a guilty or nolo contendere plea might result in deportation from or exclusion from admission to the United States or denial of naturalization under federal law.

(2) The requirements of subsection (1) may be accomplished by the defendant filing a written acknowledgment of the information contained in subsection (1).

counsel colloquy rule are guided by decisional law<sup>303</sup> or judicial benchbooks.<sup>304</sup>

Court rules or statutes that address the issue of waiver of counsel simply state: “Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided . . . . In addition, in serious offense cases the waiver shall be in writing.”<sup>305</sup>

If there is a rule on the subject, it typically contains standard form language about the court’s obligation to ensure a defendant waiving counsel has done so knowingly, intelligently and voluntarily, without requiring any specific colloquy with the defendant.<sup>306</sup> Some state rules do not use that language, preferring other words that have the same effect.<sup>307</sup> New York judges are advised that:

If the defendant desires to proceed without the aid of counsel, the court must permit him to do so if it is satisfied that he made such decision with knowledge of the significance thereof, but if it is not so satisfied it may not proceed until the defendant is provided with counsel, either of his own choosing or by assignment.<sup>308</sup>

North Carolina judges are required by statute to inform the defendant that “he has important legal rights which may be waived unless asserted in a timely and proper manner and that counsel may be of

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MONT. CODE ANN. § 46-12-210 (2011).

303. *See supra* Part II.B.

304. *See supra* Part IV.B.

305. OHIO R. CRIM. P. 44(C).

306. *See, e.g.*, S.C. CODE ANN. § 17-3-10 (2003 & Supp. 2012) (stating that counsel must be appointed “unless such person voluntarily and intelligently waives his right thereto”); ARIZ. R. CRIM. P. 17.3.

307. *See, e.g.*, CAL. PENAL CODE § 1018 (West 2008 & Supp. 2013) (“No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted . . . unless the court shall find that the defendant understands the right to counsel and freely waives it, and then only if the defendant has expressly stated in open court, to the court, that he or she does not wish to be represented by counsel.”); N.M. STAT. ANN. § 31-15-12(E) (1978 & Supp. 2000) (“Any person entitled to representation by the district public defender may intelligently waive his right to representation. The waiver may be for all or any part of the proceedings. The waiver shall be in writing and countersigned by the district public defender.”).

308. N.Y. CRIM. PROC. LAW § 180.10(5) (McKinney 2007 & Supp. 2013).

assistance to the defendant in advising him and acting on his behalf.”<sup>309</sup> They are also provided with guidelines for a *Faretta* hearing:

A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

- (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
- (2) Understands and appreciates the consequences of this decision; and
- (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.<sup>310</sup>

With respect to charges and advisement of defenses, there are some states, like Texas, that require a pro se defendant entering a guilty plea to be advised of “the nature of the charges”; for those demanding trial, they are to be advised of “the dangers and disadvantages of self-representation” without further elaboration.<sup>311</sup> Some states go beyond a requirement to advise the defendant of the charges against him or her.<sup>312</sup> In addition to the “nature of the charges,” they also require judges to ensure the defendant has an understanding of “the elements of the offense.”<sup>313</sup>

The Florida rule is more detailed than most; the defendant is not considered to have waived counsel:

[U]ntil the entire process of offering counsel has been completed and a thorough inquiry has been made into both the accused’s comprehension of that offer, and the accused’s capacity to make a knowing and intelligent waiver. Before determining whether the waiver is knowing and intelligent, the court shall advise the defendant of the disadvantages and dangers of self-representation.<sup>314</sup>

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309. N.C. GEN. STAT. § 15A-603(b) (2011).

310. *Id.* § 15A-1242.

311. TEX. CODE CRIM. P. ANN. art. 1.051(g) (West 2005 & Supp. 2012).

312. *See, e.g.*, COLO. REV. STAT. § 16-7-207 (2012).

313. *Id.* § 16-7-207(1)(g), (2)(a).

314. FLA. R. CRIM. P. 3.111(d)(2). The next paragraph of the rule states:

Regardless of the defendant’s legal skills or the complexity of the case, the

Delaware requires judges to advise defendants waiving counsel of the “dangers and disadvantages of acting pro se” and the court must find “the defendant competent” to make such a waiver.<sup>315</sup> Michigan judges are required to stress the challenges of going up against the prosecutor and the lack of assistance that will be forthcoming from the court or court staff, as well as the requirement that all rules be followed.<sup>316</sup> Connecticut defendants are “clearly advised of the right to assistance of counsel”; they must possess “the intelligence and capacity to appreciate the consequences of the decision to represent oneself”; they must “[c]omprehend[] the nature of the charges and proceedings, the range of permissible punishments, and any additional facts essential to a broad understanding of the case”; and they must be made “aware of the dangers and disadvantages of self-representation.”<sup>317</sup>

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court shall not deny a defendant’s unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by himself or herself.

*Id.* at R. 3.111(d)(3).

315. DEL. SUPER. CT. R. CRIM. P. 44(a).

316. MICH. JUDICIAL INST. MICHIGAN CIRCUIT COURT BENCHBOOK: CRIMINAL PROCEEDINGS—REVISED EDITION Appx-5 (2013), *available at* <http://courts.mi.gov/education/mji/Publications/Documents/Circuit-Court-Criminal.pdf>. Judges are to:

Elaborate on risks of self-representation:

(1) Elements of offense.

(2) Rules of procedure.

(3) Rules of evidence.

....

(7) He or she will receive no special treatment and can receive no help from the judge.

(8)The prosecutor is an experienced trial lawyer who is unlikely to give the defendant any special consideration.

(9) He or she will receive no special help from the court staff and will be expected to follow the same requirements that apply to practicing lawyers.

*Id.*

317. CONN. SUPER. CT. P. IN CRIM. MATTERS § 44-3.

Thus, court rules provide judges with minimal guidance for conducting waiver of counsel inquiries. Research discloses that only one state, Minnesota, requires judges to say anything about defenses.<sup>318</sup> There, the state criminal procedure rule 5.04 requires judges to advise pro se defendants intending to plead guilty of the following:

Before accepting the waiver, the court must advise the defendant of the following:

- (a) nature of the charges;
- (b) all offenses included within the charges;
- (c) range of allowable punishments;
- (d) *there may be defenses*;
- (e) mitigating circumstances may exist; and
- (f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.<sup>319</sup>

#### *E. State Court Judges' Benchbooks*

In addition to the guidance provided by court rules, judges in most states have a benchbook they can consult regarding the content of waiver colloquies.<sup>320</sup> These, like court rules, rarely say anything about advisement

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318. See MINN. R. CRIM. P. 5.04(4).

319. *Id.* (emphasis added).

320. See, e.g., ARK. JUDICIARY, CIRCUIT JUDGES BENCHBOOK—CIVIL AND CRIMINAL, V-1 to V-3 (2011), available at [https://courts.arkansas.gov/sites/default/files/Arkansas\\_Circuit\\_Judges\\_Benchbook\\_for\\_Criminal\\_and\\_Civil\\_Divisions2011.pdf](https://courts.arkansas.gov/sites/default/files/Arkansas_Circuit_Judges_Benchbook_for_Criminal_and_Civil_Divisions2011.pdf); MICH. JUDICIAL INST., *supra* note 316, § 2.5, 2-31 to 2-36; MONT. DIST. CT., DISTRICT COURT JUDGES' BENCH BOOK—CRIMINAL 43-44 (2010), available at <http://courts.mt.gov/content/dcourt/docs/benchbook.pdf>; S.C. JUDICIAL DEP'T, SOUTH CAROLINA BENCH BOOK FOR MAGISTRATES AND MUNICIPAL COURT JUDGES—CRIMINAL § G(5), available at <http://www.judicial.state.sc.us/summaryCourtBenchBook/PDF/Criminal.pdf>.

of possible defenses.

Some of these benchbooks merely direct the judge to citations of relevant cases, without enumerating any rules or principles themselves.<sup>321</sup> Montana provides a “Checklist for Refusal of Legal Counsel,” which suggests judges include in their colloquy a discussion regarding the “[i]nherent disadvantages” of waiving counsel such as: the defendant’s “judgment may be clouded”; the fact that “criminal procedure code and case law apply”; the fact that “rules of evidence apply [including] local and uniform court rules”; and finally, that the “same rules apply to non-lawyers and lawyers.”<sup>322</sup>

The South Carolina judges’ benchbook goes further than most in the scope of its required colloquy.<sup>323</sup> The benchbook provides that a pro se defendant must be:

[G]iven ample opportunity to be fully heard. This is, of course, one of the fundamental safeguards in a criminal trial and is deeply rooted in Anglo-American tradition as well as in Article I, Section 14, of the S.C. Constitution. . . . [The defendant may] make whatever other reasonable presentations that he considers necessary to his defense. . . . [If] the defendant is unable to handle his defense in an expeditious manner, it is only fair and proper that the magistrate or municipal judge guide him by at least telling him what he might do on his own behalf. For example, after a law enforcement officer has completed testimony on behalf of the State, the magistrate or municipal judge might suggest to an unrepresented defendant that he may cross-examine the officer on matters concerning the alleged offense to which the officer has testified.<sup>324</sup>

Beyond these references, no other benchbooks are available on the

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321. See, e.g., ARK. JUDICIARY, *supra* note 320, at V-1 to V-3; MICH. JUDICIAL INST., *supra* note 316, § 2.4(A)(1), 2-22 to 2-24. The latter also contains useful “Checklists and Scripts” in an appendix. *Id.* at Appx-5.

322. MONT. DIST. CT., *supra* note 320, at 43. The judge is also to determine if the defendant’s waiver of counsel “is knowing, intelligent and unequivocal.” *Id.*

323. See S.C. JUDICIAL DEP’T, *supra* note 320, § G(5).

324. *Id.* The benchbook further suggests that the judge inform the defendant of his right to call witnesses, have compulsory process, to introduce evidence, and to make a closing argument. While a defendant makes a closing argument, the “judge should be reasonably patient while the defendant attempts to explain himself, and should stop the defendant only when the monologue wanders into the realm of irrelevance or repetition.” *Id.*



Internet for review. These, too, like every state court rule (with the exception of Minnesota) make no reference to advisement of defenses.<sup>325</sup>

## V. THE RIGHT TO ADVISEMENT OF AVAILABLE DEFENSES UNDER THE PRINCIPLE OF LEGALITY

### A. Values Underlying the Principle of Legality

The fact that the Court in *Tovar* refused to recognize a Sixth Amendment right of a pro se defendant to be advised that one of the benefits of counsel is to be informed of possible defenses does not necessarily mean that there cannot be recognition of such a right on other grounds.<sup>326</sup> No one would disagree that the most important form of legal assistance in a criminal case is the preparation of a defense, if any is available. Therefore, at minimum, pro se defendants should be advised of legally recognized defenses available to them as they are informed of the charges against them. Fairness dictates that this should be recognized as a matter of right for those without counsel.

One does not need to search far for a theoretical basis for a pro se defendant's right to advisement by the court of available defenses. Of all the plausible grounds, the criminal law principle of legality appears the most obviously relevant. The principle of legality, as numerous commentators have noted, is really not one principle; rather, it is a constellation of rules that have been deemed to be so significant and fundamental that they have been followed by courts operating in different legal and social systems, and at different times in history.<sup>327</sup>

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325. See MINN. R. CRIM. P. 5.04(4); *supra* Part IV.D.

326. See *Iowa v. Tovar*, 541 U.S. 77, 93 (2004).

327. The most comprehensive source on the subject is Kenneth S. Gallant. See KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* (2009). A reviewer commented that the book "is a very welcome one and surely one of the better analyses, if not the best, of the principle of legality." William T. Worster, *On the Purposes of Legality and Its Application to International Law*, 9 J. INT'L CRIM. JUST. 973, 973 (2011) (reviewing GALLANT, *supra*). At the outset of his book, Professor Gallant refers to H.L.A. Hart's distinction between first- and second-order rules (i.e., primary rules of conduct and secondary rules of recognition and adjudication). GALLANT, *supra*, at 7. A law against robbery is a first-order rule, and the rule against retroactively applying criminal law is a second-order rule. *Id.* Gallant uses the term "principles" to

apply to normative concepts or statements that may or may not have hardened into rules of law. They may or may not be reflected in the legal systems of

The term legality has a “deep connection” with the rule of law.<sup>328</sup> It is “one manifestation of the more general notion of the rule of law in society. The principle of advance notice and prospective application of crimes and punishments might fairly be considered the minimum requirement for the rule of law.”<sup>329</sup> Prospectivity is the most important of all values subsumed within the notion of the rule of law because the criminal law is the application of the highest legal sanctions, sometimes including deprivation of life, liberty, and property; therefore, “the need for fairness of both substantive and procedural rules is at its greatest here.”<sup>330</sup>

The multiple rules making up the principle of legality are, with some variation, common to most adversarial and inquisitorial legal systems.<sup>331</sup>

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particular states. A principle may articulate a norm or other idea distilled from examination of specific rules of law or may state a formulation of an idea that is normatively preferred by the speaker. . . . [W]hat matters is that a principle may be instantiated in various different legal systems by differently articulated rules.

*Id.*

328. *Id.* at 15. For a thorough and comprehensive discussion of the rule of law from a British perspective, see TOM BINGHAM, *THE RULE OF LAW* (2010).

329. GALLANT, *supra* note 327, at 15 (footnote omitted).

330. *Id.* at 16–17.

331. These are:

1. No act that was not criminal under a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act may be punished as a crime.
2. No act may be punished by a penalty that was not authorized by a law applicable to the actor (pursuant to a previously promulgated statute) at the time of the act.
3. No act may be punished by a court whose jurisdiction was not established at the time of the act.
4. No act may be punished on the basis of lesser or different evidence from that which could have been used at the time of the act.
5. No act may be punished except by a law that is sufficiently clear to provide notice that the act was prohibited at the time it was committed.
6. Interpretation and application of the law should be done on the basis of consistent principles.
7. Punishment is personal to the wrongdoer. Collective punishments may not be imposed for individual crime.

The most commonly known articulations of two of these rules are *nulla crimen sine legal* (nothing is a crime except as provided by law) and *nulla poena sine legal* (no punishment may be imposed except under previously existing law).<sup>332</sup> These rules are embodied in U.S. constitutional law in the prohibition against ex post facto legislation,<sup>333</sup> as well as in numerous

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8. Everything not prohibited by law is permitted.

*Id.* at 11–12 (footnotes omitted).

These rules, despite the Latinism of *nulla crimen* and *nulla poena*, were “alien to ancient law and were introduced as rational exigencies in antithesis to systems which had left the imposition of punishments to the arbitrary discretion of those in power.” GIORGIO DEL VECCHIO, *GENERAL PRINCIPLES OF LAW* 50 (Felix Forte trans., Fred B. Rothman & Co. 1986) (1956) (footnote omitted). The proposal made in this Article is an antithesis to the current state of affairs in which a pro se defendant is granted information regarding the law that is alleged to be violated but not the defenses that the court will permit him or her to raise in response. *See generally supra* Parts II–IV. Not cited in any previous history of the subject is the fact that the *nulla poena* principle is also found in early Jewish Law. *See* BABYLONIAN TALMUD, BOOK 8: TRACT SANHEDRIN 168 (Michael L. Rodkinson trans., 1918), *available at* <http://www.sacred-texts.com/jud/t08/t0810.htm> (“And as there is no punishment without preceding warning . . . .”) (The Author is indebted to Adi Leibovitch, J.S.D. Cand., Univ. of Chicago, for this reference). The rules against prosecution for crimes not established by law, prohibiting punishment other than for written law violations, the rule requiring strict interpretation of criminal laws, and the prohibition upon retrospective application of criminal law, were unknown at common law and not recognized in England as of 1946. GEORGE WHITECROSS PATON, *A TEXT-BOOK OF JURISPRUDENCE* § 99, at 372 (1946). Nor was it (the prohibition against crimes by analogy) followed in Russian law or in Nazi Germany. *Id.* at 372–73. Despite its absence in the laws of some countries, *nulla poena* was adopted after the French revolution to address judges’ almost limitless powers; it has become “an important democratic principle which must always be safeguarded as a protection against tyranny.” MAURICE PARMELEE, *THE PRINCIPLES OF ANTHROPOLOGY AND SOCIOLOGY IN THEIR RELATIONS TO CRIMINAL PROCEDURE* 184–86 (1912). An excellent summary of the history of the principle of legality can be found in Claus Kreß, *Nulla Poena Nullum Crimen Sine Lege*, in 7 *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 890–99 (2010). This summary traces the idea of limiting executive power to the Charter of Liberties of Henry I (1100) and the Magna Carta, but the notion of limiting judicial power had its origins in the enlightenment era and social contract theory as developed by Montesquieu, Beccaria, and Fuererbach (who coined the expression *nulla crimen, nulla poena sine lege*). *See id.*; Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (“[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” (footnote omitted)).

332. GALLANT, *supra* note 327, at 12.

333. U.S. CONST. art. I, §§ 9–10. The prohibition of Bills of Attainder (crimes based not on personal conduct, but on collective punishment based on membership in particular group) is also among the rules comprising the principle of legality. *See*

international conventions.<sup>334</sup> General principles of American law also include the requirements of *lex certa* (laws must be clear and certain), and *lex stricta* (laws must be narrowly construed).<sup>335</sup> The Supreme Court has recognized the *nulla poena* and *nulla crimen* principles in its interpretation of the Ex Post Facto Clause and the Due Process Clause of the Fourteenth Amendment, although it and other courts have consolidated both into the *nulla poena sine lege* expression.<sup>336</sup>

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GALLANT, *supra* note 327, at 13. The Court's *Calder v. Bull* opinion identified four categories of ex post facto claims: (1) any law which criminalizes an act after the fact, and which punishes such act; (2) any law that aggravates a crime, or makes it greater than it was at the time it was committed; (3) any law that changes the punishment, thus inflicting a greater punishment for such act than existed at the time the crime was committed; and (4) any law that alters rules of evidence, thus accepting less or different testimony than required by the law in effect at the time of the act, in order to convict the defendant. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). For examples of recent applications of the Ex Post Facto Clause, see *Vartelas v. Holder*, 132 S. Ct. 1479, 1487 (2012) (holding an immigration provision not applicable retroactively), and *Setser v. United States*, 132 S. Ct. 1463, 1471–72, 1473 (2012) (permitting a federal sentence to be consecutive to a state sentence that has not yet been imposed).

334. *See* GALLANT, *supra* note 327, at 158, 175, 202–11; Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 733, 733–66 (Antonio Cassese et al. eds., 2002).

335. *See* GALLANT, *supra* note 327, at 13. This rule prevents judicial expansion of the scope of a statute in case of vagueness or ambiguity, and prohibits the use of crimes by analogy. *See id.* The Supreme Court referred to it as the doctrine of *strictissimi juris*, or “of the strictest right,” in two cases. *Noto v. United States*, 367 U.S. 290, 299–300 (1961); *Scales v. United States*, 367 U.S. 203, 232 (1961). The Court applied the doctrine to prevent the expansion of the scope of the statute where it might unfairly impute criminal intent to persons who are members of organizations, but who do not share its illegal purposes and conduct. *See Noto*, 367 U.S. at 299–300. “The rule of lenity . . . dovetails with the common law maxim of *nulla poena sine lege* (there can be no punishment without law).” *United States v. H.*, No. 01CR0457(JBW), 2001 WL 1646465, at \*7 (E.D.N.Y. Dec. 17, 2001) (citing *Rogers v. Tennessee*, 121 S. Ct. 1693 (2001) (Scalia, J., dissenting)); *see also* *United States v. Batchelder*, 442 U.S. 114, 121 (1979) (“[A]mbiguities in criminal statutes must be resolved in favor of lenity.” (citations omitted)); 3 NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 59:4 (7th ed. 2012) (stating the rule of lenity “developed because of a concern for individual liberty and a belief that one should not be punished by loss of liberty unless the law has provided a fair warning of what conduct is considered criminal” (footnote omitted)).

336. Court discussions on the subject arise from cases involving claims of retroactive application of harsher penalties than those established at the time of the crime, or claims that statutes are vague or ambiguous. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute

The principle of legality can be applied several ways as the basis of a right to advisement of available defenses. The first is on the basis that the primary, bedrock value of fairness in the adjudicative process can and should be extended from its current focus on the criminal prosecution<sup>337</sup> to the stage of the proceedings when a defendant presents his or her own defense. The traditional interpretation of *nulla crimen sine lege* and *nulla poena sine lege* is there cannot be a crime or a punishment “without law,” not “without a law.”<sup>338</sup> The distinction is an important one because it shows that law must be in existence at the time of an alleged offense.<sup>339</sup> This includes a specific criminal law and a specific penalty therefor, but also the law governing procedure, evidence, and defenses—all of which promote

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define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.” (citations omitted)); *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972) (“Vague laws may trap the innocent by not providing fair warning.” (footnote omitted)); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (“Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.” (alteration in original) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)) (internal quotation marks omitted)); *Ladner v. United States*, 358 U.S. 169, 178 (1958) (“[T]he Court will not interpret a federal criminal statute so as to increase a penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended.”); *United States v. Bodiford*, 753 F.2d 380, 382 (5th Cir. 1985) (“*Nulla poena sine lege* is not only an ancient maxim, it is a requisite of due process.” (footnote omitted)); *Beharry v. Reno*, 183 F. Supp. 2d 584, 590 (E.D.N.Y. 2002), *rev’d on other grounds*, *Beharry v. Ashcroft*, 329 F.3d 51 (2d Cir. 2003) (finding *nulla poena* “is central to our legal system”); *United States v. Walker*, 514 F. Supp. 294, 316 & n.20 (E.D. La. 1981) (stating *nulla poena* is “at the heart of the ‘rule of law’ characteristic of Anglo-American jurisprudence” (citations omitted)). In *Rogers v. Tennessee*, the Court held that, unlike judicial review of retroactive legislation under the broader Ex Post Facto Clause, review of a court’s application of a criminal law to a particular defendant “rest[s] on core due process concepts of notice, foreseeability, and in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct.” *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (citing *Bouie v. City of Columbia*, 378 U.S. 347, 351, 352, 354–55 (1964)). So too, should the due process concepts of notice, foreseeability, and the right to fair warning apply to the defense process, not just to criminal legislation and the penalty for violating it.

337. See generally *supra* Parts II–IV (describing the historical and current practice of state and federal courts).

338. GALLANT, *supra* note 327, at 12 (reiterating that under the principle of legality “nothing is a crime except as provided by law, and no punishment may be imposed except as provided by law”).

339. *Id.* at 12–13.

trial fairness for the defendant and the appearance of fairness to trial observers.<sup>340</sup>

Another way the principle of legality can form the basis of the right to advisement of available defenses is to extend rules that prohibit the application of vague and ambiguous *substantive* criminal laws to *procedural* criminal laws. It is not only the criminal laws defining crimes that may be vague or ambiguous; procedural and evidentiary rules and laws may be as well, not to mention being far more complex than criminal laws themselves. Pro se defendants, who the Supreme Court has held are not entitled to legal instruction by the trial judge,<sup>341</sup> face as much, if not greater, vagueness and ambiguity in laws of procedure or evidence. This includes statutory definitions (or case law) establishing legally recognized defenses. Criminal defenses, rules of procedure, and rules of evidence are all fraught with complexity.<sup>342</sup> Therefore, why should the benefits of the principle of legality be limited to substantive law?

The values underlying application of the principle of legality to criminal law also justify application of the principle of legality to procedural law, and in particular, available defenses. Those values—all of which are interconnected and fall generally under the concept of fairness—include notice, foreseeability, the right to a fair warning, an adequate opportunity to prepare, and a full and fair hearing.<sup>343</sup> Running through the latter values is the “principle of advance notice,” which, along with prospective application of crimes and punishments, “might fairly be considered the minimum requirement for the rule of law.”<sup>344</sup>

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340. See, e.g., *Blair v. Harris*, 45 P.3d 798, 809 (Haw. 2002) (Acoba, J., dissenting) (“[N]ot only is justice done, but it is publicly seen to be done.” (alteration in original) (quoting B. Schwartz & J.A. Thomson, *Inside the Supreme Court: A Sanctum Sanctorium*, 66 Miss. L.J. 177, 196 (1996)) (internal quotation marks omitted)); *Chrobuck v. Snohomish Cnty.*, 480 P.2d 489, 498 (Wash. 1971) (Finlay, J., concurring) (“[J]ustice not only must be done; justice must be seen to be done.”). The principle is well established at common law. See *Rex v. Sussex Justices*, (1924) 1 K.B. 256, 259 (Lord Hewart, C.J.) (finding that although no injustice occurred, the conviction was quashed because “it is not merely of some importance, but of fundamental importance, that justice should not only be done, but be manifestly and undoubtedly seen to be done”).

341. See *McKaskle v. Wiggins*, 465 U.S. 168, 183–84 (1984).

342. Such is a basis for the Supreme Court’s own holdings requiring counsel for criminal defendants. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963).

343. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001).

344. GALLANT, *supra* note 327, at 15.

Commentators and philosophers have even suggested that the principle of advance notice be extended beyond criminal law because it is such a fundamental part of fairness.<sup>345</sup>

Advance notice need not be limited to crimes and punishment, but should include notice of defenses. Such notice would require unrepresented defendants to have access to the law of defenses. “The law must also be accessible to those who are bound by it. Indeed, accessibility of law through publication is the chief feature of the principle of criminal law legality as implemented in almost all current societies.”<sup>346</sup> While this comment was made in reference to notice of, and accessibility to, criminal laws, it is also equally applicable to the pro se defendant’s need for advance notice and accessibility to information regarding available defenses. Thus, while the elements of the principle of legality have historically been considered necessary to limit the state’s power to prosecute, there is nothing to prevent an extension of the principle to the trial defense process.

#### B. Expanded Interpretation of the Principle of Legality

In recent scholarship, Professor Shahram Dana proposed that the principle of legality, or more specifically, the *nulla poena sine lege* rule, needs to be given a more expansive interpretation that more fully captures “its full contribution to justice, including equality before the law.”<sup>347</sup> He argues that there has been an “[u]nder-theorization of the *nulla poena*” concept, which has stalled its maturation in the context of international criminal law.<sup>348</sup> He argues:

[F]or an understanding of *nulla poena* in international law that goes beyond its simple caricature as a principle of negative rights, designed merely to prevent retroactive punishment, to one that captures its role as a *quality of justice* principle, aimed at realizing justice in the distribution of punishment. This understanding of *nulla poena* is more in tune with its role in national systems.<sup>349</sup>

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345. See *id.* at 15–16.

346. *Id.* at 20 (footnote omitted).

347. Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing*, 99 J. CRIM. L. & CRIMINOLOGY 857, 858 (2009).

348. *Id.* at 859.

349. *Id.* at 860.

Professor Dana presents a persuasive case for expansion of the principle of legality to the areas of justice and equal treatment in sentencing.<sup>350</sup> Central to his argument is the recent development of a “positive” justice attribute to *nulla poena*, evidenced by movements in many countries toward the reform of sentencing laws.<sup>351</sup> Specifically, he refers to a modern approach to the principle of legality which considers

*nulla poena*’s utility for not only limiting judicial authority, but also safeguarding it by preventing factors such as popular prejudice, political pressure, or immediate public opinion from influencing the sentence. It partly restrains these potential threats to justice in sentencing as well as the *appearance* of such an influence. Thus, in addition to safeguarding the rights of a defendant, *nulla poena* also protects the integrity of the criminal justice process.<sup>352</sup>

Professor Dana’s idea is not a novel approach to the interpretation of the principle of legality. In an early article on the subject, Professor Jerome Hall recognized the flexibility in interpretation of the *nulla poena* concept—a concept that “represents the most cherished of all values involved in the administration of the criminal law.”<sup>353</sup>

As to *nulla poena sine lege* in its reference to punishment, however, there has been very considerable departure from classical views. Indeterminate sentence, probation, suspended sentence, nominal sentence, waiver of felonies on pleas to misdemeanors, compromise, modified sentence, “good time” laws, parole, and pardon have almost completely transformed eighteenth century law and penological ideas.<sup>354</sup>

Professor Dana prefaces his argument with a recitation of the interests protected and purposes served by the *nulla crimen* and *nulla poena* concepts.<sup>355</sup> The first is protection of “one of the most treasured

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350. Professor Dana considers both *nulla crimen* and *nulla poena* “at the core of the principle of legality.” *Id.* at 859 (footnote omitted).

351. *Id.* at 864.

352. *Id.*

353. Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165, 165, 184 (1937).

354. *Id.* at 183 (footnote omitted); see also DEL VECCHIO, *supra* note 331, at 51–52 (noting that *nulla poena* “assumes a different and much more complicated significance, one which is not only negative and exclusive, but also plastic and constructive.” (footnote omitted)).

355. See Dana, *supra* note 347, at 861–64.



individual rights of all—the right to liberty”—by limiting unbridled or abusive state power.<sup>356</sup> These concepts also safeguard the principles of fair notice and foreseeability.<sup>357</sup>

These are the same values at stake in reference to the question of advisement of available defenses. Liberty, after all, is at stake. And fairness in its administration, such that justice is seen to be done, demands not only fair notice of what conduct is forbidden and what sanction will be imposed for engaging in it, but also which defenses are recognized for such conduct. It should be noted that it “seems beyond serious debate” that *nulla poena* is now considered a fundamental human right in most nations’ criminal justice systems.<sup>358</sup> The time is right for building on the momentum Professor Dana describes and recognizing that the principle of legality can and should be interpreted as a positive principle, which promotes both the quality and equality of justice<sup>359</sup> and should be extended to the pro se defense of criminal charges.<sup>360</sup>

Applying this expansion of the scope and application of *nulla poena* to a variety of new sentencing frameworks by analogy, other circumstances have arisen that necessitate the further expansion proposed here. High criminal court and public defender caseloads and reductions in public

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356. *Id.* at 861.

357. *Id.* at 862 (“Fairness and justice in the administration of criminal law demand that individuals know, or at least have the opportunity to know, the specific consequence of violating a particular law.”).

358. *Id.* at 867.

359. *See id.* at 857–66.

360. One possible objection to this part of the argument is that expansion of *nulla poena* to a variety of sentencing frameworks is perhaps not unexpected since they are all different forms of punishment. It must be remembered, however, that *nulla poena* is only one rule within the larger group of rules that make up the principle of legality. *See* GALLANT, *supra* note 327, at 12–13. The list has grown over time, and there is no one date when the concept found itself in the legal lexicons of the ancient and modern worlds. *See* Hall, *supra* note 353, at 165–70; *supra* note 347. As noted, circumstances now exist that induce greater self-representation by criminal defendants. *See supra* note 17. Now is the time for the states to meet this challenge through their courts—just as courts have done in the civil realm—and ensure the protection of the constitutional rights to self-representation and a fair and meaningful trial via advisement of legally recognized defenses. *See* JONA GOLDSCHMIDT ET AL., MEETING THE CHALLENGE OF PRO SE LITIGATION: A REPORT AND GUIDEBOOK FOR JUDGES AND COURT MANAGERS (1998) (reporting the progress in meeting the needs of pro se defendants in civil courts).

funding for indigent defense (and civil legal services)<sup>361</sup> are undoubtedly causal factors in rising claims by convicted defendants about the ineffectiveness of their counsel. Judging by the increasing number of appellate decisions addressing ineffectiveness of counsel claims,<sup>362</sup> further growth in pro se defense can be expected. These pro se defendants will need information, if not some form of assistance, to navigate the labyrinth of criminal trial rules and procedures. What was fair (and obligatory on courts) yesterday for the average defendant is, therefore, not necessarily what is fair today. *Nulla poena* has not and should not be considered a stagnant concept, one that had an “original meaning” from which we cannot diverge.<sup>363</sup>

Courts are already required to provide a laundry list of information to criminal defendants, represented or not, dealing with their constitutional and statutory rights, important procedures, and a variety of warnings and admonitions.<sup>364</sup> There are ways to include advisement of recognized defenses without it taking an inordinate amount of time or “cluttering up the . . . colloquy.”<sup>365</sup> This would be a positive application of the principle of legality and the rules of which it is comprised; one that not only promotes the values protected in all of its previous applications, but also improves the overall quality of justice in our legal system.

In many instances, the rules contained within the principle of legality serve to promote predictability in judging the legal consequences of certain conduct. Notice of what the state deems criminal behavior and to whom it would apply must be provided to the public:

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361. See, e.g., Amanda Terkel, *Liberty and Justice for Some: State Budget Cuts Imperil Americans' Access to Courts*, HUFFINGTON POST (Oct. 2, 2011), [http://www.huffingtonpost.com/2011/08/02/state-budget-cuts-access-courts\\_n\\_898190.html](http://www.huffingtonpost.com/2011/08/02/state-budget-cuts-access-courts_n_898190.html).

362. An online search of the Westlaw legal resource database, using the search terms (“effective! of counsel”) for the pre-1980 period, and the decades 1981–1990, 1991–2000, and 2001–2010 produced 2,510, 2,781, 3,776, and 7,732 cases, respectively, which address claims of ineffectiveness of defense counsel. See WESTLAW CLASSIC, <http://www.westlaw.com> (last visited Mar. 26, 2013) (accessible only by subscription).

363. See generally Dana, *supra* note 347, at 859, 861 (discussing the basis and importance of this concept).

364. See *supra* Parts II–IV (discussing the colloquys required by various federal and state courts for the waiver of counsel and self-representation).

365. Transcript of Oral Argument, *supra* note 16, at 10; Oral Argument, *supra* note 181, at 9:34.

The law must also be accessible to those who are bound by it. Indeed, accessibility of law through publication is the chief feature of the principle of criminal law legality as implemented in almost all current societies. . . . [L]egality acts as a procedural protection . . . . When the individual takes advantage of the procedure notice, he or she can avoid acting criminally. . . . [Legality] thus substantively protects life, liberty, and property, and provides the procedural protection of prior notice. Legality in criminal law is necessary to the historical conception of the rule of law that seeks to restrain tyranny that arises from the arbitrary application of coercive force.<sup>366</sup>

Next to notice of the charges against them, pro se defendants are most in need of information about available defenses. This is especially true for *malum prohibitum* offenses,<sup>367</sup> knowledge of which is not likely to be known because such laws are not part of general morality. Access to such information would require the competence to conduct continuous legal research to locate and stay abreast of decisional, statutory, or regulatory developments.

“Legality” in the principle of legality is not by definition or practice limited to matters of substance (i.e., the crimes themselves).<sup>368</sup> If it applies to the case of retroactive elimination of defenses,<sup>369</sup> it is critical that all defendants have easy access to knowledge of available defenses from the time of first appearance until the trial. In addition, while the law requires that substantive criminal laws be strictly construed,<sup>370</sup> that is not the rule with regard to criminal procedural law. If we consider defenses to be part of criminal procedure, then a contrary rule applies. Procedural provisions of the law “are liberally construed to protect the right to fair and impartial trial as a matter of due process of law.”<sup>371</sup> Liberal interpretation is given to rules governing speedy trials, statutes of limitation, and those granting

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366. GALLANT, *supra* note 327, at 20–21 (footnotes omitted).

367. See BLACK’S LAW DICTIONARY 1045 (9th ed. 2009) (including offenses such as jaywalking and running a stoplight).

368. GALLANT, *supra* note 327, at 375. “Logic and the language of the treaties and many national constitutions and laws suggest that the rule of non-retroactivity should apply to this sort of change of law.” *Id.* (footnote omitted); see also *Collins v. Youngblood*, 497 U.S. 37, 46 (1990) (stating that “simply labeling a law” as procedural will not remove it from scrutiny under the Ex Post Facto Clause).

369. See, e.g., *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

370. See *supra* note 347, and accompanying text.

371. SINGER & SINGER, *supra* note 335, § 59.9 (footnote omitted).

appellate rights.<sup>372</sup>

There is great justification for the common law principles creating safeguards in favor of an accused, and rigid application of the rules has created the necessity for the extensive reforms in criminal procedure. The provisions of these laws deserve reasonable and common sense construction to achieve their remedial objectives.<sup>373</sup>

Defense statutes themselves have remedial objectives, which happen to be the same as that of all other criminal procedure laws: to protect liberty and ensure a fair trial.<sup>374</sup> Thus, such statutes are also subject to liberal treatment, both in their notice to the public and their actual application in a case.<sup>375</sup> Not providing notice of those defenses—let alone adequate notice of their elements and meanings—to a pro se defendant is an illiberal application of these laws and runs counter to contemporary statutory construction principles.

### C. The Issue of Self-Effectiveness

In *Faretta v. California*, the Supreme Court gave constitutional protection to the right of self-representation by holding that it is guaranteed by the Sixth Amendment.<sup>376</sup> The amendment expressly guarantees the right to the assistance of counsel, but impliedly the right to self-representation as well.<sup>377</sup> The court reviewed the history of the right at common law and in colonial, state, and federal practice, and found it was “supported by centuries of consistent history.”<sup>378</sup> It held:

[I]t is not inconceivable that in some rare instances, the defendant

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372. *Id.*

373. *Id.* (footnote omitted).

374. *See id.*

375. *See, e.g.*, FED. R. CRIM. P. 11(b)(1) (requiring a detailed colloquy of a defendant’s rights).

376. *Faretta v. California*, 422 U.S. 806, 807, 834 (1975). Technically, the Court addressed the issue of whether unwanted counsel could be forced upon a defendant over his objection. *Id.* at 815. Prior decisions had recognized the right itself. *See Moore v. Michigan*, 355 U.S. 155, 161 (1957); *Carter v. Illinois*, 329 U.S. 173, 174–75 (1946); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942). *Faretta* noted also that the Sixth Amendment generally “constitutionalizes the right in an adversary criminal trial to make a defense as we know it.” *Faretta*, 422 U.S. at 818 (citing *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J., concurring)).

377. *Faretta*, 422 U.S. at 821.

378. *Id.* at 832.

might in fact present his case more effectively by conducting his own defense. Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage. And although he may conduct his own defense ultimately to his own detriment, his choice must be honored out of that respect for the individual which is the lifeblood of the law.<sup>379</sup>

The Court, however, did not hold that the right was absolute. In addition to noting that disruptiveness by a defendant could restrict the right to self-representation, the Court declared that a defendant who elects to proceed pro se would thereby give up his or her right to complain of a lack of effectiveness of counsel.<sup>380</sup> No further elaboration of this statement was made.

Thus, the question becomes: Why don't pro se defendants have a right to "effectiveness" in terms of their own representation; that is, a right to be self-effective? If defense counsel is less than effective and the lack of effectiveness results in an unfair trial, the defendant is entitled to a new trial.<sup>381</sup> This is only fair because it is not the defendant's fault that defense counsel was ineffective. Why should the pro se defendant not receive equal treatment? Can we conceive of circumstances when a pro se defendant is so unable, for whatever reason, to present a defense that he or she does not

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379. *Id.* at 834 (footnote omitted) (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)) (internal quotation marks omitted). The term "effective" was first used to describe counsel's responsibilities by Justice Sutherland's opinion in *Powell*. *Powell v. Alabama*, 287 U.S. 45, 71 (1932).

380. *See Faretta*, 422 U.S. at 835 n.46. As stated by the Court:

The right of self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of effective assistance of counsel.

*Id.* (internal quotation marks omitted).

381. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (establishing a two-prong test for claims of ineffective assistance of counsel, requiring showing that (1) counsel's performance was deficient, and (2) such performance was prejudicial to the defense); *United States v. Cronin*, 466 U.S. 648, 654–55 (1984) (finding competent counsel essential to a meaningful adversarial testing of the prosecution's case).

receive a fair trial? Of course we can; given the complexity of an adversarial system we have created that presumes parties are equally represented by trained advocates, many wonder why anyone would want to represent themselves.

Third party observers, if asked to comment on the fairness of legal proceedings, would in most cases find that pro se defendants are ill-equipped to represent themselves.<sup>382</sup> Coupled with the *McKaskle* admonition that pro se defendants are not entitled to instruction from the trial judge on the law,<sup>383</sup> these defendants really have nowhere to turn. They can roll the dice—do the best they can without knowing statutory or case law, rules of procedure and evidence, or courtroom practice—and hope for the best, or they can give up their constitutional right to self-representation and accept unwanted counsel. Unfair trials can reasonably be expected to result from the defendant's lack of "equality of arms"<sup>384</sup> and

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382. Michael J. Kelly, Note, *Making Faretta v. California Work Properly: Observations and Proposals for the Administration of Waiver of Counsel Inquiries*, 20 ST. JOHN'S J. LEGAL COMMENT. 245, 261 (2005).

383. *McKaskle v. Wiggins*, 465 U.S. 168, 183–84 (1984).

384. The phrase "equality of arms" is a principle included in the essential features of a "fair trial" under article 6 of the European Convention for Human Rights. See COUNCIL OF EUR., EUROPEAN CONVENTION OF HUMAN RIGHTS, art. 6 (2010); Hon. Samuel L. Bufford, *Center of Main Interests, International Insolvency Case Venue, and Equality of Arms: The Eurofood Decision of the European Court of Justice*, 27 NW. J. INT'L L. & BUS. 351, 396 (2007). As one commentator notes:

[F]airness means fairness to both sides, not just one. The procedure followed must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it. A trial is not fair if the procedural dice are loaded in favour of one side or the other, if (in the phrase used in the European cases), there is no equality of arms.

BINGHAM, *supra* note 328, at 90 (footnote omitted); see also Geert-Jan Alexander Knoops, *The Dichotomy Between Judicial Economy and Equality of Arms Within International and Internationalized Criminal Trials: A Defense Perspective*, 28 FORDHAM INT'L L.J. 1566, 1567 (2005) (noting that "equality of arms" requires "that the defense in criminal cases is not unjustly put at a disadvantage compared to the position of the prosecution in terms of time and facilities to prepare its defense case, as well as having access to information material to the case" (footnote omitted)); Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1039 (calling for the recognition of a constitutional right to equality of arms, defined as "the procedural rights of each advocate to formulate and present her case"). But see *United States v. Tucker*, 249 F.R.D. 58, 63 (S.D.N.Y. 2008) ("It is inherent in our criminal justice system that defendants will virtually always be outmatched in investigatory resources, funds, and time to prepare for litigation. This

the trial judge's refusal to lend a hand for fear of being accused of being biased in favor of the defendant.<sup>385</sup> One would think that advisement regarding available defenses would be as important to the defendant for fairness purposes at a guilty plea hearing or a trial as advisement of the pending charges.

Without the knowledge of legally recognized defenses, the defendant does not know what he or she needs to prove. It stands to reason that many pro se defendants are ineffective by not having the information to be able to prove their defense, if they have one, resulting in a higher probability of an unfair trial result than if access to this information was provided. Shouldn't there be a remedy for this lack of a pro se defendant's effectiveness, which may result in an unfair trial, just as there is for represented defendants?

When the Court in *Faretta v. California* held that a defendant electing to proceed pro se could not later claim self-ineffectiveness,<sup>386</sup> it did so without any elaboration and without thought of the consequences. This lack of a remedy for ineffective self-representation that results in an unfair trial is a disincentive, or penalty, for invoking one's constitutional right to self-representation. It could also be construed as a denial of equal protection on the grounds that represented and unrepresented defendants are treated unequally on the effectiveness issue,<sup>387</sup> even on the basis of a simple rationality test in service to the legitimate governmental interest in conducting a fair trial.<sup>388</sup> It can be said that the Supreme Court, in imposing

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does not offend the Constitution. 'The Bill of Rights does not envision an adversary proceeding between two equal parties.' The principle of equality of arms may apply in certain international criminal law contexts, but it has no place in our constitutional jurisprudence. For better or worse, due process demands only that a criminal defendant receive a constitutionally 'adequate' defense, not that the parties to a criminal prosecution be equally matched." (footnotes omitted) (quoting *Wardius v. Oregon*, 412 U.S. 470, 480 (1973)).

385. See Quintin Johnstone, *Law and Policy Issues Concerning the Provision of Adequate Legal Services for the Poor*, 20 CORNELL J.L. & PUB. POL'Y 571, 625 (2011) (stating that judges are often aware of concerns about appearing to favor pro se defendants).

386. *Faretta v. California*, 422 U.S. 806, 835 n.6 (1975). "[A]lthough [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." *Id.* at 834 (footnote omitted) (quoting *Illinois v. Allen*, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)) (internal quotation marks omitted).

387. See *supra* note 221.

388. See *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens

a bar upon a pro se defendant's right to claim self-ineffectiveness (which results in an unfair trial), has "imprisoned" the defendant in his right to self-representation.<sup>389</sup>

Yet, the Court recently sounded strangely sympathetic to pro se prisoner defendants in *Martinez v. Ryan*.<sup>390</sup> In *Martinez*, a prisoner claimed to have had an ineffective trial lawyer, as well as an ineffective lawyer for his first collateral review petition.<sup>391</sup> The issue was "whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding."<sup>392</sup> In the course of ruling for the prisoner, the Court explained the distinction between this case, in which a trial lawyer's effectiveness could, by state law, only be raised at a first-review collateral proceeding (and not on direct appeal), and most other cases in which a pro se prisoner has an appellate brief to use when representing himself in a collateral review, which raises the trial lawyer's ineffectiveness.<sup>393</sup> The Court noted:

When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-

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a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." (citing *Heller v. Doe*, 509 U.S. 312, 319–20 (1993))). As the right to a fair trial is a fundamental right, it could also be argued that strict scrutiny applies in this situation and that the government would not be able to establish a compelling governmental interest to support the unequal treatment described of represented and unrepresented parties. *See, e.g.*, *United States v. Enjady*, 134 F.3d 1427, 1433–34 (10th Cir. 1998), *opinion clarified*, No. 96-2285, 1998 WL 133994 (10th Cir. Mar. 25, 1998). That argument, however, is beyond the scope of this Article.

389. *Cf. Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942). The Court held:

[T]o 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.

*Id.* (citations omitted).

390. *See Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012).

391. *Id.* at 1314–15.

392. *Id.* at 1315.

393. *See id.* at 1316–21.



review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. To present a claim of ineffective assistance at trial in accordance with the State's procedures, then, a prisoner likely needs an effective attorney.

The same would be true if the State did not appoint an attorney to assist the prisoner in the initial-review collateral proceeding. *The prisoner, unlearned in the law, may not comply with the State's procedural rules or may misapprehend the substantive details of federal constitutional law.* While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.

A prisoner's inability to present a claim of trial error is of particular concern when the claim is one of ineffective assistance of counsel. The right to the effective assistance of counsel at trial is a bedrock principle in our justice system. It is deemed as an "obvious truth" the idea that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while protecting the rights of the person charged.<sup>394</sup>

This same Supreme Court once held that defendants may proceed pro se if the trial judge determines they have knowingly and intelligently waived counsel, and did so "with eyes open," which permits casting defendants adrift without assistance at a plea hearing or trial and without information about available defenses.<sup>395</sup> Suddenly, the same Supreme Court is now concerned that convicted, pro se prisoners will be unable to perfect a collateral attack on their convictions due to their lack of legal knowledge and inability to comply with procedural rules or substantive law needed for collateral review proceedings.<sup>396</sup> This solicitude for, at least, pro se prisoners and the recognition that they need information will (hopefully) one day be shown to pro se defendants as a general blueprint for accessing

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394. *Id.* at 1317 (emphasis added) (citations omitted) (quoting *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963)) (internal quotation marks omitted).

395. *Faretta v. California*, 422 U.S. 806, 835 (1975) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)) (internal quotation marks omitted); *see also* *Iowa v. Tovar*, 541 U.S. 77, 93–94 (2004).

396. *See Martinez*, 132 S. Ct. at 1317.

information about available defenses.

While the notion stated in *Faretta* that a pro se defendant cannot claim self-ineffectiveness<sup>397</sup> may sound reasonable at first blush, it is not inconceivable to imagine that there might be cases in which the defendant does such a poor job of self-representation that it results in an unfair trial. There are many American cases in which convicted defendants claim ineffectiveness in their pro se defense and, despite the “no self-ineffectiveness claims” rule, some courts have even gone so far as examining the record to determine trial fairness.<sup>398</sup> However, no court has questioned the rule itself.

Yet, a recent thoughtful opinion by the Newfoundland and Labrador Court of Appeals in Canada on this issue is instructive.<sup>399</sup> In *R. v. Ryan*, the defendant in a murder trial was granted permission to self-represent.<sup>400</sup> The trial judge did not provide him with specific information about the trial process, although some guidance was provided as the case progressed.<sup>401</sup> The defendant required instruction on court rules, and the judge repeatedly stated on the record her concern about his ability to comprehend or appreciate the explanations and suggestions that she gave him.<sup>402</sup> The defendant was unable to raise evidentiary objections, appeared confused, did not understand the process, and was incapable of conducting cross-examination.<sup>403</sup> The judge “mused about [the defendant’s] fitness to

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397. See *Faretta*, 422 U.S. at 835 n.6.

398. See, e.g., *United States v. VanHoesen*, 450 F. App’x 57, 62 (2d Cir. 2011). Cases raising pro se self-ineffectiveness are usually ones in which a defendant claims a trial court erred by granting him pro se status when it shouldn’t have in light of his lack of knowledge or his mental condition or because the defendant was forced to self-represent because of the court’s failure to appoint substitute counsel. See, e.g., *id.* at 61 (raising the issue of a lack of mental competency); *United States v. Schmidt*, 105 F.3d 82, 89 (2d Cir. 1997) (noting the defendant was forced to self-represent); *Evans v. State*, No. 04-11-00591-CR, 2012 WL 1648420, at \*3 (Tex. App. May 9, 2012) (raising the issue of a lack of knowledge).

399. See *R. v. Ryan* (D.), 2012 NLCA 9, para. 14 (Can. Nfld.).

400. *Id.* at para. 14. Specifically, the opinion states the defendant “chose to represent himself” at trial after rejecting legal aid attorneys appointed to represent him, without reference to any form of waiver of counsel inquiry. *Id.* Generally, Canadian jurisprudence requires trial judges to ensure that defendants waiving counsel understand “the nature and importance of the role of a lawyer in assisting” with hearings. *R. v. Boone* (2003), 179 Man. R. 2d 227, para. 14 (Can. Man. Q.B.).

401. *Ryan* (D.), 2012 NLCA 9, para. 15.

402. *Id.* at para. 16.

403. *Id.* at para. 16–17.

conduct his own trial,” and the transcript reflected over sixty incidents during a fourteen-week trial at which issues regarding his apparent inability to represent himself were commented upon by the trial judge.<sup>404</sup>

On appeal, the court first acknowledged the traditional rule followed in Canada: A self-represented defendant cannot complain if he has, by his or her own conduct, forfeited the right to counsel and lost the case; the defendant is considered to be the “author of his own misfortune.”<sup>405</sup> The court then addressed the following issue:

In the context of a jury trial involving a self-represented accused who is entitled to use but does not avail of counsel, in what circumstances, if any, should a trial judge declare a mistrial where it is apparent that, despite attempts by the trial judge to give direction to the accused as to the conduct of the trial, the accused cannot properly conduct his defence and there is a danger that he will not receive a fair trial?<sup>406</sup>

The court noted that represented defendants are entitled to effective assistance of counsel.<sup>407</sup> And, while pro se defendants are entitled to reasonable judicial assistance in presenting their defense,<sup>408</sup> that does not

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404. *Id.* at para. 17–18. In addition to being unable to defend himself, the defendant also received late disclosure (discovery) from the Crown, was kept from using the telephone while incarcerated until a court order was obtained, and was limited in his use of the computer, television, and VCR. *Id.* at para. 19–28.

405. *Id.* at para. 77.

406. *Id.* at para. 82.

407. *Id.* at para. 121. On the requirements of counsel, the court stated:

The standard of counsel competence to which an accused is entitled is therefore grounded in results: was there a miscarriage of justice resulting from procedural unfairness or lack of “reliability of the trial’s result” brought about by a level of representation that was below reasonable professional judgment. Although establishing counsel incompetence is difficult and, fortunately such cases are infrequent, what is important for present purposes is that actions taken by an accused’s legal representative, when they do fall outside what can be characterized as reasonable professional judgment, can result in judicial intervention even if the actions were taken in good faith, to prevent a miscarriage of justice.

*Id.* at para. 124.

408. *See id.* at para. 128–29. Said the court specifically:

The fundamental duty of a trial judge to see that an accused receives a fair trial means that the judge must take steps to provide assistance to an

mean the court's assistance is the same as an advocate would provide.<sup>409</sup> Then the court considered the anomalous situation when a represented party can appeal and receive a new trial based on ineffective assistance of counsel, but a pro se defendant cannot:

We do not say to an accused who was represented by incompetent counsel "you chose that counsel, you are the author of your own misfortune and there is therefore nothing we can do for you." . . . "[F]reedom to choose counsel is not taken as waiver of counsel's duty to be competent." Rather, we accord a remedy on appeal where the

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unrepresented accused to enable his or her defence, or any defence that proceeding may reasonably disclose, is brought to the attention of the jury with full force and effect.

The trial judge's duty does not go as far as providing the same degree of assistance as would be provided by counsel if the accused were represented. Otherwise he or she would become an advocate for the accused, thereby compromising judicial impartiality. There is no set formula of instruction that can ritualistically be used in each case. The advice and instruction must be tailored to the particular circumstances.

. . . [T]rials involving unrepresented accuseds are rarely consistent or simple. Their need for guidance varies depending on the crime, the facts, the defences raised and the accused's sophistication. The judge's advice must be interactive, tailored to the circumstances of the offence and the offender, with appropriate instruction at each stage of a trial.

How far a trial judge should go in assisting an accused is therefore a matter of judicial discretion. *The overriding duty is to ensure that the unrepresented accused has a fair trial.*

*Id.* at para. 128–29 & nn. 22–23 (citations omitted) (quoting *R. v. Phillips*, 2003 ABCA 4, 172 C.C.C. 3d 284 (Can.), *aff'd* [2003] 2 S.C.R. 623) (internal quotation marks omitted).

<sup>409.</sup> See *id.* at para. 126 ("This is not to say that an unrepresented accused is entitled to the same level of advocacy as if he had been represented by competent counsel or that fairness of the trial is to be measured by comparing the accused's conduct of his own case with the potential conduct of the case by a competent counsel. The authorities are clear that he is not entitled to that level of protection. In most situations, one would expect that competent counsel would present a better case. The accused gives up the opportunity to present that case when he or she chooses to represent himself or herself. The question at issue here, however, is more fundamental: is the accused entitled to protection where the level of his advocacy falls below, not the level that one could expect from competent counsel, but below the acceptable competency level of counsel advocacy that would justify appellate intervention?" (citing *R. v. Rain*, 1998 ABCA 315, para. 38 (Can.))).

level of representation falls below a minimum level to be expected of counsel and that level of incompetence leads to a miscarriage of justice in the sense that the reliability of the trial's result may be compromised. It would be inconsistent and treating an unrepresented accused less fairly to use that same reasoning to say "your choice of counsel (yourself) means you are the author of your own misfortune and you have no remedy." Should not the unrepresented accused equally be entitled to a remedy on appeal where the level of representation he gave himself falls below a minimum level necessary to enable a proper defence to be presented, leading to a conclusion that there is a miscarriage of justice in the sense that the reliability of the trial's result may be compromised? I think so.<sup>410</sup>

The court conceded there might be cases in which a pro se defendant attempts to manipulate the system to avoid a trial altogether,<sup>411</sup> but indicated "that is not this case."<sup>412</sup> The court concluded:

The error of the trial judge in not providing an appropriate remedy, including, if nothing else was appropriate, a mistrial, resulted in Mr. Ryan not receiving a fair trial. Such an error which deprives him of his entitlement to a fair trial constitutes a miscarriage of justice.

The only remedy that can be provided, post-trial, at the appellate level is to declare that a mistrial should have been ordered by the trial

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410. *Id.* at para. 153 (citation omitted).

411. *See id.* at para. 171 ("It might be objected that unless such matters are at least factored into the equation, there will be a risk that an accused, by taking an unreasonable position that effectively disables himself from being able to defend himself at trial, and subsequent retrials, could effectively avoid ever being brought to trial. There is something to this. If it could be inferred that the accused was manipulating the system to avoid its consequences and was thus abusing the process, the trial judge would be within her right to take that fact into account in deciding to give the accused another chance to obtain a fair trial in just the same way that a court may decline a request from an accused for a postponement of the start of a trial to engage new counsel, if the court is satisfied that the discharge of existing counsel was made for the ulterior motive of postponing the trial and not for some legitimate reason. (Indeed, if a mistrial were declared and, on a retrial, the judge was faced with the accused again persisting in representing himself in similar circumstances, and demonstrating he had learned nothing from the previous experience, that would be part of the history of the case which could be legitimately taken into account in considering what remedy, if any, should be granted on the subsequent trial if the accused's performance again threatened a fair trial.).").

412. *Id.* at para. 172.

judge and order a new trial . . . .<sup>413</sup>

This reasoning, coming from a court in a jurisdiction where judges have a duty of reasonable assistance to pro se defendants,<sup>414</sup> is even more applicable under American law where courts have no such duty. Thus, the probability of such cases arising is higher in American courts than in Canadian courts. Presumably, American defendants—without reasonable judicial assistance—are more likely to be ineffective and not receive a fair trial without knowledge of the elements of the defenses they may wish to present.

#### VI. ARGUMENTS AGAINST RECOGNITION OF THE RIGHT TO BE INFORMED OF AVAILABLE DEFENSES

At least two arguments have been raised against advisement of defenses possible, available, or otherwise. The first is that the recognition of a pro se defendant's right to be advised of available defenses would transform the trial judge into the defendant's advocate.<sup>415</sup>

This objection is answered by reference to the proposed manner of advisement, which can be made by providing the pro se defendant with a written document, such as a pamphlet or a copy of relevant statutes, that lists available defenses.<sup>416</sup> The advisement is of all available defenses, not just those that are, in the opinion of the court, applicable to the defendant. Providing such information is no different than the trial judge enumerating the various trial rights a defendant who seeks to plead guilty has before accepting the plea.<sup>417</sup> No one accuses judges of a lack of impartiality when they advise defendants of their constitutional rights; nor should anyone accuse judges of bias if they advise pro se defendants of the legally recognized defenses available to them under state law. Judges, however, are human and may often think that most of the defendants brought before them are guilty.<sup>418</sup> While guilty plea rates do support that belief, we know

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413. *Id.* at para. 181–82 (citations omitted).

414. *Id.* at para. 63.

415. *See, e.g.,* Swenson v. Dittner, 439 A.2d 334, 338–39 (Conn. 1981) (finding it proper for a judge to refrain from counseling pro se civil litigants on defenses to avoid unlawfully acting as an advocate).

416. *See infra* Part VII.

417. *See* FED. R. CRIM. P. 11(b)(1) (stating the detailed colloquy to be provided to pleading defendants).

418. *See, e.g.,* Waddell v. State, 582 A.2d 260, 263 (Md. Ct. Spec. App. 1990) (recounting a trial judge's statement that had no purpose other than to demonstrate

that guilty pleas are entered by defendants for a variety of reasons other than factual guilt.<sup>419</sup> It is these categories of cases in which the advisement of available defenses will further the interests of justice. Justice Scalia is wrong when he asserts that there is no “social interest” in doing anything that prompts a defendant who decides to plead guilty from changing his or her mind.<sup>420</sup> The social interest is doing justice, not maximizing the number of guilty pleas entered by persons accused of crimes. Unfortunately, none of Justice Scalia’s brethren on the Supreme Court reminded him of that cardinal purpose of the justice system at oral argument in *Tovar*.<sup>421</sup>

The information under my proposal would be provided in written form (or orally, in cases of illiteracy) and would consist of all available defenses. By “available,” I mean those that are legally cognizable under statutory or common law. The term “possible,” used in *Von Moltke*, when the Supreme Court described the nature of the required waiver of counsel inquiry,<sup>422</sup> is ambiguous. It connotes a scenario of someone informing prose defendants of what defenses are most applicable under the facts and circumstances of the case, which would involve a legal opinion or other form of subjective interpretation of the facts and the application of the law to them. Under current law, the judge may not engage in brainstorming about a particular defense that may or may not be the most promising.<sup>423</sup> Rather, the court should provide a list of all recognized defenses, as is done in some jurisdictions in hearings for parking violations.<sup>424</sup> Just as useful and

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her presupposition of the defendant’s guilt and noting prior admonishments made to that judge for similar displays of prejudice).

419. 25 AM. JUR. TRIALS *Plea Bargaining Techniques* § 66 (1978) (“Although a plea of guilty may be voluntary, it may not be accurate. A defendant may not understand what mental state and act constitute commission of the crime charged. A defendant may have a valid defense to a charge, or his conduct may not be as serious as that charged. A defendant may enter a false guilty plea, seeking to protect another person from criminal responsibility. Moreover, a guilty plea may be entered by a mentally disturbed person, and the guilty plea process does not allow much time to determine incompetency unless the defendant is obviously insane or incompetent.”).

420. Transcript of Oral Argument, *supra* note 16, at 46–47; Oral Argument, *supra* note 181, at 52:13.

421. See Transcript of Oral Argument, *supra* note 16; Oral Argument, *supra* note 181.

422. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

423. See, e.g., *State v. Deaver*, No. 2008AP2223-CR, 2009 WL 3189353, at \*6 (Wis. Ct. App. Oct. 7, 2009) (“The circuit court is not required to brainstorm from the bench about specific defenses available to a particular defendant.”).

424. See, e.g., D.C. CODE § 50-2303.05(a)(2) (LexisNexis 2011).

fair as it is for a pro se defendant to be informed of the charges, and the elements thereof, the legally recognized (available) defenses should also be provided to a defendant. In this respect, the judge is only fulfilling the judicial duty of ensuring a fair trial and is neither overreaching nor evidencing a lack of impartiality.

Some might argue that to provide information about available defenses would “clutter up the . . . colloquy,” and take too much valuable judicial time.<sup>425</sup> Criminal case processing is more efficient if defendants, pro se or otherwise, plead guilty and waive their trial rights.

However, it would not take more than a few minutes at most to provide a pro se defendant with a copy of the relevant criminal code provisions containing available defenses (including statutes of limitation) and explain to the defendant that each has requirements that must be met, just like the prosecution has to prove each of the elements of the pending charges. If a pro se defendant states a desire to enter a guilty plea, then he or she should be given time to consider the information regarding defenses before the court accepts a plea. To avoid delay, the defenses information could be provided at an early stage of the proceedings, before the defendant’s arraignment or other hearing takes place at which a plea is ordinarily entered.

Doing so will not necessarily deter a pro se defendant who wants to plead guilty from doing so. To that extent, the social interest in convicting those who elect to plead guilty is satisfied. Some defendants who are given the list of defenses and their elements may realize that one or more of them are applicable in their case, and perhaps they will be right. If they elect to raise any such defenses pro se, they will know the elements that need to be proven, thus improving judicial economy, not to mention putting them on a more comparable footing with represented defendants whose attorneys are able to analyze the facts of their case and suggest a possible defense.

If a defendant receives the advisement of defenses, and raises one of the defenses, he or she may or may not prevail. If the defense succeeds, the defendant is acquitted, indicating the jury believed he was innocent, or the prosecution didn’t prove its case. In either case, the social interest in justice has been served. If the defense does not succeed, the social interest in maximizing trial fairness is furthered.

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425. See, e.g., Transcript of Oral Argument, *supra* note 16, at 10; Oral Argument, *supra* note 181, at 9:34.



The second argument against providing access to defenses information is based on the holding in *Tovar*, which applied the pragmatic approach announced in *Patterson v. Illinois*,<sup>426</sup> requiring fewer advisements to pro se defendants who elect to plead guilty than those who plead not guilty and demand trial.<sup>427</sup> While defendants who demand trial will need much more information than those who plead guilty, in the case of defendants pleading guilty, “[t]he constitutional requirement is [only] satisfied when the trial court informs the accused of the nature of the charges against him, of his right to be counseled regarding his plea, and of the range of allowable punishments attendant upon the entry of a guilty plea.”<sup>428</sup>

But, to follow this policy in regards to something as fundamental to one’s right to self-representation as information about available defenses is to say that only the (potentially) innocent deserve the benefits of the law, which is inconsistent with the values underlying an adversarial system premised on equal justice for all,<sup>429</sup> and the criminal law principle of legality.<sup>430</sup> As Professor Dana puts it—in the context of his argument regarding an unequal application of the *nulla poena sine lege* principle, as distinguished from the *nullum crimen sine lege* principle in international criminal justice—the assertion that “[o]nly the innocent deserve the benefits of the principle of legality . . . naturally offends our notions of justice. It would be unacceptable for a legal system to institutionalize such an approach.”<sup>431</sup>

In the long run, justice and judicial economy is served because some pro se defendants demanding a jury trial may realize, after reviewing the available defenses and their definitions, that they have no defense, or could not meet the burden of persuasion of some defense they had hoped to raise. This realization may convince them to enter into a plea bargain. In addition, those “gray area” defendants with a mental condition that

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426. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

427. *Iowa v. Tovar*, 541 U.S. 77, 90 (2004).

428. *Id.* at 81.

429. See *supra* notes 221–22 and accompanying text.

430. See Dana, *supra* note 347, at 902; *supra* Part V.A. Professor Dana—commenting on an international court’s decision applying the principle of *nulum crimen sine lege*, but not *nulla poena sine lege*—states that the decision “grants the benefits of legality on the innocent but withholds it from the guilty.” Dana, *supra* note 347, at 902.

431. Dana, *supra* note 347, at 857.

interferes with their ability to present a defense<sup>432</sup> may also realize they are not capable of meeting the requirements of a given affirmative defense, such as insanity, even though in their own layperson mind they thought they could invoke this defense. Rather than impeding the prompt dispositions of guilty pleas, knowledge of the required elements of a planned defense may cause a pro se defendant to realize the low probability of proving the defense and withdraw his or her demand for trial.

A prosecution perspective on the question was reflected in the Solicitor General's oral argument in *Tovar*.<sup>433</sup> He argued that, not only would information about possible defenses be a waste of time, it would also give the pro se defendant false hope that some defense might be available, or that a suppression motion might result in exclusion of evidence against them.<sup>434</sup>

The same can be said of the represented defendant. Just as a defendant's review of a handout listing applicable defenses might create false hope, the represented defendant's discussion of all possible defenses and the potential for evidence suppression with their attorney might create false hope. We do not withhold information about available defenses when counsel consults with a client in order to protect such a defendant from having false hope of a possible defense, so why should we do so in the case of a pro se defendant? The pro se defendant may actually have a defense and not know it without information about available defenses. If that causes a trial to occur rather than a guilty plea that would have been entered had the defenses information not been provided, then so be it. Prosecutors have no right to the lowest possible criminal trial caseload. The adversary system was designed with trial in mind, not guilty pleas, so the justice system will need to adjust to the possibly slight increase in the number of trials that may result as a consequence of advisement about available defenses; or, conversely, fewer trials may be needed if some pro se defendants who are informed of the elements of available defenses decide they may be unable to establish their anticipated defense.

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432. See *Indiana v. Edwards*, 554 U.S. 164, 172 (2008).

433. See Transcript of Oral Argument, *supra* note 16, at 18–27; Oral Argument, *supra* note 181, at 17:35–28:18.

434. Transcript of Oral Argument, *supra* note 16, at 24; Oral Argument *supra* note 181, at 25:41.

## VII. IMPLEMENTING ADVISEMENT OF AVAILABLE DEFENSES

How should a court advise a pro se defendant of his or her available defenses?<sup>435</sup> Available defenses are primarily those set forth in the relevant criminal code. Most codes have a section enumerating the recognized defenses available to defendants charged with offenses set forth in the same code.<sup>436</sup>

That is not to say those are the only available defenses. For example, alibi may or may not be included in the listing of available defenses.<sup>437</sup> Also, a failure to establish personal or subject matter jurisdiction,<sup>438</sup> unconstitutionality of a criminal law,<sup>439</sup> violation of a statute of limitations,<sup>440</sup> selective prosecution,<sup>441</sup> and failure to prove one or more elements of the crime charged beyond a reasonable doubt<sup>442</sup> are additional, un-codified defenses of which a pro se defendant should be informed.

Courts could inform pro se defendants of their available defenses by simply tendering them a document or brochure listing all available defenses. The hard copy of available defenses could be supplemented by online information about available defenses on court websites. Definitions would track the language of enumerated recognized statutory defenses, or provide a legal dictionary definition for those not included in the criminal code list. Courts already hand out informational papers—through court staff, self-help centers, and judges themselves—to pro se litigants seeking legal remedies in housing, small claims, domestic relations, administrative review, and minor civil cases.<sup>443</sup> These papers range from general

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435. The use of the term “available defenses” is deliberate, and distinguishable from “possible defenses,” since the latter could be construed to involve an improper judgment by the trial judge as to a set of defenses most applicable to the defendant’s case. *See infra* notes 437–42 and accompanying text.

436. *See, e.g.*, N.J. STAT. ANN. §§ 2C:2-8 to -12 (West 2005 & Supp. 2012).

437. *See, e.g.*, *State v. Goode*, 288 P.3d 306, 308 (Utah Ct. App. 2012).

438. *See, e.g.*, *In re D.K.*, 47 A.3d 347, 350 (Vt. 2012).

439. *See, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 379–80 (1992).

440. *See, e.g.*, *Smith v. United States*, 133 S. Ct. 714, 717–18 (2013).

441. *See, e.g.*, *United States v. DeChristopher*, 695 F.3d 1082, 1088 (10th Cir. 2012).

442. *See, e.g.*, *Evans v. Michigan*, 133 S. Ct. 1069, 1073 (2013).

443. *See Self-Help Centers*, A.B.A. (Nov. 22, 2011), [http://www.americanbar.org/groups/delivery\\_legal\\_services/resources/pro\\_se\\_unbundling\\_resource\\_center/self\\_service\\_centers.html](http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/self_service_centers.html) (outlining a national compilation of pro se service centers that provide assistance, unfortunately, only to civil disputants and not pro se defendants).

instructions regarding specific procedures to form motions and pleadings, affidavits, financial information forms, and the like.<sup>444</sup> Thus, there is ample precedent for imposing such an obligation on courts. The necessity of access to information such as available defenses to ensure fairness in criminal cases (felony or misdemeanor) when liberty is at stake, is surely of greater importance than the need for information in civil cases when economic interests are at stake.

The author was recently cited in Chicago for parking his motorcycle at an expired meter.<sup>445</sup> The back of the Notice of Violation states:

By ordinance, the following grounds are allowed for contesting a violation:

- The respondent was not the owner or lessee of the cited vehicle at the time of the violation;
- The cited vehicle or its state registration plates (license plates) were stolen at the time the violation occurred;
- The relevant signs prohibiting or restricting parking were missing or obscured;
- The relevant parking meter was inoperable or malfunctioned through no fault of the respondent;
- The facts alleged in the parking or compliance violation notice are inconsistent or do not support a finding that the specified regulation was violated (e.g., motorists may contest a city sticker violation if they have resided in Chicago for less than 30 days or the cited vehicle was purchased in the last 30 days; tinted windows comply with the medical use requirement of 625 ILCS 5/12-503(g); the residential parking permit was issued to a delivery service, or repair vehicle or home healthcare provider doing business with or assisting a resident of the zone, etc.);
- The illegal vehicle condition did not exist at the time of the compliance violation; or
- The illegal vehicle condition was corrected prior to the hearing (this defense does not apply to city sticker violations (§ 9-64-125), muffler

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444. *See id.*

445. City of Chi., Dep't of Revenue, Notice of Violation, No. 5155426850 (Sept. 23, 2012) (on file with author).

or exhaust violations (§ 9-76-140(a)), missing plate violations (§ 9-76-160(a)), expired registration violations (§ 9-76-160(f)), and tinted window violations (§ 9-76-220)).<sup>446</sup>

If the City of Chicago finds it necessary and is able to inform pro se respondents in administrative hearings of their available defenses in ordinance violation cases, basic fairness dictates that criminal courts, with the authority to impose much greater sanctions, should do so as well. The list of available defenses in criminal cases may be somewhat longer, with greater depth and detail, but this would not justify a failure to advise defendants of any defenses.

Judges are not required to assist pro se defendants in the presentation of their defense.<sup>447</sup> Yet, pro se defendants are required to comply with the same rules of law and procedure applicable to represented parties.<sup>448</sup> It is not surprising, therefore, that many pro se trials at which no standby counsel has been appointed involve frequent delays and generate frustration among judges, prosecutors, and jurors due to the ineptitude and ignorance of the law, procedure, and courtroom protocol shown by the defendant.<sup>449</sup> The Supreme Court in *Indiana v. Edwards* held that, in the case of a competent but mentally ill defendant, a trial judge may deny a request to proceed pro se if the court believes the defendant would make a “spectacle” of himself:

[I]n our view, a right of self-representation at trial will not “affirm the dignity” of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel. To the contrary, given that defendant’s uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant’s lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial. As

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446. *Id.*

447. *McKaskle v. Wiggins*, 465 U.S. 168, 183–84 (1984) (“A defendant does not have a constitutional right to receive personal instruction from the trial judge on courtroom procedure. Nor does the Constitution require judges to take over chores for a *pro se* defendant that would normally be attended to by trained counsel as a matter of course.”).

448. *See, e.g., McNeil v. United States*, 508 U.S. 106, 113 (1993) (noting pro se civil litigants are not excused from compliance with procedural rules).

449. *See, e.g., McKaskle*, 465 U.S. at 187 n.17.

Justice Brennan put it, [t]he Constitution would protect none of us if it prevented the courts from acting to preserve the very processes that the Constitution itself prescribes.<sup>450</sup>

The same comments with respect to the pro se trial being a spectacle and the defendant being humiliated are applicable to those individuals without mental illness. While their right to self-representation “plainly encompasses certain specific rights to have [their] voice heard[,] . . . to control the organization and content of [their] own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury,”<sup>451</sup> they have little or no legal knowledge or skill to perform these actions. Thus, until pro se defendants are provided with some form of legal assistance, providing access to defenses information will guide them in proving their affirmative or other defense. This will help to streamline the presentation of evidence at trial, reduce delay, and preserve judicial resources.

It is not only the mentally ill pro se defendant’s incapacity for self-representation that threatens trial fairness, as the *Edwards* Court observed.<sup>452</sup> It is also—and, for purposes of this Article, most importantly—the lack of a defendant’s access to fundamental information about what defenses are legally available. Moreover, trial fairness will not only be improved from the defendant’s perspective if defense information is made available, the trial will appear more fair to spectators as they observe a trial with fewer interruptions, objections, and irrelevancies.<sup>453</sup> Public perception of fairness is, of course, the foundation for the legitimacy of the courts, without which obedience to the law would not occur:

Accordingly, our rules for criminal justice sanctioning have been carefully designed so as to maximize both the fact and appearance of fairness, by deliberately tilting many rules in favor of the defendant and against the sovereign. . . . Since legitimation is the essential contribution of the judicial system, judges act consistently with their function, and thus in the public interest, only when they adopt rules maximizing fairness to defendants. If those rules occasionally produce

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450. *Indiana v. Edwards*, 554 U.S. 164, 176–77 (2008) (alteration in original) (citations omitted) (quoting *McKaskle*, 465 U.S. at 176–77; *Illinois v. Allen*, 397 U.S. 337, 350 (1970)) (internal quotation marks omitted).

451. *McKaskle*, 465 U.S. at 174.

452. *See Edwards*, 554 U.S. at 176–77.

453. *See Goldschmidt*, *supra* note 140, at 177.

results which temporary majorities abhor, that should be of little concern to the courts, for our perspective must be determined by the long-range benefits accruing from our efforts to secure the appearance of fairness. By pursuing fairness, rather than acting as law enforcement agents, we achieve, in the long-run, the willing consent of the governed. The republic . . . will be endangered if judges conclude that they must “vindicate the public interest in the enforcement of the criminal law,” rather than develop rules which satisfy the claims of individual fairness.<sup>454</sup>

Likewise, contrary to the Supreme Court’s decision in *Iowa v. Tovar*, there is a strong public interest in providing information about available defenses to pro se defendants, whether they state an intention to plead guilty or go to trial.<sup>455</sup> The public’s interest is the same as the court’s: trial fairness to the parties. A rule requiring courts to advise pro se defendants of their available defenses maximizes fairness to the accused, enhances perceptions of trial fairness, and strengthens the public’s trust and confidence in the legitimacy of the judicial process. Such a rule, supported by and furthering the remedial objectives of the principle of legality, is long overdue.

### VIII. CONCLUSION

While the concept of the right to advisement of defenses may seem unorthodox, if not radical, to some, it is consistent with recent and past scholarship in which the principle of legality is viewed as a principle furthering the quality of justice. Its interpretation and application need not be limited to the negative ex post facto prohibition. The criminal law principle of legality provides a legal basis for the recognition of the pro se defendant’s right to be advised of available defenses—those legally recognized by the court conducting the defendant’s prosecution.

The principle of legality’s underlying values are to provide advance notice of the crime before it is committed and to authorize punishment for the crime. This Article argues that pro se defendants are entitled to access equally important information necessary for a fair trial—notice of legally recognized defenses to the pending charge—under the principle of legality.

The principle of legality and the multiple rules of which it is

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454. United States v. Standefer, 610 F.2d 1076, 1114 (3d Cir. 1979) (Gibbons, J., concurring in part, dissenting in part).

455. See *Iowa v. Tovar*, 541 U.S. 77, 93 (2004).

comprised has been incorporated into the Supreme Court's due process jurisprudence, and it has international recognition as a human right. Providing pro se defendants with advisement regarding legally recognized defenses will promote trial fairness by leveling the playing field in the adversarial process between the state and the defendant, at least as to knowledge of the elements of the defenses.

Judicial economy would also be served when defendants who thought they could establish a certain defense realize they cannot meet its requirements. If defendants demand trial, they will be better able to select and present evidence relevant to their chosen defense. This will streamline pro se defendant trials, and it will avoid the spectacle of persons unskilled in law trying to defend themselves without knowledge of what defenses are available and what such defenses require. Granting access to information about possible defenses to pro se defendants will ensure justice, the appearance of justice, and equal justice under law.