THE MYTH OF AUTONOMY RIGHTS

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Supreme Court rhetoric, scholarly discussion, blackletter law, and ethical rules have perpetuated a myth that individual rights protect the autonomy of defendants within the criminal legal system. To expose this myth, I examine six rights that the Court has enshrined as essential decision points for criminal defendants due to the rights' purported expressive and consequential functions: (1) the right to self-representation; (2) the right to plead guilty; (3) the right to waive a jury; (4) the right to testify; (5) the right to waive appeals; and (6) the right to maintain innocence at a capital trial. I conclude that each of these rights fails to protect defendant autonomy.

I then argue that genuine displays of autonomy under the criminal legal system take the form of resistance to the law, legal advocates, and the legal system. Thus, the autonomy of criminal defendants occurs not because of law but in spite of it. As such, scholarly discussions of the personal autonomy of criminal defendants should focus not on rights and rules but on acts of resistance. The current autonomy rights discourse is harmful because it obscures the system's defects by framing discussions around individual rights instead of structural limitations. This lends itself to solutions involving procedural tinkering to better actualize individual rights instead of radical structural reform or abolition. By obscuring these structural defects and stressing the system's protective qualities, the autonomy rights discourse presents the system not only as legitimate, but as functional, and potentially even successful. As such, a new scholarly frame is warranted: autonomy as resistance to law and the legal system. By illuminating the ways in which autonomy in the

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criminal legal system resembles autonomy under the American institution of slavery, the autonomy as resistance frame exposes the need for radical structural change and facilitates a reimagining of the criminal legal system.

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INTRODUCTION

Modern legal scholars take for granted that criminal defendants have individual rights that protect their autonomy within the criminal legal system.[1] This Article refutes that notion, arguing that structural

[1] *See, e.g.*, Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147 (2010) [hereinafter Hashimoto, *Resurrecting*]; Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 427–28 (2007) [hereinafter Hashimoto, *Defending*]; Markus D. Dubber, *Legitimating Penal Law*, 28 CARDOZO L. REV. 2597 (2007); Stephen Ellmann, *Lawyers*

limitations in the current criminal legal system render the law unable to protect the autonomy of criminal defendants. The myth of these autonomy rights is harmful because it legitimizes a system that is beyond repair by suggesting not only that opportunities for autonomy exist but that the law is functioning to protect and safeguard these opportunities. In unpacking the myth, this Article illuminates both that these rights have failed and that the expressions of autonomy that occur in the criminal legal system take the form of resistance to that system.

Respect for individual autonomy has long been an American ideal.[2] The Enlightenment concept of autonomy, which emphasized personal liberty free from government intrusion, was a central value of the American Revolution and the Founding.[3] The Framers sought to ensure protection of these liberties from the newly formed government through enactment of the Bill of Rights.[4] Individual autonomy is thus a fundamental component of American law and legal institutions. Markus Dubber has observed that "[l]egitimacy discourse in the United States since the Revolution has revolved around autonomy."[5] This includes discourse about the criminal legal system.[6] In cases like *Faretta v. California*[7] and *McCoy v. Louisiana*,[8] the Supreme Court has recognized the autonomy of criminal defendants to be a constitutional value that surpasses the goal of reliability in criminal—and even capital—convictions. The *McCoy* Court emphasized that "a defendant's choice" in making his defense "must be honored out of that respect for the individual which is the lifeblood of the law"[9] and went as far as to hold that "[v]iolation of a defendant's Sixth Amendment-secured autonomy" amounted to structural error.[10] The Model Rules of

and Clients, 34 UCLA L. REV. 717, 720 (1987); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW (Oxford Univ. Press 2000) (1978); *see also infra* notes 12–13.

2 *See, e.g.*, Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 VILL. L. REV. 1705, 1707–08 (1992); Jessica Wilen Berg, *Understanding Waiver*, 40 HOUS. L. REV. 281, 286–87, 287 n.21 (2003) (claiming that "[a]utonomy is the basic value underlying liberal society" and that "autonomy forms the basis for our system of laws and does so appropriately").

3 Winick, *supra* note 2, at 1708–12.

4 *Id.* at 1710.

5 Dubber, *supra* note 1, at 2603.

6 *Id.* at 2600.

7 Faretta v. California, 422 U.S. 806, 807 (1975) (holding that the Sixth Amendment gives criminal defendants a right to self-representation and finding that a state may not "constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense"); *see also* McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984) ("The right to appear *pro se* exists to affirm the dignity and autonomy of the accused . . . .").

8 McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018).

9 *Id.* at 1507–08 (quoting *Faretta*, 422 U.S. at 834).

10 *Id.* at 1511.

Professional Conduct seek to protect the decision-making power of criminal defendants to determine the objectives of their representation.[11] The legal scholarship on the autonomy of criminal defendants is vast: legal scholars have debated the role of specific criminal procedures in safeguarding or promoting autonomy for defendants,[12] disagreed whether defense attorneys should seek to maximize their clients' autonomy,[13] and queried whether autonomy ought to be subordinated to other societal values.[14] Prosecutors take the defendant autonomy narrative for granted, commonly beginning an

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11 MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

12 *See, e.g.*, Alberto Bernabe, *A Tale of Two Cases: The Supreme Court's Uneasy Position on the Proper Allocation of Authority to Decide Whether to Concede a Client's Guilt in a Criminal Case*, 43 J. LEGAL PRO. 53, 67 (2018) (concluding that *McCoy* did not go far enough to protect defendant autonomy); Hashimoto, *Resurrecting*, *supra* note 1, at 1178 (explaining that, for some defendants, "the possibility of an acquittal, even if remote, may be more valuable than the difference between a life and a death sentence"); Robert E. Toone, *The Absence of Agency in Indigent Defense*, 52 AM. CRIM. L. REV. 25, 28–32 (2015) (arguing that indigent clients lack the autonomy of private clients because their lawyers lack financial incentives to obey); Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 200 (2001) (arguing that vagueness in ethical rules undermines autonomy goals). *See generally* Dubber, *supra* note 1 (discussing autonomy as a legitimating principle of criminal law and questioning if it falls short in reality of punishment, policing, and penal law).

13 *See, e.g.*, John D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 AM. U. L. REV. 207 (2008) (proposing framework for criminal defense attorneys to determine when to substitute judgment for mentally impaired clients); Josephine Ross, *Autonomy Versus a Client's Best Interests: The Defense Lawyer's Dilemma When Mentally Ill Clients Seek to Control Their Defense*, 35 AM. CRIM. L. REV. 1343, 1348 (1998) (discussing whether defense attorneys should substitute judgment for mentally ill defendants); Rodney J. Uphoff & Peter B. Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. KAN. L. REV. 1, 6 (1998) (including a study of 700 public defenders determining that while the majority adopted a lawyer-centered model of representation, a significant minority adopted a client-centered model); Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 317 (1987) (exploring the principle of autonomy as the basis for shifting increased authority to clients in the "informed consent" model); Ellmann, *supra* note 1, at 720 (endorsing a client-centered practice where the "responsibility of the lawyer is to enable the client to exercise his right to choose").

14 W. Bradley Wendel, *Autonomy Isn't Everything: Some Cautionary Notes on* McCoy v. Louisiana, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 92, 97–103 (2018) (questioning whether *McCoy* protected defendant autonomy at the cost of sacrificing reliability and fairness); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 623 (2005) (finding that *Faretta*'s emphasis on autonomy "sidesteps more difficult questions about inequality and injustice in the criminal justice system, the proper allocation of authority between attorneys and clients, and other structural problems"); Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 165 (2000) (arguing that a focus on defendant autonomy can undermine commitments to justice and the adversarial process).

opening statement with the declaration that "this is a case about choices."[15]

But much of the criminal legal system is inherently inconsistent with self-governance and self-determination. Recent scholarship has demonstrated that the criminal legal system is a vestige of racial subordination that operates disproportionately against Black and Brown individuals at every stage.[16] The overwhelming majority of criminal cases involve indigent defendants.[17] Thus, who enters the criminal legal system is frequently not a product of individual bad choices, but of identity and absence of power—that is, not a product of choice, but, as this Article deems it, a product of "selection."

More obviously, punishment limits—or extinguishes in the case of capital defendants—the autonomy of those proven culpable of crimes.[18] But the criminal legal system devastates the autonomy of those

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15 While opening statements such as this may frequently result from the need to prove the defendant possessed specific intent, this is not always the case. During my career as a public defender in the Bronx, I heard this line uttered in drunk driving cases on more than one occasion: "This is a case about choices. The defendant chose to drink and then he chose to drive."

16 PAUL BUTLER, CHOKEHOLD: POLICING BLACK MEN 47–69 (2017); Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 952 (2019); Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1, 10 (2019) [hereinafter Roberts, *Foreword*]; Ross Kleinstuber, McCleskey *and the Lingering Problem of "Race," in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 37, 38 (David P. Keys & R. J. Maratea eds., 2016); Gennaro F. Vito & George E. Higgins, *Capital Sentencing and Structural Racism: The Source of Bias*, *in* RACE AND THE DEATH PENALTY: THE LEGACY OF *MCCLESKEY V. KEMP* 71, 71–72 (David P. Keys & R. J. Maratea eds., 2016); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); Dorothy E. Roberts, *Constructing a Criminal Justice System Free of Racial Bias: An Abolitionist Framework*, 39 COLUM. HUM. RTS. L. REV. 261, 262–63 (2007) [hereinafter Roberts, *Framework*].

17 Richard A. Oppel Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, N.Y. TIMES (Jan. 31, 2019), https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html (last visited Nov. 13, 2021) ("Roughly four out of five criminal defendants are too poor to hire a lawyer and use public defenders or court-appointed lawyers."); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUST., DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), https://www.bjs.gov/content/pub/pdf/dccc.pdf [https://perma.cc/RV32-767X] ("At the end of their case approximately 66% of felony Federal defendants and 82% of felony defendants in large State courts were represented by public defenders or assigned counsel.").

18 *See, e.g.*, Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1608 (1986); *see also* Dubber, *supra* note 1, at 2611 ("It might be argued, for instance, that capital punishment—as the intentional and permanent destruction of the offender's entire being, including her capacity for autonomy—is so patently inconsistent with the law's function of preserving and respecting the autonomy of persons as to be illegitimate per se, particularly if it is inflicted in part because of the offender's perceived inability to exercise her capacity for autonomy in a manner consistent with the autonomy of others.").

presumed innocent as well.[19] Pretrial detention has few meaningful differences from postconviction imprisonment. In both scenarios, detainees have little bodily control, with government agents dictating their movement, surveilling their person, and restricting their communication, association, and consumption.[20] Even those who avoid detention find themselves the object of state surveillance and control in the form of ankle monitoring, mandated appointments with community and social service providers, and lengthy court appearances.[21]

As these examples illustrate, there are three primary ways in which notions of autonomy and the criminal legal system intersect. First, the system presupposes that defendants are autonomous actors. This assumption buttresses the criminal law, enabling the criminal legal system to hold defendants accountable for their actions. Second, certain criminal rights and procedures purportedly exist to protect the ability of criminal defendants to make fundamental choices within the criminal legal system. Third, criminal punishment constrains individual autonomy. While this Article briefly touches on some of the concerns raised in each of these arenas, it focuses its analysis on the second one: the criminal rights and procedures that purportedly function to protect autonomy.

Within the criminal legal system, the Supreme Court has found that the Constitution provides certain procedural protections to accused persons by allowing them to make decisions that are "personal." These are individual rights that the Court has found relate to the creation of—and the audience for—the defense narrative. The Court has deemed these rights personal to the defendant because they promote the defendant's story of nonculpability and because the

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19 *See* Kate Weisburd, *Sentenced to Surveillance: Fourth Amendment Limits on Electronic Monitoring*, 98 N.C. L. REV. 717, 775 (2020) ("The process of facing criminal charges is in itself punitive. Pretrial detention, bail, administrative fees, restitution, and fine payments, as well as the burdens of attending multiple court dates, all add up to an ultimate de facto sanction."); ISSA KOHLER-HAUSMANN, MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING 1 (2018); MALCOLM M. FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT 199 (1992).

20 Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1312 (2012).

21 Weisburd, *supra* note 19, at 775; KOHLER-HAUSMANN, *supra* note 19, at 1 ("[C]omparatively trivial infractions entangle people in the tentacles of the criminal justice system, impose burdens to comply with judicial processes, require time away from work and children, entail fees and fines, and generate records that can be accessed by potential employers . . . ."); FEELEY, *supra* note 19, at 199.

defendant will bear the consequences of this narrative "personally."[22] These rights include whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, forgo an appeal, and—most recently—whether to "assert innocence" at a capital trial.[23] Undergirding these decisions is the right of self-representation, where the criminal defendant controls the entirety of his narrative and thus, the argument goes, bears total responsibility for the outcome of his case.[24] Although one can make a case that other procedural protections seek to maximize defendant autonomy, I limit my analysis to these six, which I refer to collectively as "the autonomy rights."

Through a discussion of the autonomy rights, I illustrate that while these rights may maximize autonomy in theory, the structural limitations of the criminal legal system prevent them from doing so in practice. Thus, while these rights may occasionally protect the autonomy of affluent defendants, they prove hollow for indigent defendants—the majority of those charged with crimes.[25] The autonomy rights fail to protect criminal defendants' ability both to make meaningful choices and to engage in fundamental self-expression.

This does not mean that it is impossible for defendants to display autonomy within the criminal legal system. Indeed, defendants do so daily in the form of acts of resistance. Instead, what it does mean is that their autonomous actions are not attributable to legal protections—i.e., autonomy rights. Put another way, when criminal defendants display agency within the criminal legal system, they do so despite the law and not because of it. In this way, the structural limitations in the current criminal legal system render the autonomy of criminal defendants analogous to that of enslaved persons under the American institution of slavery: both groups engage in autonomy not as a consequence of

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22 Faretta v. California, 422 U.S. 806, 819–20 (1975); Oral Argument at 16:15, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16-8255) [hereinafter Oral Argument], https://www.oyez.org/cases/2017/16-8255 (last visited Nov. 13, 2021) ("People can walk themselves into jail. They can walk themselves, regrettably, into the gas chamber. . . . But they have a right to tell their story.").

23 *McCoy*, 138 S. Ct. at 1508.

24 *See Faretta*, 422 U.S. at 834 ("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.'" (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring))).

25 *See supra* note 17.

rights but as an expression of resistance to a legal institution.[26] When historians discuss moments of autonomy displayed by enslaved people, they recognize that these moments have occurred despite the system and not because of it.[27] Legal scholars should bring this same approach to analysis of the criminal legal system; we should replace the discourse of autonomy rights with what this Article defines as the discourse of Autonomy as Resistance.

Autonomy as Resistance is best described as acts of insubordination by criminal defendants to authorities within the criminal legal system. Sometimes these authorities are explicitly oppositional to the defendant: prosecutors, court officers, judges; other times, they are the very actors purported to act as the defendants' guides and confidants: public defenders and appointed counsel. Autonomy as Resistance need not be an intentional political statement of rebellion against the criminal legal system. Often it is merely an individual's refusal to submit to perceived injustice, unfairness, discomfort, or inconvenience. It also need not be successful. Finally, unlike the "autonomy rights discourse," which emphasizes the role of law as a protective mechanism for the autonomy of criminal defendants, the autonomy as resistance discourse repositions law in the current legal system as antithetical to agentic aims. In this way, my theory of

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26 This Article does not argue that the American criminal legal system and the American institution of slavery are equivalent. Indeed, there are significant differences between the two—notably, the exclusively race-based nature of American slavery, the heritable nature of enslaved status, and the operation of the transatlantic trade of enslaved people, just to name a few. Instead, this Article aligns itself with the growing number of scholars who contend that the criminal legal system, while distinct from American slavery, is both rooted in the institution and shares its racially subordinating aims. *See, e.g.*, Roberts, *Foreword*, *supra* note 16, at 4 ("[C]riminal procedure and punishment in the United States still function to maintain forms of racial subordination that originated in the institution of slavery—despite the dominant constitutional narrative that those forms of subordination were abolished."); Dylan Rodríguez, *Abolition as Praxis of Human Being: A Foreword*, 132 HARV. L. REV. 1575, 1580–84 (2019) (discussing the connection between slavery and the modern carceral state); Goodwin, *supra* note 16, at 911 (arguing that slavery transformed over time into sharecropping, Jim Crow segregation, and contemporary prison labor); Kim Gilmore, *Slavery and Prison—Understanding the Connections*, 27 SOC. JUST. 195, 195–96 (2000) (discussing the relationship between the prison industrial complex and racialized chattel slavery); ANGELA Y. DAVIS, ABOLITION DEMOCRACY: BEYOND EMPIRE, PRISONS, AND TORTURE 35–37 (2005); Isaac Chotiner, *Bryan Stevenson on the Frustration Behind the George Floyd Protests*, NEW YORKER (June 1, 2020), https://www.newyorker.com/news/q-and-a/bryan-stevenson-on-the-frustration-behind-the-george-floyd-protests [https://perma.cc/C4E3-T6QZ] (arguing that slavery did not end in 1865; it simply evolved into racial terror, segregation, and mass incarceration).

27 *See infra* Section III.A.

Autonomy as Resistance differs from scholars who suggest that rights claims are critical forms of resistance.[28]

The current jurisprudence and discourse of individual autonomy in the criminal legal system as a product of law—what this Article refers to as the "autonomy rights discourse"—is harmful in several ways. First, it obscures the system's defects by framing discussions around individual rights instead of structural limitations. This lends itself to solutions involving procedural tinkering to better actualize individual rights instead of radical structural reform or abolition. Second, by obscuring these structural defects and stressing the system's protective qualities, it presents the system not only as legitimate, but as functional, and potentially even successful. As such, a new scholarly frame is warranted: not autonomy as legally enabled self-governance, but autonomy as resistance to law and the legal system. By illuminating the ways in which autonomy in the criminal legal system resembles autonomy under slavery, the Autonomy as Resistance frame adds a thumb on the scale for the need for radical structural change and, even potentially, abolition.

I make the case for this conclusion in three Parts. In Part I, I summarize the tradition of viewing law as an instrument to protect individual autonomy in the criminal legal system, surveying Supreme Court decisions, rules of professional responsibility, and the stated aims of defender organizations. In Part II, I discuss the structural limitations of the modern criminal legal system that make it a bad fit for the legal safeguarding of individual autonomy. I then illustrate how the "autonomy rights" tend to play out in practice for indigent criminal defendants. In Part III, I invoke the American institution of slavery as a paradigmatic example of autonomous action arising as resistance to law. I then argue that modern criminal defendants' displays of autonomy are best encapsulated by resistance to the criminal legal system, not as a meaningful exercise of legal rights. Finally, in light of this resemblance, I argue for a reframing of autonomy discourse. First, I discuss how the current discourse of autonomy rights harms criminal defendants by obscuring the need for systemic reform. Then, I argue that reframing the autonomy discourse in terms of resistance to law is both a better fit to describe the agency of criminal defendants and more likely to facilitate a necessary reimagining of the criminal legal system.

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[28] *See, e.g.*, Eric J. Miller, *Encountering Resistance: Contesting Policing and Procedural Justice*, 2016 U. CHI. LEGAL F. 295, 342–43 (2016); Alice Ristroph, *Regulation or Resistance? A Counter-Narrative of Constitutional Criminal Procedure*, 95 B.U. L. REV. 1555, 1558–60 (2015); Jenny E. Carroll, *The Resistance Defense*, 64 ALA. L. REV. 589, 589 (2013).

I. AUTONOMY RIGHTS DISCOURSE AND THE CRIMINAL LEGAL SYSTEM

In this Part, I explore the meaning of autonomy and summarize the ubiquity of autonomy discourse in discussions concerning the legal rights of criminal defendants by the Supreme Court, among scholars, and among practitioners. I observe that each of these constituencies recognizes defendant autonomy as a value worth protecting and assumes the ability of laws and rules to achieve meaningful autonomy in the criminal legal system.

A. *Autonomy Jurisprudence*

Autonomy discourse pervades criminal law, with the Supreme Court setting much of its tenor. As a result, most scholars, rule-makers, and practitioners take as given the law's ability to protect the autonomous decision-making of individuals.

Pinning down the definition of autonomy is difficult because philosophers and legal scholars have long debated its meaning.[29] Richard Fallon, Jr. has observed that autonomy "means different things to different people" and that it "occasionally appears to change its meaning in the course of a single argument."[30] Similarly, Daniel R. Williams deems autonomy "a perfect slogan" because it lacks a precise definition but has "intuitive appeal" and "because it captures a deep moral sensibility about what is properly valued in our criminal justice

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[29] *See, e.g.*, Hashimoto, *Resurrecting*, *supra* note 1, at 1153 ("This Article uses the word autonomy as the Supreme Court has used it: to embody the concept of private space within which a person can make and act upon decisions free from government intervention."); R. George Wright, *Legal Paternalism and the Eclipse of Principle*, 71 U. MIAMI L. REV. 194, 207 (2016) ("Very roughly, autonomy in the fullest, most ambitious sense focuses on the idea of a will that is capable of genuine agency. Such a will is capable of being moved by apparently good and bad reasons, including principles."); Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 876–78 (1994) (distinguishing between descriptive and ascriptive autonomy); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989) (arguing for the feminist conception of autonomy that includes recognition of a social component); Strauss, *supra* note 13, at 336 ("[Autonomy] denotes the ability to make choices about one's life; it is the right of self-determination."); Daniel R. Williams, *Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility*, 57 HASTINGS L.J. 693, 703 (2006) ("Autonomy, for present purposes, is expressed in three interrelated ways: the power to waive rights, the power to control one's own destiny, and the power to insist on being left alone.").

[30] Fallon, *supra* note 29, at 876; *see also* Strauss, *supra* note 13, at 339 ("[A]utonomy is a vague notion and it may be difficult to determine exactly what is a client's 'autonomous' choice.").

system."[31] Williams further contends that the autonomy slogan "rhetorically supports the moral infrastructure of the criminal law."[32]

The Enlightenment concept of individual autonomy, which emphasized personal liberty free from government intrusion, frequently appears in Supreme Court opinions.[33] According to this view, freedom derived from natural law and thus was inalienable; the purpose of the Bill of Rights was to safeguard this freedom.[34] Nineteenth-century philosopher John Stuart Mill expanded on this concept, arguing that individual autonomy resulted in the best outcome for the individual and thus, in aggregate, the most utility for society.[35] Mill believed that the individual's ability to exercise choice and pursue reason was necessary to achieve self-fulfillment and that government interference with these qualities was desirable only when it acted to protect third parties from the individual.[36] Government interference for an individual's "own good" was anathema, unless it served to provide knowledge to an individual so that they might exercise choice consistent with their desires.[37] To Mill, only this "soft paternalism" was permissible.[38] Immanuel Kant argued that, regardless of social utility, respect for autonomy was morally required.[39] Kant saw autonomy as a fundamental quality of personhood and posited that individuals were capable of self-governance and self-reflection as rational decision-makers.[40] Consequently, the State is morally obligated to treat individuals as rational, autonomous beings.[41]

In the criminal arena, the Court has typically invoked autonomy in the context of representation, determining whether a particular decision belongs to a defendant or their attorney. Here, the Court frames autonomy as the capacity for self-expression and self-governance, but it does so without context, ignoring the overarching government intrusion that inherently coerces a defendant's so-called

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31 Williams, *supra* note 29, at 697.

32 *Id.* at 698–99.

33 Winick, *supra* note 2, at 1708–12.

34 *Id.*

35 *Id.* at 1712–14.

36 *Id.*

37 *Id.* at 1713 & n.36.

38 *See* JOHN STUART MILL, ON LIBERTY 172–73 (2d ed. 1859) (discussing the "bridge scenario").

39 Winick, *supra* note 2, at 1714–15.

40 *Id.*

41 *Id.*

decisions.[42] Most recently, in 2018, the Court made an unabashed step in favor of capital defendants' "[a]utonomy to decide" in *McCoy v. Louisiana*, when it overturned Robert McCoy's conviction and death sentence because his lawyer conceded his guilt over Mr. McCoy's express objection as an effort to persuade the jury to spare his life.[43] Emphasizing that the Sixth Amendment entitled a defendant to "*Assistance* of Counsel for *his* defence" the Court concluded,

> With individual liberty—and, in capital cases, life—at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense: to admit guilt in the hope of gaining mercy at the sentencing stage, or to maintain his innocence, leaving it to the State to prove his guilt beyond a reasonable doubt.[44]

The Court emphasized that the Constitution protects a defendant's "[a]utonomy to decide that the objective of the defense is to assert innocence" at a capital trial, regardless of the wisdom or likely repercussions of that choice.[45] As Justice Sotomayor stated during oral argument, "People can walk themselves into jail. They can walk themselves, regrettably, into the gas chamber. But they have a right to tell their story."[46]

The Court's decision made no mention of the path that led to Mr. McCoy having been charged with capital murder. It failed to discuss the significant evidence that revealed that Mr. McCoy was likely mentally compromised.[47] It did, however, note the trial court's ruling that Mr.

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42 Here, the Court's conception of individual autonomy would likely be challenged by scholars arguing for a reframing of autonomy as relational. *See, e.g.*, Nedelsky, *supra* note 29; John Christman, *Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves*, 117 PHIL. STUD. 143 (2004).

43 Defense counsel's theory was that if Mr. McCoy took responsibility for his actions, the jury might interpret it as a sign of remorse. McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018).

44 *Id.* at 1505.

45 *Id.* at 1508.

46 *See* Oral Argument, *supra* note 22, at 16:15.

47 There were early signs that Robert McCoy's behavior was far from normal. *See* Brief for Respondent at 5–13, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16-8255). Accused of murdering his girlfriend's family members, Mr. McCoy explained the real killers were corrupt law enforcement officers who acted in retaliation for his witnessing their participation in drug activity. *Id.* at 6. Mr. McCoy maintained that he had been out of town and identified purported alibi witnesses, none of whom supported his claims. *Id.* at 5, 7. Mr. McCoy fired his public defenders after they declined to spend limited funding on subpoenaing witnesses who did not exist or lacked relevance to his case. *Id.* at 8. His family then hired Larry English, who repeatedly told the court that he believed Mr. McCoy was "suffering from some severe mental and emotional issues" and "has exhibited very bizarre behavior." *Id.* at 9–11 (quoting Transcript of Record at 347, 388). Two weeks before trial, Mr. English reiterated that "Mr. McCoy lacks the mental capacity to even help me defend himself in this case. I believe that Mr. McCoy is insane . . . ." *Id.* at 13 (quoting Transcript of Record at 436).

McCoy was competent to stand trial—which, the Court intimated, afforded him full "autonomy rights."[48] Nor was the possible deficiency of his attorney's advice, experience, or investigation relevant to the Court's analysis.[49] In fact, the Court explicitly chose not to analyze counsel's effectiveness "[b]ecause a client's autonomy, not counsel's competence, is in issue."[50]

Instead, the Court found the error to be structural because it interfered with a defendant's right to make "fundamental choices" about the objective of their defense.[51] The Court determined that whether "the objective of the defense is to assert innocence" was on par with four other autonomy rights, including "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal."[52] Use of a quote from Justice Scalia summed up the ruling: "Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State."[53]

The *McCoy* Court's promotion of a criminal defendant's autonomy as the right to self-expression or self-determination was not new. The decision was the direct heir of one of the Court's most controversial[54] rulings, *Faretta v. California*.[55] In *Faretta*, the Court first held that criminal defendants had a Sixth Amendment right to represent themselves, provided they waived their right to counsel

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48 *McCoy*, 138 S. Ct. at 1508–09.

49 After firing his public defenders and proceeding pro se, Mr. McCoy accepted the representation of Mr. English, whom his parents had retained at a cost of $5,000. *Id.* at 8–9; State v. McCoy, 218 So. 3d 535, 545, 555 n.20 (La. 2016). Although the trial court offered to appoint a second attorney, Mr. McCoy refused. *See* Brief for Respondent at 12, *McCoy*, 138 S. Ct. 1500 (No. 16-8255). Mr. English indicated that his strategy was to concede guilt in the guilt-innocence phase to gain credibility with the jury in the penalty phase when he introduced mitigation evidence of Mr. McCoy's significant mental health issues. But Mr. English's entire penalty phase presentation consisted of a single witness—the psychologist who found Mr. McCoy competent to stand trial—who testified merely that Mr. McCoy lacked a mental illness that would have "interrupt[ed] his ability to know right from wrong." Joint Appendix Volume II of II (JA432-JA760) at 689, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

50 *McCoy*, 138 S. Ct. at 1510–11.

51 *Id.*

52 *Id.* at 1508.

53 *Id.* (quoting Martinez v. Ct. App. of Cal., Fourth App. Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring)).

54 Criticism of *Faretta* is extensive. *See, e.g.*, John F. Decker, *The Sixth Amendment Right to Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483 (1996); United States v. Farhad, 190 F.3d 1097, 1106–07 (9th Cir. 1999) (Reinhardt, J., concurring) (arguing that asserting a right to self-representation at trial may be the equivalent of permitting a defendant to waive his right to a fair trial).

55 Faretta v. California, 422 U.S. 806 (1975).

knowingly and voluntarily.[56] The case involved a defendant charged with grand larceny who requested to represent himself at trial because he believed that his public defender had too many cases to represent him competently.[57]

That *Faretta* would employ an autonomy lens was evident from the first paragraph of Justice Stewart's majority opinion, which rephrased the question for the Court as "whether a State may constitutionally hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense."[58] The Court made a case for autonomy as a value ingrained in American history and culture. First, it found that federal law recognized self-representation dating back to the Judiciary Act of 1798, which stated that "in all the courts of the United States, the parties may plead and manage their own causes *personally* or by the assistance of such counsel."[59] Seizing on this idea of "personal rights," the Court concluded that the Sixth Amendment conferred such a right on defendants because the structure of the Amendment implied the "right . . . to make one's own defense personally."[60] The Court reasoned that the rights enumerated by the Sixth Amendment—which include the right to notice, confrontation, compulsory process, and assistance of counsel—all amounted to the right to make a defense at an adversarial criminal trial.[61] These rights are "personal" because "[t]he right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[62]

The Court pointedly noted that the only tribunal that had historically required representation by counsel was the notorious Star Chamber—the antithesis of the American liberty-protecting judicial system.[63] Citing drafts of the Bill of Rights and contemporaneous state constitutions, the Court found that "there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of

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56 *Id.* at 807.

57 *Id.*

58 *Id.*

59 *Id.* at 812–13 (quoting Judiciary Act of 1789 § 35, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1654)) (emphasis added).

60 *Id.* at 819.

61 *Id.* at 818–20. Interestingly, the Court has never found that defendants have a personal right to forgo confrontation of a witness. *See* McCoy v. Louisiana, 138 S. Ct. 1500, 1508–09, 1512 (2018) (finding that the Sixth Amendment protects a defendant's right to determine whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, forgo an appeal, and maintain innocence during a capital trial).

62 *Id.* at 819–20.

63 *Id.* at 821–23.

assistance of counsel,"[64] concluding that those who wrote the Bill of Rights surely "understood the inestimable worth of free choice."[65] Having established that self-representation was a critical component of American democracy, the Court explained that providing a lawyer to an unwilling defendant would only "lead [the defendant] to believe that the law contrives against him."[66]

The *Faretta* decision, like *McCoy*, championed self-governance devoid of contemporary context. Of course, as one scholar has observed, "Our choices are almost never wholly free; rather, they are constrained by a variety of social, economic, religious, psychological, and familial pressures . . . ."[67] But by stripping away the context—and thereby the constraints—of the American criminal legal system, the Court created an illusion of legally protected autonomy that is legitimizing of that system.

In fact, the *Faretta* Court explicitly declined to consider in its analysis the practical realities of such an exercise of "free choice."[68] While the Court acknowledged that most people would fare better with counsel than they would representing themselves, it made clear that theoretical defendant autonomy was more important than practical consequences.[69] A defendant's technical legal knowledge or lack thereof was, accordingly, irrelevant.[70] Defendants need only be informed of the disadvantages of self-representation so that they might "knowingly and intelligently" waive their right to counsel.[71] With soaring rhetoric, the Court announced that only by preserving a criminal defendant's ability to self-govern could the ideals of the American republic be actualized: "[A]lthough [the 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.'"[72]

B. *Autonomy Scholars*

The scholarly discourse on the autonomy of criminal defendants has followed the Supreme Court's framing in *Faretta* and *McCoy*. Most

64 *Id.* at 832.

65 *Id.* at 833–34.

66 *Id.* at 834.

67 Winick, *supra* note 2, at 1769.

68 *See Faretta*, 422 U.S. at 834.

69 *Id.* ("Personal liberties are not rooted in the law of averages.").

70 *Id.* at 836.

71 *Id.* at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)).

72 *Id.* at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)) (emphasis added).

take for granted that autonomy—defined here as self-expression and self-determination—is both a laudable and an attainable goal for criminal defendants,[73] although others believe autonomy should sometimes be subordinated to other values.[74] Following *Faretta*, most criticism focused on the practical consequences of the ruling, questioning whether fairness and reliability were more important goals than defendant autonomy.[75] Scholars debated the wisdom of the Court's later decisions limiting the right of self-representation by approving the use of standby counsel[76] and recognizing that courts could apply a higher standard for mentally compromised, but competent, criminal defendants who wished to represent themselves.[77] Scholars generally approved of these rulings as striking a better balance between the goal of defendant autonomy and those of fairness and reliability.[78]

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73 *See supra* notes 12–13. There are exceptions. Robert E. Toone has argued that indigent defendants lack the ability to control their attorney that comes with a financial relationship. *See* Toone, *supra* note 12. I. Glenn Cohen has observed that indigent clients not only lack the ability to choose their lawyer, they have no right to a high-quality defense, a particular expenditure of resources, or "a meaningful attorney-client relationship." I. Glenn Cohen, *Rationing Legal Services*, 5 J. LEGAL ANALYSIS 221, 243 (2013) (quoting Morris v. Slappy, 461 U.S. 1, 14 (1983)). Stephen Schulhofer has noted that, along with no choice of counsel, indigent defendants lack "effective means to monitor counsel's loyalty and performance." Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1991 (1992).

74 *See supra* note 14.

75 *See, e.g.*, Sabelli & Leyton, *supra* note 14, at 165 (arguing that the right of self-representation "undermines the fairness of the criminal process"); Decker, *supra* note 54, at 563–65 (arguing that due process concerns should outweigh the right of self-representation).

76 McKaskle v. Wiggins, 465 U.S. 168, 177–78 (1984) (upholding the appointment and participation of standby counsel so long as standby counsel did not undermine the appearance of self-representation "since the right to appear *pro se* exists to affirm the accused's individual dignity and autonomy").

77 Indiana v. Edwards, 554 U.S. 164, 171, 173–74 (2008) (recognizing a "mental-illness-related limitation on the scope of the self-representation right" for "gray-area" defendants).

78 *See, e.g.*, Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System*, 75 N.Y.U. L. REV. 676, 682–83, 706, 735 (2000) (arguing that the courts should strengthen and better define the role of standby counsel to protect a criminal defendant's right to a fair trial); Jona Goldschmidt, *Autonomy and "Gray-Area" Pro Se Defendants: Ensuring Competence to Guarantee Freedom*, 6 NW. J.L. & SOC. POL'Y 130, 131 (2011) (proposing methods for "'gray-area' defendants . . . to better protect the bedrock values of individual dignity and autonomy that are the foundation of any system of equal justice under law"); John H. Blume & Morgan J. Clark, *"Unwell":* Indiana v. Edwards *and the Fate of Mentally Ill Pro Se Defendants*, 21 CORNELL J.L. & PUB. POL'Y 151, 153–54 (2011) (arguing that *Edwards* did not go far enough in that it failed to craft specific guidelines for self-representation by criminal defendants and that as a result "gray-area" defendants "will be permitted to represent themselves in trials that are antithetical to the basic purposes of the criminal justice system"); Todd A. Berger, *The Aftermath of* Indiana v. Edwards*: Re-evaluating the Standard of Competency Needed for Pro Se Representation*, 68 BAYLOR L. REV. 680, 689 (2016) (arguing that the reasoning of the *Edwards* decision supports a conclusion that due process requires that trial courts demand a "heightened standard of competence" to permit self-representation).

An exception to this trend is Erica J. Hashimoto, who has written several articles emphasizing the value of defendant autonomy and urging courts to take measures to better protect it.[79] Hashimoto conducted an empirical review of federal and state court criminal cases and concluded that, for felony cases, the data did not support the assumptions that pro se defendants suffered significantly worse outcomes than represented defendants or that most pro se defendants exhibited outward signs of mental illness.[80] Although Hashimoto recognized that the underlying datasets were small and incomplete, she contended that "the available data [was] sufficient to cast serious doubt on the validity of the [two] assumptions."[81] Based in part on this research, Hashimoto argued that not only was *Faretta* rightly decided, but the Court should reinvigorate its autonomy jurisprudence.[82] According to Hashimoto, *Faretta* opponents made three flawed strains of arguments: (1) that lawyers are wiser than their clients; (2) that the agreement to accept counsel waived a defendant's autonomy interest; and (3) that autonomy rights threaten defendants with mental illness.[83] Hashimoto argued that rights-backed autonomy was critical for indigent defendants because counsel appointment systems had financial incentives for attorneys to breach their duty of loyalty.[84] Although she conceded that a carveout was likely necessary to prevent harm to mentally ill clients, Hashimoto made clear that it should be narrowly tailored so as not to imperil the robust autonomy rights of most criminal defendants.[85]

The Supreme Court has twice relied on Hashimoto's conclusions. In declining to overrule *Faretta*, the Court cited Hashimoto's empirical research—without noting the limitations of her datasets—as evidence that unfair trials featuring pro se defendants were "not common."[86] The *McCoy* Court also cited her work for its normative positions on rights-backed autonomy, crediting her conclusion that some capital defendants may value even a remote chance of acquittal more than they desire avoiding a death sentence.[87]

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79 Hashimoto, *Resurrecting*, *supra* note 1; Hashimoto, *Defending*, *supra* note 1, at 427–28.

80 Hashimoto, *Defending*, *supra* note 1, at 423, 427. Hashimoto drew her conclusion regarding mental illness from the fact that no competency examination was ordered in these cases. *Id.* at 456–59. According to Hashimoto, "[C]ompetency evaluations in both the state and federal systems are done routinely upon any indication of mental illness." *Id.* at 457.

81 *Id.* at 441–46.

82 *See* Hashimoto, *Resurrecting*, *supra* note 1, at 1151 n.12, 1176–77 & nn.164, 169–70 & 173.

83 *Id.* at 1148.

84 *Id.*

85 *Id.*

86 Indiana v. Edwards, 554 U.S. 164, 178 (2008).

87 McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018).

C. *"Client" Autonomy*

The current debate within the criminal defense bar about the ideal model of representation takes for granted that the autonomy of criminal defendants may be facilitated by the creation of and adherence to legal rules—a notion this Article challenges. Consistent with Supreme Court jurisprudence, the Model Rules of Professional Conduct focus on defendant autonomy in the context of the attorney relationship, carving out particular decisions reserved for the client.[88] Proponents of a client-centered model of criminal defense practice subscribe to a theory of representation wherein they attempt to maximize client autonomy by deferring to clients to determine the objectives—and sometimes the strategy—of their defenses.[89]

Under the Model Rules, "strategic" decisions and "trial management" are left to the attorney. The rules conceive of the distinction as permitting a client to determine the "objectives" or ends of the litigation, while the attorney determines the "means." Model Rule 1.2 mandates that a lawyer "abide by a client's decisions concerning the objectives of representation" and specifies that, in a criminal case, a lawyer must follow the client's decision "as to a plea to be entered, whether to waive jury trial and whether the client will testify."[90] The rule reserves for attorneys the power to "take such action on behalf of the client as is impliedly authorized to carry out the representation."[91]

Many have observed that this "ends" and "means" distinction leaves a multitude of gray areas, causing the defense bar to adopt different orientations around how to appropriately allocate decision-making between defendant and defense counsel.[92] Two philosophies dominate: traditional, or "lawyer-centered," representation and participatory, or "client-centered," representation.[93] According to lawyer-centered representation, after identifying the goals of the

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88 MODEL RULES OF PRO. CONDUCT r. 1.2 (AM. BAR ASS'N 2020).

89 Uphoff & Wood, *supra* note 13, at 9.

90 MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

91 *Id.*

92 Uphoff & Wood, *supra* note 13, at 11. Scholars have commented on the ambiguity of "ends" and "means." *See* Strauss, *supra* note 13, at 324; Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 507 (1994); Sabelli & Leyton, *supra* note 14, at 182; Rodney J. Uphoff, *Who Should Control the Decision to Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763, 776–77 (2000). The ABA's commentary previously conceded that a "clear distinction" between the two "sometimes cannot be drawn," but this language has since been removed. *See* MODEL RULES OF PRO. CONDUCT r. 1.2 cmt. (AM. BAR ASS'N 1989) https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_rule12 (last visited Nov. 26, 2021).

93 Uphoff & Wood, *supra* note 13, at 7–8; Uphoff, *supra* note 92, at 771.

representation, the client assumes a passive role, and the lawyer relies on their training, skill, and judgment to manage the case in the way most likely to bring about the client's desired results.[94] Under client-centered representation, the attorney seeks to maximize client autonomy by encouraging clients to take an active role both in identifying priorities and in making fundamental decisions likely to have a substantial impact on the case.[95] The client-centered model is premised on the idea that clients are better positioned to make case decisions because they best understand their own values and priorities.[96] The lawyer's role is "to provide clients meaningful information so as to empower them to make informed choices about their cases."[97] The last several decades have resulted in a shift from the lawyer-centered to the client-centered model, with many prestigious public defender offices now explicitly advertising themselves as client centered[98]—often with language that recalls the Court's "choice" rhetoric in *McCoy* and *Faretta*.[99]

In addition, clinical scholarship has long supported the client-centered model of representation[100] and has engaged in no significant

94 Uphoff & Wood, *supra* note 13, at 7–8.

95 *Id.* at 8–9.

96 *Id.* at 9.

97 *Id.*

98 *See, e.g.*, *Holistic Defense, Defined*, BRONX DEFS., https://bronxdefenders.org/holistic-defense [https://perma.cc/52UF-65RX] ("A holistic defender goes beyond the zealous advocacy of the committed public defender with an enhanced set of skills that are both client-centered and interdisciplinary."); *PDS Historical Timeline*, PUB. DEF. SERV. FOR D.C., https://www.pdsdc.org/about-us/historical-timeline [https://perma.cc/LC3A-P8E9] ("The National Legal Aid and Defender Association issues the report *PDS: A Model of Client-Centered Representation*, which highlights the PDS program as a '*beacon of hope*' for its client-centered representation."); *Dignity. Justice. Hope.*, ORLEANS PUB. DEFS., https://www.opdla.org [https://perma.cc/9ZQG-VSKF] ("We fight for our clients by providing excellent client-centered representation, reforming the system and partnering with the community."); *Introduction*, HENNEPIN CNTY. PUB. DEF., https://www.hennepinpublicdefender.org [https://perma.cc/PJ5F-RY2M] ("Our client-centered representation defends, protects, and fights for those facing a daunting criminal justice system.").

99 *See, e.g.*, *Mission and Story*, BRONX DEFS., https://www.bronxdefenders.org/who-we-are [https://perma.cc/WZ6Q-RFFG] ("Whether a client *decides to fight their case or seek an alternative resolution*, their team stands behind them, making sure they get the justice they deserve." (emphasis added)); *Introduction*, ALAMEDA CNTY. PUB. DEF., https://www.acgov.org/defender/about [https://perma.cc/H4YA-HMK3] ("Our client-centered practice gives a voice to those whose voices have been silenced by poverty.").

100 Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006) (examining multiple meanings of client-centeredness); Ellmann, *supra* note 1, at 720 (endorsing a client-centered practice where the "responsibility of the lawyer is to enable the client to exercise his right to choose"); DAVID A. BINDER, PAUL BERGMAN, SUSAN C. PRICE & PAUL R. TREMBLAY, LAWYERS AS COUNSELORS: A CLIENT-CENTERED APPROACH (2d ed. 2004); Michael Meltsner, *Celebrating the Lawyering*

debate regarding whether legally protected autonomy is achievable for defendants in the criminal legal system. Instead, this scholarship has tended to focus on whether and when attorneys are justified in substituting their own judgment for that of "gray area" defendants—those who, while likely legally competent, display significant symptoms of mental illness.[101]

Considering these attitudes, it is unsurprising that criminal defense attorneys and law professors were visibly supportive of Robert McCoy's autonomy interest and skeptical of his attorney's actions. Both the National Association of Criminal Defense Lawyers (NACDL) and the American Bar Association (ABA) were amici in support of Mr. McCoy. The NACDL asserted that "respect for the individual rights and decision-making of the defendant" was a "core principle" of the Fifth and Sixth Amendments.[102] The brief then listed four of the six "autonomy rights"—whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal—and asserted that "fundamental fairness requires that the accused retain the autonomy to decide them."[103] The ABA echoed these sentiments, contending that "[t]he attorney, as an assistant, is obliged to respect the client's autonomy to make fundamental decisions about his or her case."[104]

In sum, the Supreme Court's autonomy rhetoric has informed the discourse in both the academy and the profession. Each of these groups assumes as a starting point that laws, rules, and norms within the criminal legal system can function to meaningfully protect defendant autonomy. In the next Part, I reject this assumption.

II. THE LAW'S FAILURE TO PROTECT DEFENDANT AUTONOMY

In this Part, I discuss the structural limitations of the modern criminal legal system that make it a bad fit for the protection of individual autonomy. I then illustrate how the six "autonomy rights"

Process, 10 CLINICAL L. REV. 327, 328 (2003); Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 848–49 (1998); Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 ARIZ. L. REV. 501, 507–11 (1990).

101 *See, e.g.*, King, *supra* note 13 (proposing framework for criminal defense attorneys to determine when to substitute judgment for mentally impaired clients); Ross, *supra* note 13, at 1348 (discussing whether defenders should substitute judgment for mentally ill defendants).

102 Brief of the Nat'l Ass'n of Crim. Def. Laws. as Amicus Curiae in Support of Petitioner at 2–3, McCoy v. Louisiana, 138 S. Ct. 1500 (2018) (No. 16-8255), 2017 WL 5624692, at *2–3.

103 *Id.* at 4.

104 Brief of Am. Bar Ass'n as Amicus Curiae in Support of Petitioner at 7, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

tend to play out in practice for indigent criminal defendants, concluding that they fail to safeguard defendant autonomy.

A. *Systemic Constraints on Autonomy*

Recent scholarship has emphasized the links between the institution of slavery and the criminal legal system.[105] Indeed, as many have noted, the Thirteenth Amendment specifically contemplates incarceration as slavery, prohibiting all slavery and involuntary servitude, save "as a punishment for crime whereof the party shall have been duly convicted."[106] Dorothy Roberts has observed that "[t]he pillars of the U.S. criminal punishment system—police, prisons, and capital punishment—all have roots in racialized chattel slavery."[107] Roberts traced the roots of modern policing and state surveillance to slave patrols that monitored the behavior of both enslaved and free Black people and pursued those who escaped from bondage.[108] She then explained how criminal punishment replaced slavery as a tool of racial subordination: "Criminal punishment was a chief way the southern states nullified the Reconstruction Amendments, reinstated the white power regime, and made free [B]lacks vulnerable to labor exploitation and disenfranchisement."[109]

These scholars argue that anti-Black racial subordination did not end with the demise of slavery; rather, it evolved:[110] first, into the post-Reconstruction Era of Racial Terror in which white people both lynched with impunity Black people accused of transgressing the social order[111] and imprisoned them for minor "public order" offenses on mining crews or chain gangs as a method of ensuring cheap labor.[112] Next, laws

105 *See supra* note 26.

106 U.S. CONST. amend. XIII, § 1.

107 Roberts, *Foreword*, *supra* note 16, at 20.

108 *Id.* at 20–28.

109 *Id.* at 30.

110 *See Slavery in America: The Montgomery Slave Trade*, EQUAL JUST. INITIATIVE (2018), https://eji.org/reports/slavery-in-america [https://perma.cc/DTN9-7JDH]; Chotiner, *supra* note 16; *see also* Roberts, *Foreword*, *supra* note 16, at 7 ("First, today's carceral punishment system can be traced back to slavery and the racial capitalist regime it relied on and sustained.").

111 EQUAL JUST. INITIATIVE, LYNCHING IN AMERICA: CONFRONTING THE LEGACY OF RACIAL TERROR (3d ed. 2017), https://lynchinginamerica.eji.org/report [https://perma.cc/8KKL-7DTX].

112 *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II (2008) (chronicling post-slavery imprisonment of African Americans as forced laborers); Roberts, *Foreword*, *supra* note 16, at 20 ("After Emancipation, criminal control functioned as a means of legally restricting the freedoms of black people and preserving whites' dominant status.").

formalizing segregation ushered in the era of Jim Crow.[113] As Ion Meyn has carefully documented, federal "reforms" during this era wrote race into criminal procedure by expanding powers of prosecutors and intentionally limiting the agency of criminal defendants, who were primarily Black, compared to that of civil litigants, who were primarily white.[114] Finally, as the Civil Rights Movement brought disfavor on the use of overt racial classifications, a new "color-blind" racial subordination began in the facially race-neutral system of mass incarceration.[115]

While slavery constrained the autonomy of enslaved people in an obvious way, the modern criminal legal system places similar constraints on criminal defendants. The goal of the criminal legal system is to limit the autonomy of those who have demonstrated "improper" self-governance. As feminist scholars have observed, autonomy as "proper" self-governance "tends to depend on prevailing norms and [consolidates] power relations."[116] The United States incarcerates more people than any other country in the world,[117] yet only one in every twenty-four arrests is for a violent crime.[118] Recent scholars have argued that the American criminal legal system perpetuates white supremacy through the mass incarceration, surveillance, and control of primarily Black and Brown people.[119] Law

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113 *See, e.g.*, EQUAL JUST. INITIATIVE, SEGREGATION IN AMERICA (2018), https://segregationinamerica.eji.org/report [https://perma.cc/822L-W6EX].

114 Ion Meyn, *Constructing Separate and Unequal Courtrooms*, 63 ARIZ. L. REV. 1 (2021).

115 *See generally* ALEXANDER, *supra* note 16 (arguing that the criminal legal system perpetuates racial subordination through the facially race-neutral tool of mass incarceration); Loïc Wacquant, *Deadly Symbiosis: When Ghetto and Prison Meet and Mesh*, 3 PUNISHMENT & SOC'Y 95, 96 (2001).

116 JENNIFER M. DENBOW, GOVERNED THROUGH CHOICE: AUTONOMY, TECHNOLOGY, AND THE POLITICS OF REPRODUCTION 2 (2015); *see also* CLAIRE E. RASMUSSEN, THE AUTONOMOUS ANIMAL: SELF-GOVERNANCE AND THE MODERN SUBJECT xv (2011).

117 Drew Kann, *5 Facts Behind America's High Incarceration Rate*, CNN (Apr. 21, 2019, 3:50 PM), https://www.cnn.com/2018/06/28/us/mass-incarceration-five-key-facts/index.html [https://perma.cc/WR6B-4WB3].

118 BUTLER, *supra* note 16, at 62; *see also* I. Bennett Capers, *The Under-Policed*, 51 WAKE FOREST L. REV. 589, 594 (2016) (indicating that prosecutors charge four times as many misdemeanors as felonies nationwide).

119 BUTLER, *supra* note 16, at 47–69; Goodwin, *supra* note 16, at 952 ("State and private prisons hone the practice of producing inmates through disparate racialized policing practices, thereby, intentionally or not, replicating slavery and strategically utilizing its core labor force: poor Blacks primarily, but also Latinos, immigrants, Native Americans, and poor whites."); Roberts, *Foreword*, *supra* note 16, at 10 (discussing the "realization that white supremacy is deeply woven into the fabric of every legal institution in the United States and upheld by U.S. constitutional law"); Roberts, *Framework*, *supra* note 16, at 263 (presenting framework that recognizes how the criminal justice system "refashions past regimes of racial control to continue to sustain white supremacy").

professor and former federal prosecutor Paul Butler sums up this reality: "American criminal justice today is premised on controlling African American men."[120] As of 2018, Black men were 5.8 times more likely to be incarcerated as white men, and Black women were 1.8 times more likely to be incarcerated as white women.[121] While racial subordination is paramount, unique experiences of discrimination exist for those whose identities occupy the intersection of multiple axes of oppression within the criminal legal system, including gender, gender identity, age, immigration status, ability, and housing status.[122]

This Section demonstrates how these two structural aspects of the criminal legal system—its white supremacist lens and its massiveness—work in tandem to create a criminal legal system in which law does not function to protect the autonomy of criminal defendants.

1. Selection

The biggest myth of the criminal legal system is that most of those who become entangled within it do so because of their "bad choices" to commit criminal acts.[123] This is the myth that fuels the opening, closing,

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120 BUTLER, *supra* note 16, at 17.

121 BUREAU OF JUST. STAT., PRISONERS IN 2018 (2020), https://www.bjs.gov/content/pub/pdf/p18_sum.pdf [https://perma.cc/5ZNW-3YLW]. Building on the work of Kimberlé Crenshaw, scholars have underscored that Black women experience subordination in the criminal legal system based on two axes of oppression: race and gender. *See, e.g.*, KIMBERLÉ WILLIAMS CRENSHAW, PRISCILLA OCEN & JYOTI NANDA, AFR. AM. POL'Y F. & CTR. FOR INTERSECTIONALITY & SOC. POL'Y STUD., BLACK GIRLS MATTER: PUSHED OUT, OVERPOLICED AND UNDERPROTECTED (2015), https://www.atlanticphilanthropies.org/wp-content/uploads/2015/09/BlackGirlsMatter_Report.pdf [https://perma.cc/GJ5A-BN3L]; *see also* Capers, *supra* note 118 (arguing that white people are "under-policed" and that police give them a "racial pass" by forgoing their arrest for misdemeanor crimes).

122 *See generally* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); I. India Thusi, *Harm, Sex, and Consequences*, 2019 UTAH L. REV. 159, 183–84 (2019) (contending that the criminal legal system is a structural harm for communities that experience intersectional discrimination); Ifeoma Ajunwa, *The Modern Day Scarlet Letter*, 83 FORDHAM L. REV. 2999, 3002 (2015) (arguing that formerly incarcerated women disproportionately suffer from collateral legal consequences of convictions due to intersectional identities); Kimberlé W. Crenshaw, *From Private Violence to Mass Incarceration: Thinking Intersectionally About Women, Race, and Social Control*, 59 UCLA L. REV. 1418, 1435 (2012) (discussing intersectional oppression in the context of mass incarceration); Subini Ancy Annamma, David Connor & Beth Ferri, *Dis/ability Critical Race Studies (DisCrit): Theorizing at the Intersections of Race and Dis/ability*, 16 RACE ETHNICITY & EDUC. 1, 1 (2013) (proposing a new theoretical framework that emphasizes the intersection of race and dis/ability).

123 *See, e.g.*, Vesla M. Weaver, Andrew Papachristos & Michael Zanger-Tishler, *The Great Decoupling: The Disconnection Between Criminal Offending and Experience of Arrest Across Two Cohorts*, 5 RUSSELL SAGE FOUND. J. SOC. SCIS. 89 (2019).

and sentencing arguments of prosecutors who attempt to convey that conviction and punishment are necessary for those whom they contend improperly self-govern.[124] While choice undoubtedly factors in for some, it is not the dominant mechanism by which a person becomes a defendant.[125] Frequently, a person becomes a defendant, not because of the decisions they make, but because of their identity, in a process I call "selection." The great majority of those selected are Black, Brown, and/or indigent. Black people are more than twice as likely to be arrested as white people.[126] Nearly half of Black men and forty-four percent of Latino men can anticipate being arrested at least once by age twenty-three.[127] Disproportionate arrests stem, in part, from disproportionate street encounters, as police are far more likely to stop and frisk Black and Brown people. Data from cities and towns across the country underscore that Black and Brown people are stopped, detained, and arrested often to a degree that exceeds their actual numbers in the population.[128]

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124 *See supra* note 15.

125 Anna Roberts has demonstrated that statistics concerning arrests and convictions do little to illuminate factual and legal culpability. *See, e.g.*, Anna Roberts, *Arrests as Guilt*, 70 ALA. L. REV. 987, 991–97 (2019).

126 *Statistical Briefing Book: Law Enforcement & Juvenile Crime: Arrests by Offense, Age, and Race*, OFF. OF JUV. JUST. & DELINQUENCY PREVENTION (Nov. 16, 2020), https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=2&selYrs=2018&rdoGroups=1&rdoData=r [https://perma.cc/Z7Z5-L59D] (search 2018, all ages, rate); *QuickFacts: United States*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045219 [https://perma.cc/VL35-7CZ8].

127 Robert Brame, Shawn D. Bushway, Ray Paternoster & Michael G. Turner, *Demographic Patterns of Cumulative Arrest Prevalence by Ages 18 and 23*, 60 CRIME & DELINQUENCY 471, 474–78 (2014).

128 *See* Press Release, NYCLU, New NYCLU Report Finds NYPD Stop-and-Frisk Practices Ineffective, Reveals Depth of Racial Disparities (May 9, 2012), https://www.nyclu.org/en/press-releases/new-nyclu-report-finds-nypd-stop-and-frisk-practices-ineffective-reveals-depth-racial [https://perma.cc/SU3F-Y6B5] (revealing that Black and Latino boys and men between the ages of fourteen and twenty-four were the subjects of 41.6% of stops in 2011, although they were only 4.7% of the population of New York City); Camelia Simoiu, Sam Corbett-Davies & Sharad Goel, *The Problem of Infra-marginality in Outcome Tests for Discrimination*, 11 ANNALS OF APPLIED STATS. 1193, 1203–05 (2017) (including a study of 4.5 million North Carolina traffic stops, which found that police were more likely to stop Black and Latinx motorists, but were less likely to find contraband than in stops of white motorists); U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/U4S4-VZXE] [hereinafter INVESTIGATION OF FPD] (revealing that from 2012 to 2014, 85% of car stops and 93% of arrests involved African Americans—despite the fact that they comprised only 67% of Ferguson's population); U.S. DEP'T OF JUST., CIV. RTS. DIV., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 7 (2016), https://www.justice.gov/crt/file/883296/download [https://perma.cc/5U3Y-4QJ3] [hereinafter INVESTIGATION OF BPD] (finding Black Baltimore residents were three times as likely to be stopped as white residents, and 95% of people stopped at least ten times were African American);

Moreover, there are some criminal charges that law enforcement reserves primarily for Black people. These tend to be crimes that permit officers a high degree of discretion. For example, in Ferguson, Missouri, from 2011 to 2013, ninety-five percent of those charged with Manner of Walking in Roadway were Black, as were ninety-four percent of those charged with Failure to Comply.[129] Similarly, the Justice Department's investigation of the Baltimore City Police Department concluded that charges such as Failure to Obey, Trespassing, Making a False Statement, and Disorderly Conduct were disproportionately levied against Black people.[130]

In addition to its white supremacist selection process, the American criminal legal system has expanded exponentially in the last half-century: it has become massive. In 2013, the city of Ferguson issued nearly eleven thousand more arrest warrants than its total population—most of which involved traffic offenses.[131] Somewhat infamously, the Ferguson Police Department arrested a man and charged him with Making a False Declaration because he told them his name was "Mike" instead of "Michael."[132] Baltimore police arrested and charged African Americans with one offense for every 1.4 African American residents—resulting in a city with nearly as many crimes as people.[133]

Americans look to the criminal legal system to solve a host of perceived problems unrelated to criminal activity and thereby support the criminalization of behavior that is merely undesirable or annoying. Devon Carbado has deemed this phenomenon "mass criminalization."[134] Carbado illustrates mass criminalization with a list of "nonserious behaviors and activities" that states have criminalized, including, among other examples: spitting in public places; loitering; panhandling; public camping; possessing spoons, bowls, blenders, or other purported drug paraphernalia; jaywalking; riding bicycles on the sidewalk; removing trash from a bin; and urinating in public.[135] Carbado notes that not only are many of these crimes vaguely defined, but they are disproportionately committed by people who are poor.[136] Their ubiquity in combination with their vagueness give police nearly

see also Capers, *supra* note 118, at 593, 597–606 (arguing that police give white people a "racial pass" in choosing not to arrest them for participation in misdemeanor crimes).

129 INVESTIGATION OF FPD, *supra* note 128, at 4.

130 INVESTIGATION OF BPD, *supra* note 128, at 7.

131 INVESTIGATION OF FPD, *supra* note 128, at 3, 6.

132 *Id.* at 3.

133 INVESTIGATION OF BPD, *supra* note 128, at 55.

134 Devon W. Carbado, *Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1487 (2016).

135 *Id.* at 1487–88.

136 *Id.* at 1488.

limitless discretion in determining whom to arrest.[137] Dorothy Roberts has commented on this intersection of mass criminalization and racial subordination: "Criminalizing [B]lack people entailed both defining crimes so as to make [B]lack people's harmless, everyday activities legally punishable and punishing [B]lack people regardless of their culpability for crimes."[138]

Paul Butler has illustrated the danger of expansive police discretion in the context of mass criminalization. As a law professor, Butler arranges for his students to do ride-alongs with police:

> The game is called Pick a Car. [The police officer] tells the students to pick any car they see on the street and he will legally stop it. He says that he can follow any driver and within a few blocks he or she will commit some traffic infraction. . . . This gives him an enormous amount of power. As a practical matter, if you are driving a car, he can stop you at will. This is exactly what the police do to African Americans and Hispanics.[139]

Discretion and mass criminalization thus work in tandem to provide the agents of the white supremacist state a mechanism to cabin the self-governance of Black and Brown people.[140] However, other "undesirables" have also been caught in this net, including poor whites,[141] queer people, gender nonbinary people, and disabled

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137 *Id.* at 1488–89.

138 Roberts, *Foreword*, *supra* note 16, at 33–34.

139 BUTLER, *supra* note 16, at 59–60.

140 This is not a new phenomenon. *See* SUSAN M. SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC 140–203 (2009).

141 Monica Bell emphasizes that poverty is not easily disentangled from race in the context of the criminal legal system: "Poverty and race operate together in ways that construct and are constructed by the carceral state, and the racial structure of poverty feeds into the carceral state through distinct pathways." Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 16 (2018). Bell goes on to argue that criminal punishment creates racial meaning, explaining that "we would not have 'criminalization of poverty' if a particular type of poverty—urban, segregated, related to the withholding of structural opportunity—were not so closely associated with race." *Id.* at 17. Michelle Alexander characterizes the incarceration of poor whites as the "collateral damage" of anti-Black mass incarceration. ALEXANDER, *supra* note 16, at 199. Dan Berger finds this characterization "both true and incomplete" because "[i]t misses how the targets of repression can change—as we've seen in the expanded demonization of immigrants from Latin America and Muslim-majority countries in recent years." Dan Berger, *Rise in White Prisoners Doesn't Change Innate Racism of Prisons*, TRUTHOUT (Apr. 28, 2019), https://truthout.org/articles/rise-in-white-prisoners-shows-prison-racism-goes-beyond-disparities [https://perma.cc/GC46-AZGS]. Berger contends that today's trend is the increasing incarceration of poor whites—particularly white women. *Id.* Yet Berger makes clear that this does not diminish the nature of the criminal legal system as a tool of "racial capitalism," i.e., the preservation of capitalist inequalities, most keenly felt through racism. *Id.*

people,[142] with many experiencing the subordination of the criminal legal system based on multiple, intersectional identities.[143]

What should be clear is that the criminal legal system is not a place where most individuals opt in through their own deviant choices. Instead, many criminal defendants are selected for participation in the criminal legal system by state agents due to the defendants' passive membership in disfavored groups. Black and Brown criminal defendants suffer the limits placed on their autonomy most acutely, due to the false narrative of Black criminality that has long justified their detention. However, this Article contends that all indigent defendants lack legally protected opportunities for meaningful autonomy following their selection for participation in the criminal legal system.

2. Surveillance and Detention

While criminal punishment inherently involves deprivation of autonomy, criminal process does as well.[144] From the moment an individual encounters law enforcement, the individual's ability to self-govern is limited both theoretically and practically by a police officer's subjective belief that the individual has behaved in a "reasonably suspicious manner" and thus is not free to leave.[145] If the individual disagrees with the police officer's conclusion, the officer will respond with a physical attempt to deprive the individual of liberty, or in some cases, life.[146] If the police officer's conclusion is objectively incorrect, the individual might be able to recover future financial recompense or have

142 Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1823–25 (2020); *see also* Jamelia N. Morgan, *Policing Under Disability Law*, 73 STAN. L. REV. 1401, 1404 (2021) (discussing police violence through the lens of disability).

143 *See supra* notes 121–22.

144 *See* Weisburd, *supra* note 19, at 775; FEELEY, *supra* note 19, at 199.

145 *See* Terry v. Ohio, 392 U.S. 1, 30 (1968) (finding the search of defendant constitutional "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous"). While the Court has repeatedly held that an officer's subjective belief is irrelevant when determining the legality of these seizures, *see, e.g.*, Anderson v. Creighton, 483 U.S. 635, 641 (1987), it is, of course, quite relevant to the *fact* of these seizures.

146 *See, e.g.*, Kennedi Harris, *Local Deputy Faces Complaint After Handcuffing Wrong Man*, WRDW (Sept. 28, 2021, 7:42 PM), https://www.wrdw.com/2021/09/28/richmond-county-deputy-faces-complaint-after-handcuffing-wrong-man [https://perma.cc/6CZX-EK4W] (describing an incident in which a man was handcuffed because police misidentified him as a suspect despite his pleas of innocence); Alex Johnson & Gabe Gutierrez, *Baton Rouge Store Owner Says His Video Shows Cops 'Murdered' Alton Sterling*, NBC NEWS (July 7, 2016, 4:05 AM), https://www.nbcnews.com/news/us-news/baton-rouge-store-owner-says-his-video-shows-cops-murdered-n604841 [https://perma.cc/FTR3-QKJN] (explaining that Louisiana police officers allegedly murdered Alton Sterling as he simply asked why he was being arrested).

evidence excluded from a criminal case, but no neutral arbiter exists on the street to prevent the individual's forceable detention.[147] Instead, it will be hours, possibly days, before the individual is brought before the neutral arbiter, a judge, whose job is not yet to determine the legality of the individual's detention, but instead to decide whether or not the individual will be permitted to pay for their freedom.[148] Those who cannot afford freedom will be transferred to what is known as preventive detention, or pretrial detention, but what is actually jail.[149] Those who can pay will still find themselves obligated to attend court appearances, typically determined with no regard for their schedules, and often requiring them to miss work or school and to find childcare.[150] In some jurisdictions, their release may be conditioned on further supervision, including mandatory attendance at a drug or jobs program or electronic ankle monitoring.[151] Sometimes, these judicial and extrajudicial appearances will go on for years before resolution of the case.[152] This is the level of deprivation of liberty that an innocent person charged with a misdemeanor would receive in the relatively progressive New York City—that is to say, it is the best-case scenario.[153]

Of course, the other arena in which indigent defendants suffer disproportionately is pretrial detention resulting from an inability to afford bail. The Supreme Court has repeatedly noted the distinction between a defendant's constitutional rights before and after they have received a criminal conviction. In *Faretta*[154] and *McCoy*[155]—both preconviction cases—the Court emphasized the strength of the defendant's Sixth Amendment rights, explaining in later cases that because the defendant is still imbued with the presumption of innocence, he has greater autonomy rights at this stage.[156] Conversely, in cases where defendants have either pled guilty or have been

147 If the individual is very lucky, the prosecutor drawing up the charging documents will decline to prosecute them.

148 Jenny Tsay, *After Arrest, How Long Until a Bond Hearing?*, FINDLAW (Apr. 9, 2014, 8:47 AM), https://www.findlaw.com/legalblogs/criminal-defense/after-arrest-how-long-until-a-bond-hearing [https://perma.cc/3D36-HQAG].

149 Appleman, *supra* note 20, at 1312.

150 KOHLER-HAUSMANN, *supra* note 19, at 1.

151 *See generally* Weisburd, *supra* note 19.

152 *See* Daniel Hamburg, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223, 226 (2015) (discussing defendants in Bronx, New York, waiting three to five years before their trials began).

153 *See generally* KOHLER-HAUSMANN, *supra* note 19 (examining the New York City criminal legal system as a method of surveillance and control of poor communities of color).

154 Faretta v. California, 422 U.S. 806, 818 (1975).

155 McCoy v. Louisiana, 138 S. Ct. 1500, 1511 (2018).

156 Martinez v. Ct. App. of Cal., Fourth App. Dist., 528 U.S. 152, 162 (2000).

adjudicated guilty beyond a reasonable doubt, the status of the defendant "changes dramatically."[157] In these cases, the Court has found that only due process applies and that the defendant's autonomy interest is reduced as a result of their conviction.[158]

Yet despite the Court's theoretical legal distinction,[159] pretrial detention is the functional equivalent of posttrial carceral punishment, as far as individual autonomy is concerned.[160] Defendants who cannot afford bail must await the resolution of their case in a city or county jail.[161] Just as in prisons, jails surveil and control nearly every aspect of a person's life, including bodily movement, association, and access to information, food, hygiene, and recreation.[162] Many jails and prisons routinely employ harsh measures such as mandatory strip searches,[163] corporal punishment,[164] and solitary confinement.[165] Research shows that extended time in solitary confinement leads to the development of psychiatric symptoms, including hallucinations, panic attacks, difficulty concentrating, memory lapse, obsessive thoughts, paranoia,

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157 *Id.*

158 *Id.* at 163.

159 Bell v. Wolfish, 441 U.S. 520, 537 (1979).

160 Appleman, *supra* note 20, at 1303 (describing pretrial detention as "conditions tantamount to punishment"); *see also* ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL 63 (2018) ("Although pretrial detention is not supposed to be punishment, defendants typically receive credit for their pretrial incarceration against any jail or prison sentence they eventually receive. In other words, their pretrial detention retroactively becomes punishment.").

161 Appleman, *supra* note 20, at 1312.

162 *See* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1353–54 (2014).

163 Marty Drapkin, *Strip Search Policies in Jails*, CORRECTIONS 1 (Jan. 27, 2011), https://www.correctionsone.com/corrections-training/articles/strip-search-policies-in-jails-sKIq8Sv3p5mvucSZ [https://perma.cc/4VJT-LW9Y]; Associated Press, "*It's a Beautiful Thing:" City to Fork over $33M in Jail Strip Search Lawsuit*, NBC N.Y. (Mar. 23, 2010, 12:33 PM), https://www.nbcnewyork.com/news/local/nyc-settles-illegal-jail-strip-search-lawsuit-for-33-mil/1881173 [https://perma.cc/SLR2-UJXT].

164 *See, e.g.*, Maurice Chammah, *They Went to Jail. Then They Say They Were Strapped to a Chair for Days.*, MARSHALL PROJECT (Feb. 7, 2020, 6:00 AM), https://www.themarshallproject.org/2020/02/07/they-went-to-jail-then-they-say-they-were-strapped-to-a-chair-for-days [https://perma.cc/B39E-QSSB]; Dawn R. Wolfe, *Ohio Jail Faces $2.8 Million Lawsuit After Claims of Abuse Are Made by Dozens of Men*, APPEAL (Dec. 16, 2019), https://theappeal.org/ohio-jail-faces-2-8-million-lawsuit-after-claims-of-abuse-are-made-by-dozens-of-men [https://perma.cc/KMP9-3B4E].

165 Winnie Hu & Kate Pastor, *Trial of 5 Rikers Guards Brings out Culture of Violence at Jail*, N.Y. TIMES (June 8, 2016), https://www.nytimes.com/2016/06/09/nyregion/trial-of-5-rikers-guards-brought-out-culture-of-violence-at-jail.html [https://perma.cc/3NZQ-8JGY]; Allen Arthur & Dave Boucher, *Too Sick for Jail—But Not for Solitary*, MARSHALL PROJECT (Feb. 15, 2018, 9:00 AM), https://www.themarshallproject.org/2018/02/15/too-sick-for-jail-but-not-for-solitary [https://perma.cc/Q65W-QPPY].

impulse control, and hyperresponsivity to stimuli.[166] Mental health conditions are often exacerbated because jails rarely have even the minimal mental health treatment found in prisons; consequently, suicide is a leading cause of death for individuals in pretrial detention.[167]

This is the context within which indigent criminal legal defendants are granted so-called autonomy rights. In the next Section, I will examine each of these rights to determine if indigent criminal defendants have a meaningful opportunity to exercise their autonomy through the protection of these rights.

B. *Exercising the "Autonomy Rights"*

The Supreme Court has found that the Constitution entitles criminal defendants to make decisions in six instances where an autonomy interest is paramount. The Court has deemed these rights "personal" because a defendant will personally experience the consequences associated with these decisions.[168] These rights include whether to plead guilty, waive the right to a jury trial, testify on one's own behalf, forgo an appeal, "assert innocence" at a capital trial, and—most fundamentally—self-represent.[169] Each of these purported decisions relates to the creation of—and the audience for—the defense narrative; they promote the defendant's story of nonculpability.[170] Below, I examine each of these so-called decision points to determine if the law protects meaningful autonomy for indigent criminal defendants operating within the criminal legal system. I conclude that these rights do not protect the autonomy interest of criminal defendants for two, often overlapping reasons. First, a defendant's autonomy interest may not be protected because, in reality, other actors make decisions that formally belong to the defendant; these actors exert pressure or coercion over the defendant. I call this the "no choice" scenario. Second, a defendant's autonomy interest may not be protected because the choice presented is not a meaningful one: there is one realistic, rational option under the circumstances. I call this the "no meaningful choice" scenario.

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166 *See, e.g.*, Stuart Grassian, *Psychiatric Effects of Solitary Confinement*, 22 WASH. U. J.L. & POL'Y 325, 335–38 (2006); Ruiz v. Texas, 137 S. Ct. 1246, 1247 (2017) (Breyer, J., dissenting); *see also* Davis v. Ayala, 576 U.S. 257, 287 (2015) (Kennedy, J., concurring).

167 Appleman, *supra* note 20, at 1319.

168 Faretta v. California, 422 U.S. 806, 819–20 (1975); *see also* Oral Argument, *supra* note 22, at 16:15.

169 McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018); *see Faretta*, 422 U.S. at 834.

170 *McCoy*, 138 S. Ct. at 1508; McKaskle v. Wiggins, 465 U.S. 168, 177 (1984) (referring to self-representation as "[t]he specific right[] to make [the defendant's] voice heard").

1. The Right to Self-Representation

Perhaps the most maligned of the autonomy rights, the right to self-representation, has received substantial scholarly criticism, typically focused on the practical risks of exercising the right. The *Faretta* Court found that a defendant's lack of legal knowledge has no bearing on their right to proceed pro se.[171] Moreover, the Court later made clear that "the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out."[172] This leaves detained pro se defendants with no practical ability to investigate their cases. Specifically, they cannot meet with witnesses, vet experts, or view physical evidence. While they may have access to a phone, calls are typically not unlimited. Each call begins with a prerecorded message announcing both the caller's incarceration and the jail's monitoring of the conversation—two facts likely to chill the speech of the recipient.[173] Without access to the internet, a defendant cannot easily determine experts with whom to consult and retain. Neither the prosecutor nor the detention facility is likely to permit the defendant to personally view the physical evidence in the case, including any alleged weapons, blood-stained clothing, or video surveillance. Thus, while criminal defendants have the theoretical right of self-representation, detained defendants—particularly those in serious cases—have no way of actualizing this right.

It may be for these reasons that very few defendants charged with felonies represent themselves.[174] This is not true for defendants charged with misdemeanors, who are much more likely to proceed without an attorney—at least in federal court.[175] In explaining this discrepancy, Erica Hashimoto suggests that these pro se litigants may include criminal defendants who fall just outside the income requirements for appointed counsel, which are notoriously vague.[176] If such is the case, then these defendants are "choosing" to self-represent after doing a cost-benefit analysis of the price of an attorney versus the likelihood of

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171 *Faretta*, 422 U.S. at 836.

172 Martinez v. Ct. App. of Cal., Fourth App. Dist., 528 U.S. 152, 162 (2000) (quoting *McKaskle*, 465 U.S. at 183–84).

173 *See* Kathryn E. Miller, *The Attorneys Are Bound and the Witnesses Are Gagged: State Limitations on Post-Conviction Investigation in Criminal Cases*, 106 CALIF. L. REV. 135, 143–47 (2018) (discussing ideal conditions for witness interviews).

174 Hashimoto, *Defending*, *supra* note 1, at 447 (finding the rate of self-representation to be roughly 0.3% to 0.5%).

175 *Id.* at 478–79.

176 *Id.* at 480.

their subsequent incarceration. While such behavior may be a choice of sorts, it is not motivated by the desire for self-expression that the autonomy rights purportedly protect.

For indigent defendants, there are also considerable risks for *not* exercising the right of self-representation. While defendants with means have the right to choose an attorney to help navigate the criminal legal system,[177] indigent defendants—who make up roughly eighty percent of criminal defendants[178]—do not.[179] Instead, a public defender or "panel attorney" is typically appointed to represent them. The state of indigent defense is long lamented. Fifty years after *Gideon v. Wainwright*,[180] Attorney General Eric Holder described the state of indigent defense as a "crisis"—one in which

> too many defendants are left to languish in jail for weeks, or even months, before counsel is appointed. Too many children and adults enter the criminal justice system with nowhere to turn for guidance—and little understanding of their rights, the charges against them, or the potential sentences—and collateral consequences—that they face. Some are even encouraged to waive their right to counsel altogether.[181]

States have failed to provide adequate financial resources toward their system of indigent criminal defense, and, as a result, public defenders and panel attorneys remain overburdened with criminal cases.[182] Studies in states across the country reveal that public defenders routinely manage astronomically high caseloads, which results in a reduction in the amount of time they can spend counseling each client—in some cases to as little as five minutes—and makes them significantly less likely to take cases to trial.[183]

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177 Wheat v. United States, 486 U.S. 153 (1988).

178 Oppel & Patel, *supra* note 17.

179 *Wheat*, 486 U.S. at 159.

180 Gideon v. Wainwright, 372 U.S. 335 (1963).

181 Eric H. Holder, Jr., Att'y Gen., U.S. Dep't of Just., Attorney General Eric Holder Speaks at the American Bar Association's National Summit on Indigent Defense (Feb. 4, 2012), https://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-bar-association-s-national-summit-indigent [https://perma.cc/M93A-9CGT].

182 THOMAS GIOVANNI & ROOPAL PATEL, BRENNAN CTR. FOR JUST., *GIDEON* AT 50: THREE REFORMS TO REVIVE THE RIGHT TO COUNSEL 1 (2013), https://www.brennancenter.org/sites/default/files/2019-08/Report_Gideon-at-50.pdf [https://perma.cc/UF57-65PC].

183 *See* POSTLETHWAITE & NETTERVILLE & AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFS., THE LOUISIANA PROJECT: A STUDY OF THE LOUISIANA DEFENDER SYSTEM AND ATTORNEY WORKLOAD STANDARDS 2 (2017), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.pdf [https://perma.cc/2ZTA-2RJF] (revealing that state required 1,769 defenders, but only employed

Alexandra Natapoff has argued that even excellent defense counsel can do little to alleviate the systemic harms suffered by criminal defendants:

> [A] lawyer in an individual case will often be powerless to address a wide variety of systemic injustices. A defendant may be the victim of overbroad laws, racial selectivity in policing, prosecutorial overcharging, judicial hostility to defendants, or harsh mandatory punishments and collateral consequences, none of which his lawyer can meaningfully do anything about.[184]

Recent scholarship has criticized the very nature of appointed counsel as antithetical to the autonomy interest of indigent defendants.[185] Robert Toone has argued that the attorney-client relationship is not one of agency for indigent clients because their attorneys lack a financial incentive to follow their wishes: "[Indigent clients] have essentially no ability to prevent their lawyers from shirking or pursuing ends that conflict with the defendants' own. They have no ability to compel their lawyers to investigate defenses, research case law, file motions, prepare for trial, or perform other critical defense-related tasks."[186] I. Glenn Cohen[187] has observed that indigent clients not only lack the ability to choose their lawyer,[188] they have no right to a high-quality defense or a particular expenditure of resources,[189] and no right to "a meaningful attorney-client relationship."[190] Stephen Schulhofer has similarly noted that in addition to having no choice of counsel,

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363, resulting in individual defenders having up to 405 felony cases); Oppel & Patel, *supra* note 17 (explaining that a Rhode Island attorney was assigned as many as fifty cases daily, with clients receiving up to five minutes for introductions, questions, and advice before their case was called); *id.* (describing Colorado and Missouri studies revealing that defenders have two to three times the recommended workload); *id.* (explaining that the consequence of high caseloads is a reduction in trials); DOTTIE CARMICHAEL, AUSTIN CLEMENS, HEATHER CASPERS, MINER P. MARCHBANKS, III & STEVE WOOD, PUB. POL'Y RSCH. INST., GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION xvii (2015), http://www.tidc.texas.gov/media/8d85e69fd4fb841/guidelines-for-indigent-defense-caseloads-01222015.pdf [https://perma.cc/5CSY-L8G7] (describing a Texas study, which determined that while, ideally, 14–20% of misdemeanors and 11–20% of felonies would go to trial, in reality, only 1.1% of misdemeanors and 2.5% of felonies actually did).

184 Alexandra Natapoff, Gideon *Skepticism*, 70 WASH. & LEE L. REV. 1049, 1049 (2013).

185 *See, e.g.*, Toone, *supra* note 12, at 27 (arguing that indigent defendants lack agency because they lack the ability to control that comes with a financial relationship).

186 *Id.*

187 Cohen, *supra* note 73, at 243.

188 *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006).

189 Debra Cassens Weiss, *Kagan Says Poor Defendants Are Entitled to a 'Ford Taurus' Defense*, A.B.A. J. (Mar. 19, 2013, 12:00 PM), https://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense [https://perma.cc/F5NB-FAW3].

190 Morris v. Slappy, 461 U.S. 1, 14 (1983).

indigent defendants lack "effective means to monitor counsel's loyalty and performance."[191]

In short, for indigent defendants, the decision to accept counsel or self-represent often comes down to a belief in which option is the lesser of two evils, with the overwhelming majority agreeing to accept counsel.[192] It is in the context of this type of attorney-client relationship that the remaining "autonomy rights" typically arise.

2. The Right to Plead Guilty

Following the right of self-representation, the right to plead guilty or go to trial may be the most fundamental "autonomy right." It theoretically promotes defendant autonomy both by allowing the defendant to determine the primary objective of the representation and by providing an expressive function, permitting the defendant to accept or deny responsibility for the charged crime. The Court has repeatedly stated that criminal defendants have a constitutional right to make this decision.[193] The Model Rules of Professional Conduct have codified this right, specifying that a "lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered."[194] But despite these purported protections, very few indigent defendants go to trial, revealing that this right provides no choice at all.

The Supreme Court has acknowledged that "[p]leas account for nearly 95% of all criminal convictions."[195] Scholars have lamented the demise of the jury trial[196] and referred to the criminal legal system as a "post-trial world."[197] Jenny Roberts has argued that, given this decline, ineffective assistance of counsel doctrine should address the effectiveness of plea bargaining rather than trial practice because plea bargaining represents the heart of what lawyers actually do.[198]

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191 *See* Schulhofer, *supra* note 73, at 1991.

192 *See* Hashimoto, *Defending*, *supra* note 1, at 462.

193 Jones v. Barnes, 463 U.S. 745, 751 (1983); McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018).

194 MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2020).

195 Padilla v. Kentucky, 559 U.S. 356, 372 (2010).

196 *E.g.*, Robert J. Conrad, Jr. & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 105 (2018); Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004); GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA (2004).

197 *See, e.g.*, Jocelyn Simonson, *The Criminal Court Audience in a Post-trial World*, 127 HARV. L. REV. 2173 (2014).

198 Jenny Roberts, *Effective Plea Bargaining Counsel*, 122 YALE L.J. 2650 (2013).

Why have criminal defendants stopped "choosing" to go to trial? It is not because policing and prosecution have become more accurate; scores of innocent people plead guilty every day.[199] One of the causes is the overburdening of the criminal legal system with an increasing number of arrests and charges. This contributes to high caseloads for defenders and prosecutors and crowded calendars for judges, incentivizing all three actors to pressure defendants to accept plea offers.

It is well known that judges and prosecutors often impose a "trial tax" on defendants who insist on going to trial.[200] Prosecutors have nearly limitless discretion to determine charges, which enables them to drive the plea-bargaining process. Prosecutors regularly condition plea offers on the defendant's willingness to waive legal arguments, "such as stating that any lesser charge plea will be 'off the table' if a defendant pushes a case to pretrial hearings."[201] Paul Butler illustrates how prosecutors use the trial tax to pressure defendants to take pleas with a typical speech that he used to give as a federal prosecutor:

> Your client is staring at five felony charges. Here is what we are going to do. Dude will plead guilty to one count of assault with a deadly weapon and one count of making terroristic threats, and then I'll drop the other charges. I'll recommend the judge lock him up for a year. If your client doesn't take the deal, we're going to trial. If he is found guilty, and he will be, I am going to ask the judge to give him ten years.[202]

Public defenders have their own speech, delivered to their clients, about the parade of horribles that will result from a loss at trial.[203] Public defender Jeffrey Stein notes that, in his jurisdiction, the trial tax "can be a matter of decades."[204] Even in strong cases, Stein sometimes advises a plea: "You tell your client that they would *probably* win at trial, but if they lose, they will go to prison. The plea promises some meaningful benefit: getting out of jail sooner, avoiding deportation, not losing a job,

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199 *See* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. OF BOOKS (Nov. 20, 2014), https://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty [https://perma.cc/2LM4-QVQT]; Jeffrey D. Stein, Opinion, *How to Make an Innocent Client Plead Guilty*, WASH. POST (Jan. 12, 2018), https://www.washingtonpost.com/opinions/why-innocent-people-plead-guilty/2018/01/12/e05d262c-b805-11e7-a908-a3470754bbb9_story.html [https://perma.cc/RVX7-VSDW].

200 *See, e.g.*, Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, 48 CRIME & JUST. 313 (2019) (referring to this practice as a "trial tax").

201 KOHLER-HAUSMANN, *supra* note 19, at 258.

202 BUTLER, *supra* note 16, at 31.

203 Stein, *supra* note 199.

204 *Id.*

seeing a daughter before her next birthday."[205] A Baltimore resident explains another version of this conversation: "[The public defender] doesn't know your name, and then you go to court, and he's asking you what you are going to do. You're saying, 'I'm innocent. I'm fighting this to the end. I really didn't do this.' And he's like, 'This is the state's offer.'"[206]

Courts also coerce pleas, sometimes by forcing unprepared, overworked defenders to begin a trial.[207] When the defender objects, the court threatens a contempt charge.[208] The defendant now has to "choose" between accepting the existing plea offer or taking his chances at trial with an unprepared lawyer—knowing that a loss will invoke the trial tax.

In addition, scholars have brought to light the importance of bail in determining case outcomes.[209] People who cannot afford bail have incentives to take a plea that would get them out of pretrial detention, which is not meaningfully different from postconviction incarceration from an autonomy standpoint. Alexandra Natapoff explains this phenomenon among those charged with misdemeanors:

> A person who is incarcerated pretrial and cannot afford bail can often plead guilty and accept a sentence of "time served"—the amount of time he or she has already been incarcerated—and thereby obtain immediate release. For many people, this common arrangement confirms their intuition that they were, in effect, being punished for being poor, since if they could have afforded bail, they never would have been locked up in the first place and might have escaped incarceration or even conviction altogether.[210]

Yet bail is not always the explanation. Guilty pleas are common even among individuals who are not detained before trial or who are charged with misdemeanors. Misdemeanor trials are even rarer than felony trials, constituting just one to two percent of cases.[211] Public defenders who conduct less-than-five-minute interviews with their clients before advising them to plead guilty are so commonplace that

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205 *Id.*

206 JUST. POL'Y INST., BAILING ON BALTIMORE: VOICES FROM THE FRONT LINES OF THE JUSTICE SYSTEM 22 (2012), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/bailingonbaltimore-final.pdf [https://perma.cc/454X-393S] (quoting Tyriel Simms).

207 *See, e.g.*, NATAPOFF, *supra* note 160, at 77.

208 *Id.*

209 Shima Baradaran Baughman, *Dividing Bail Reform*, 105 IOWA L. REV. 947, 951 (2020); KOHLER-HAUSMANN, *supra* note 19, at 135; Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585 (2017).

210 NATAPOFF, *supra* note 160, at 63.

211 *Id.* at 67.

this type of representation has a nickname: "meet 'em and plead 'em."[212] Natapoff notes that this lack of defense resources pressures some to plead guilty, as defendants perceive that their lawyers have high caseloads, insufficient investigative services, and little time for interviews.[213] Other defendants succumb to plea offers "to end the grueling process of repeated court appearances."[214] According to a lawsuit by the Bronx Defenders, the average wait time for a misdemeanor bench trial in the Bronx was 642 days, while a misdemeanor jury trial carried a wait time of 827 days.[215] While the wait time in the other New York City boroughs was shorter than in the Bronx, criminal defendants still had to wait an average of 414 days for a jury trial in Manhattan, 496 days for one in Brooklyn, and 558 days for one in Queens.[216] During this time, defendants must make court appearances roughly every four to six weeks, requiring them to miss work or school, find transportation, and obtain childcare while subjecting them to the continued surveillance of the criminal legal system.[217] Former public defenders Sarah Lustbader and Vaidya Gullapalli describe the impact of a "routine" court appearance:

> In courtrooms, jails, and benefits offices around the country, low-income people are told to wait. For hours. They are not told to return in an hour, or that someone will call them when it's their turn, or to take a seat, have a cup of water, and read a book. In criminal court, defendants and their families are often forced to wait for hours. They must do so silently, and are not allowed to read a newspaper, let alone check their phone. There is simply no regard for their time.[218]

A desire to end the punishment created by the criminal court process creates a highly effective pressure for indigent defendants to plead guilty. Perhaps more than any other right, the right to plead guilty provides no opportunity for autonomy or self-expression.

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212 Stephen B. Bright & Sia Sanneh, *Violating the Right to a Lawyer*, L.A. TIMES (Mar. 18, 2013, 12:00 AM), https://www.latimes.com/opinion/la-xpm-2013-mar-18-la-oe-bright-gideon-justice-20130318-story.html (last visited Nov. 8, 2021).

213 NATAPOFF, *supra* note 160, at 67, 75–77.

214 *Id.* at 77–78.

215 Complaint at 2, Trowbridge v. Cuomo, No. 16cv3455 (S.D.N.Y. Dec. 21, 2016), 2016 WL 7489098, at *2.

216 *Id.* at *4.

217 *See* KOHLER-HAUSMANN, *supra* note 19, at 80, 135–37.

218 *The Waiting Game: NYPD Ripped 1-Year-Old from Mother, but Why Did the Benefits Office Expect Her to Wait for Hours, Standing up, with a Child?*, APPEAL (Dec. 13, 2018), https://theappeal.org/the-waiting-game-nypd-ripped-1-year-old-from-mother-but-why-did-the-benefits-office-expect-her-to-wait-for-hours-standing-up-with-a-child [https://perma.cc/CR4T-VAYN].

3. The Right to Waive a Jury

Although it has stated that the Constitution is silent on the defendant's right to waive a jury,[219] the Court has also observed that codification of this right fulfills an autonomy interest, as it involves the defendant's selection of the audience to hear his expression of innocence. However, the right to waive a jury is the only autonomy right where the Court has found that the decision need not be left to the defendant alone.[220] Jurisdictions may choose to require the consent of the prosecutor and/or the trial court to deem a jury waiver valid.[221] Thus, the decision to waive a jury is the one autonomy right where the defendant's autonomy interest is not paramount: the State's interest in fairness provides a counterweight.[222]

Consent requirements aside, like the other autonomy rights, the right to waive a jury fails to provide an opportunity for the exercise of autonomy. For one thing, many criminal defendants are not entitled to jury trials in the first place. In many states, charges that carry a possible punishment of less than a year are adjudicated via bench trials. In some jurisdictions, it is common for prosecutors to reduce criminal charges on the eve of trial for the sole purpose of avoiding a trial by jury.[223]

For criminal defendants who retain some element of choice, there is reason to believe the choice is not meaningful. In many courtrooms, the identity of judges and jurors does not differ significantly—with both being disproportionately white—because of the barriers placed on jury service. Although Americans have a cultural commitment to the superiority of the jury trial in obtaining accurate outcomes, at least one study suggests that verdicts determined by juries are not meaningfully different from those determined by judges. In an analysis of over 3,500 criminal cases, judges reported that they agreed with the jury's determination eighty percent of the time.[224] One of the reasons that

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219 Singer v. United States, 380 U.S. 24, 26 (1965).

220 *Id.*

221 *Id.* at 36. For a critique of these requirements, see Guha Krishnamurthi, *The Constitutional Right to Bench Trial*, N.C. L. REV. (forthcoming 2022) (on file with author).

222 *Singer*, 380 U.S. at 36.

223 *What You Need to Know About Misdemeanor Trials in New York City Criminal Courts.*, SHALLEY & MURRAY, https://www.shalleyandmurray.com/misdemeanor-trials-nyc [https://perma.cc/D36Q-3HJ5]. As a public defender in the Bronx from 2007 to 2012 and as a clinical professor practicing in Manhattan since 2019, I have witnessed frequent eve-of-trial reductions from charges that require a jury trial to charges that do not. *See, e.g.*, People v. Suazo, 118 N.E.3d 168, 171–72 (N.Y. 2018) (discussing an instance of this practice).

224 Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1064 (1964) (showing that in thirteen percent of cases, both judge and jury would acquit, and in sixty-seven percent of cases, both judge and jury would convict).

judges and juries appear somewhat interchangeable is the historic and continued exclusion of the very jurors who might approach questions of culpability differently: African Americans.[225] The white supremacist aim of the criminal legal system has long been reflected in its jury system. Thomas Frampton has argued that "[s]ince the end of Reconstruction, the criminal jury box has both reflected and reproduced racial hierarchies in the United States."[226] Frampton chronicles the efforts of southern whites to prevent Black jury service into the modern day, going as far as to pass legislation permitting nonunanimous jury verdicts to minimize the influence of Black jurors on the ultimate verdict.[227] Beginning in 1935, prosecutors began to routinely rely on peremptory challenges to exclude African Americans from jury service.[228] After reviewing data from over five thousand Louisiana jury trials from 2011 to 2017, Frampton concluded that prosecutors struck Black potential jurors "at an extraordinarily disproportionate rate, and they [did] so with greater frequency when prosecuting [B]lack defendants."[229] His analysis of over seven hundred nonunanimous jury verdicts confirms that Black jurors in aggregate vote differently than white jurors, and that nonunanimous verdicts tend to disadvantage Black defendants more than white defendants.[230] It was not until April 2020 that the Supreme Court declared these nonunanimous jury verdicts unconstitutional in serious cases.[231]

Contemporary exclusion of Black potential jurors continues to be widespread.[232] In Houston County, Alabama, prosecutors struck eighty

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225 There is a dearth of African Americans on the federal bench as well. A 2019 report by the Center for American Progress determined just 20% of federal judges are people of color. *See* DEMOCRACY & GOV'T REFORM TEAM, CTR. FOR AM. PROGRESS, EXAMINING THE DEMOGRAPHIC COMPOSITIONS OF U.S. CIRCUIT AND DISTRICT COURTS 3 (2020), https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts [https://perma.cc/Z9EJ-SX7X]. African Americans make up 10% of sitting judges and 13% of acting judges, while Hispanic people compose about 7% of sitting judges and 9% of acting judges. *Id.* Data for state judges is incomplete but does reveal that they are overwhelmingly white and male. *See* Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887, 1901–08 (2017).

226 Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1593 (2018).

227 *Id.* at 1603–19.

228 *Id.* at 1620.

229 *Id.* at 1621–22.

230 *Id.* at 1622.

231 Ramos v. Louisiana, 140 S. Ct. 1390 (2020). The Court made clear that nothing about the opinion impacted the process of trying defendants without a jury for "petty offenses." *Id.* at 1394 n.7.

232 *See, e.g.*, EQUAL JUST. INIT., ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5, 14 (2010), https://eji.org/wp-content/uploads/2019/10/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/E7KK-QY3K].

percent of Black jurors in capital cases, while in Jefferson Parish, Louisiana, prosecutors removed eligible Black jurors "at more than three times the rate that they strike white prospective jurors."[233] In South Carolina, researchers determined that prosecutors struck eligible Black jurors at nearly three times the rate that they struck eligible white jurors.[234] After an evaluation of seven hundred California cases from 2006 to 2018, a report by the Berkeley Death Penalty Clinic concluded that prosecutors continue to remove African American and Latinx people from juries "for reasons that are explicitly or implicitly related to racial stereotypes."[235] While the conventional wisdom is that modern prosecutors rely on peremptory strikes to exclude these jurors, Frampton cautions that prosecutorial challenges for cause "no less than peremptory strikes, are an important—and unrecognized—vehicle of racial exclusion in criminal adjudication."[236]

Capital juries are hit the hardest. The requirement of death qualification, which requires potential jurors to state their ability to theoretically impose a death sentence, accelerates the exclusion of African Americans from capital juries.[237] Studies show that African Americans are more likely to oppose the death penalty,[238] and thus less likely to survive death qualification. In a recent study analyzing data from two recent surveys in Solano County—the county in California with the largest percentage of African American residents—Mona Lynch and Craig Haney determined that significant differences existed between whites and African Americans in both the fact and the strength of their support for capital punishment.[239] Of the Solano potential jurors who would have been excluded during death qualification, between eighty and ninety percent of the African Americans opposed the death

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233 *Id.* at 14.

234 Ann M. Eisenberg, *Removal of Women and African Americans in Jury Selection in South Carolina Capital Cases, 1997–2012*, 9 NE. U. L. REV. 299, 299–300 (2017).

235 BERKELEY L. DEATH PENALTY CLINIC, WHITEWASHING THE JURY BOX: HOW CALIFORNIA PERPETUATES THE DISCRIMINATORY EXCLUSION OF BLACK AND LATINX JURORS iv–vi (2020), https://www.law.berkeley.edu/wp-content/uploads/2020/06/Whitewashing-the-Jury-Box.pdf [https://perma.cc/N36P-T6H9].

236 Thomas Ward Frampton, *For Cause: Rethinking Racial Exclusion and the American Jury*, 118 MICH. L. REV. 785, 785 (2020).

237 *See generally* Eisenberg, *supra* note 234; Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 118 (2016); J. Thomas Sullivan, *The Demographic Dilemma in Death Qualification of Capital Jurors*, 49 WAKE FOREST L. REV. 1107, 1140–43, 1147 (2014); Alec T. Swafford, Note, *Qualified Support: Death Qualification, Equal Protection, and Race*, 39 AM. J. CRIM. L. 147, 158 (2011).

238 Mona Lynch & Craig Haney, *Death Qualification in Black and White: Racialized Decision Making and Death-Qualified Juries*, 40 L. & POL'Y 148, 151–52 (2018).

239 *Id.* at 159.

penalty, as compared to only approximately fifty percent of whites.[240] As a consequence, the African Americans likely to survive death qualification "were a much smaller group than those originally in the venire and typically had views that made them outliers among their peers."[241]

Lynch and Haney also concluded that Black and white prospective jurors assessed capital sentencing–phase evidence differently: African Americans were much more likely to consider classic mitigation evidence—such as an impoverished childhood, familial substance abuse, mental illness, and a positive institutional history—as a thumb on the scale for mercy, while whites often interpreted such evidence as supporting a death sentence.[242] Lynch and Haney concluded that death qualification not only results in the "significant underrepresentation of African Americans," but also "leaves behind a subgroup that does not represent the views of its community."[243]

As such, there is no indication that preserving a criminal defendant's right to waive a criminal jury creates a meaningful opportunity for a principled selection of a favorable audience to receive the defendant's narrative.

4. The Right to Testify

Perhaps the most obviously expressive right, the right to testify, is literally the right of a criminal defendant to tell their story. The Court has described the right to testify as "[e]ven more fundamental to a personal defense than the right of self-representation" and has characterized the right as "an accused's right to present his own version of events in his own words."[244] During the *McCoy* oral arguments, Justice Sotomayor spoke of this right as an encapsulation of the autonomy interest, with inherent, rather than instrumental, value: "People can walk themselves into jail. They can walk themselves, regrettably, into the gas chamber. But they have a right to tell their story."[245] But is the right to testify a meaningful right?

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240 *Id.*

241 Kathryn E. Miller, *The Eighth Amendment Power to Discriminate*, 95 WASH. L. REV. 809, 847 (2020). Death qualification also provides prosecutors with facially race-neutral reasons that permit them to strike Black jurors without running afoul of *Batson v. Kentucky*. *See id.*

242 Lynch & Haney, *supra* note 238, at 160–67.

243 *Id.* at 165, 168.

244 Rock v. Arkansas, 483 U.S. 44, 52 (1987).

245 Oral Argument, *supra* note 22, at 16:15.

Alexandra Natapoff has observed that while one million defendants appear in the criminal legal system each year, "the typical defendant may say almost nothing to anyone but his or her own attorney."[246] A criminal defendant testifies in roughly half of the five percent of cases that go to trial.[247] Natapoff attributes this silencing of indigent defendants to constitutional doctrine, criminal rules, and defense attorneys.[248] The Constitution protects the right to remain silent,[249] and evidentiary rules discourage speech from criminal defendants who have prior criminal histories. Testifying permits a prosecutor to impeach the defendant with evidence of prior convictions.[250] Moreover, a testifying defendant is at risk of a perjury charge or sentencing enhancement.[251] Wishing either to take advantage of the State's burden of proof or to conceal a problematic narrative, defense counsel often pressure their clients not to testify.[252] Even if a defendant does testify at trial, they do not present an unvarnished narrative. Rather, direction from their attorney and evidentiary rules work together to shape and limit what the jury hears. William Simon describes the effect that an attorney can have on a client's testimony:

> [L]awyers typically dominate their clients' cases and orchestrate their clients' behavior in court not to express their own senses of themselves, but to conform to the judge's and jury's stereotypes about how a respectable, law-abiding citizen looks and behaves. Of course, if this is the best way to get an acquittal, most defendants would prefer such a defense; but few experience it as an affirmation of their individuality.[253]

Robert Dinerstein has similarly emphasized that client narratives are not pure, but rather are mediated through the instrumental goals of the lawyer—what he terms "the prism of tactical calculation."[254] Charles R. Lawrence, III, laments that, while traditional storytelling "values rich contextual detail, the law excludes large parts of the story as

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246 Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449–50 (2005).

247 *Id.* at 1459; Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 397 (2018).

248 Natapoff, *supra* note 246, at 1453–54.

249 U.S. CONST. amend. V.

250 *See, e.g.*, FED. R. EVID. 609.

251 Natapoff, *supra* note 246, at 1460.

252 *Id.* at 1470–73.

253 William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1713–14 (1993).

254 Robert D. Dinerstein, *"Every Picture Tells a Story, Don't It?": The Complex Role of Narratives in Disability Cases*, 15 NARRATIVE 40, 42–43 (2007).

irrelevant."[255] Not only can rules defining relevancy present a barrier, but also stories including hearsay and certain opinions must be curtailed.[256]

Even highly edited stories draw scrutiny. Jurors penalize many defendants who testify at trial. Evidence suggests that jurors who learn of a defendant's prior criminal record are more likely to convict.[257] This is especially true when the defendant has a prior conviction for the same type of crime for which they are being tried, suggesting that jurors disregard instructions forbidding them from considering the convictions as evidence of criminal propensity.[258] Implicit racial bias also comes into play. M. Eve Hanan has posited that racially disparate sentences can partially be explained by judges' skepticism of African-American defendants' expressions of remorse, noting that "[i]mplicit racial bias likely plays a role in assessing the countenance, gestures, and sometimes words of defendants."[259] Similarly, a study by William J. Bowers, Benjamin D. Steiner, and Marla Sandys revealed that white jurors were less likely than Black jurors to believe Black defendants' expressions of remorse in capital cases.[260]

Yet Jeffrey Bellin has found that, paradoxically, jurors also penalize defendants who do not testify.[261] These jurors impose what Bellin calls a "silence penalty," in that they are more likely to convict defendants who do not take the stand.[262]

Consequently, the decision to testify, rarely exercised and almost never amounting to a defendant's personal expression, does not create an opportunity for defendant autonomy.

5. The Right to Forgo an Appeal

The Court has included the right to forgo an appeal in its list of rights that protect defendant autonomy, but it has not explicitly found that the Constitution protects waiver of this right. Most of the Court's jurisprudence focuses on third-party standing in capital cases where the

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255 Charles R. Lawrence, III, *The Word and the River: Pedagogy as Scholarship as Struggle*, 65 S. CAL. L. REV. 2231, 2278 (1992).

256 *See, e.g.*, FED. R. EVID. 401, 701, 702, 704, 802.

257 Bellin, *supra* note 247, at 401–06, 418–19.

258 *Id.* at 403.

259 M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 356 (2018).

260 William J. Bowers, Benjamin D. Steiner & Marla Sandys, *Death Sentencing in Black and White: An Empirical Analysis of the Role of Jurors' Race and Jury Racial Composition*, 3 U. PA. J. CONST. L. 171, 215–16 (2001).

261 Bellin, *supra* note 247, at 407–10.

262 *Id.* at 407–10, 420.

act of waiving an appeal is the equivalent of consenting to execution.[263] In these cases, the Court has dismissed petitions by the defendant's family and friends seeking to prevent the waiver[264] as "uninvited meddlers."[265]

Yet, the overwhelming majority of appeals waivers do not occur in the capital context, but rather on a daily basis, as a consequence of pleading guilty to felonies and misdemeanors.[266] Criminal defendants entering a plea of guilty typically engage in a boilerplate colloquy with the trial judge, wherein they are asked to affirm their waiver of rights associated with forgoing a trial, including the right to an appeal. For example, in New York, the court asks defendants entering a plea a series of yes or no questions, including:

> Have you spoken to your lawyer about waiving your right to appeal?
>
> Are you willing to do so in return for the plea and sentence agreement?
>
> Do you waive your right to appeal voluntarily, of your own free will and choice?[267]

Rarely does a colloquy become more probing than these questions, with a defendant's simple assent all that is legally necessary to waive the appeal.[268] Thus while a defendant's waiver of appeals is subject to all the same pressures that impact guilty pleas, it is not the object of the negotiation. As such, these waivers permit even less of an exercise of defendant autonomy.

In the capital context, both courts and scholars have described appellate waivers as exercises in self-determination.[269] But meaningful autonomy cannot exist in the capital criminal legal system, which operates as an even more coercive system within the criminal legal system. Capital punishment represents the height of a government's power over its citizens. Since its inception, the American death penalty has supported white supremacy. Southern whites employed the death

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263 *See, e.g.*, Demosthenes v. Baal, 495 U.S. 731 (1990); Whitmore v. Arkansas, 495 U.S. 149 (1990); Gilmore v. Utah, 429 U.S. 1012 (1976); Rees v. Peyton, 384 U.S. 312 (1966).

264 *Demosthenes*, 495 U.S. at 737; *Whitmore*, 495 U.S. at 166; *Gilmore*, 429 U.S. at 1014–15.

265 *Whitmore*, 495 U.S. at 164; *id.* at 179 (Marshall, J., dissenting).

266 *See* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 128–30 (1995).

267 NYCOURTS.GOV, GUILTY PLEA COLLOQUY 7 (2016), https://www.nycourts.gov/judges/cji/8-Colloquies/Plea%20of%20Guilty.pdf [https://perma.cc/JJL4-L65G].

268 Courts uphold a waiver of appeals provided the waiver is deemed knowing and voluntary. *See, e.g.*, *Demosthenes*, 495 U.S. at 734.

269 *See, e.g.*, Richard J. Bonnie, *The Dignity of the Condemned*, 74 VA. L. REV. 1363, 1376 (1988); Melvin I. Urofsky, *A Right to Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553, 582 (1984).

penalty as a form of social control, codifying dozens of crimes for which enslaved people could suffer death, but limiting capital crimes for whites to a bare few.[270] Scholars have described the modern death penalty as the natural outgrowth of the lynching of African Americans following the Civil War.[271] From 1930 to 1976, of the 455 men executed for rape, 405 of them, or 89.5%, were Black.[272] No white man has ever been executed for the nonhomicide rape of a Black woman or child.[273] Today, capital defendants remain disproportionately Black,[274] and Black defendants accused of killing white victims are the most likely to be sentenced to death.[275]

When viewed through this lens—as a detained capital defendant—discussions of autonomy make little sense. Philosopher Joseph Raz conceived of a similar disconnect in his story of the Hounded Woman—a woman stranded on a desert island who is endlessly pursued by a hungry beast.[276] Although the woman can travel wherever she wants on the island, she is not truly free because she has to devote all of her time and resources to elude the beast.[277] Raz's point is that individuals are rendered nonautonomous when they act within a system that radically constrains their options.[278]

To say that the options of individuals on death row are constrained is an understatement. For many convicted of capital crimes, the most

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270 *See, e.g.*, Sheri Lynn Johnson, Coker v. Georgia*: Of Rape, Race, and Burying the Past*, *in* DEATH PENALTY STORIES 171, 191 (John H. Blume & Jordan M. Steiker eds., 2009). Virginia had over sixty capital crimes for enslaved people, but far fewer capital crimes for whites. *Id.*

271 FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 89–118 (2003); Roberts, *Framework*, *supra* note 16, at 272–73.

272 Hugo Adam Bedau, *The Case Against the Death Penalty*, *in* CRIMINAL INJUSTICE: CONFRONTING THE PRISON CRISIS 209, 215 (Elihu Rosenblatt ed., 1996); *see also* Marvin E. Wolfgang & Marc Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS AM. ACAD. POL. & SOC. SCI. 119, 123 (1973).

273 Brief Amicus Curiae of the Am. Civ. Liberties Union, ACLU of La. & NAACP Legal Def. & Educ. Fund, Inc., in Support of Petitioner at 7, Kennedy v. Louisiana, 554 U.S. 407 (2008) (No. 07-343), 2008 WL 503591, at *7.

274 *See, e.g.*, Katherine Beckett & Heather Evans, *Race, Death, and Justice: Capital Sentencing in Washington State, 1981–2014*, 6 COLUM. J. RACE & L. 77, 100 (2016); McCleskey v. Kemp, 481 U.S. 279, 287 (1987) (discussing "Baldus Study," which found that Black defendants in Georgia were 1.1 times more likely to be sentenced to death than white defendants, while accounting for 230 variables that could have provided nonracial explanations for the discrepancies).

275 Kleinstuber, *supra* note 16, at 38 (indicating that 32 out of 36 empirical studies on racial discrimination in capital punishment concluded that death sentences were more likely in circumstances where the victim was white, the defendant was Black, or both); Vito & Higgins, *supra* note 16, at 74 (discussing 2011 summary of ABA studies finding significant racial disparities in eight death penalty states, especially when factoring in victim's race).

276 JOSEPH RAZ, THE MORALITY OF FREEDOM 374 (1986).

277 *Id.*

278 *Id.*

realistic victory for which they can hope is sentencing relief that changes their death sentence to a sentence of life without parole.[279] The realities of confinement contribute to "volunteerism"—the act of waiving one's appeals to achieve a faster execution.[280] Many describe death row confinement as "the hardest time that a prisoner can do."[281] Although the death row experience varies from state to state, most lock down residents in their cells for as many as twenty-three hours a day.[282] Death row residents are rarely permitted to participate in educational or other prison programs.[283] Residents may typically take one to three showers per week and exercise alone several times a week in a wire mesh dog run.[284] Prison officials continually surveil residents, keeping cells illuminated around the clock, which often disrupts residents' sleep.[285] Visitation is limited to counsel and an approved list of family and friends, which typically excludes individuals with criminal records.[286] Some institutions, like Texas's death row, prohibit contact visits, requiring residents to be separated from all visitors by thick

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279 This 2018 study by the Death Penalty Information Center of 170 capital reversals in Pennsylvania concluded that eighty-six percent resulted in a new sentence of life without parole. *See, e.g.*, *DPIC Study Shows 97% of Prisoners Who Overturn Pennsylvania Death Sentences Are Not Resentenced to Death*, DEATH PENALTY INFO. CTR. (Apr. 26, 2018), https://deathpenaltyinfo.org/news/dpic-study-shows-97-of-prisoners-who-overturn-pennsylvania-death-sentences-are-not-resentenced-to-death#:~:text=The%20DP%20IC%20%20study%20%20found%20that,resentencing%20to%20life%20without%20parole [https://perma.cc/UWK6-7BZ5].

280 Robert Anthony Phillips, *Volunteering for Death: The Fast Track to the Death House*, CRIME MAG. (Oct. 9, 2009), http://www.crimemagazine.com/volunteering-death-fast-track-death-house [https://perma.cc/5L57-D9RB]; Welsh S. White, *Defendants Who Elect Execution*, 48 U. PITT. L. REV. 853, 871 (1987).

281 J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147, 210 & n.338 (2006).

282 Phillips, *supra* note 280; John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 966 (2005).

283 Blume, *supra* note 282, at 966; White, *supra* note 280, at 871.

284 Oleson, *supra* note 281, at 212.

285 *Id.* at 213.

286 *See, e.g.*, *Death Row*, FLA. DEP'T OF CORR., http://www.dc.state.fl.us/ci/deathrow.html [https://perma.cc/7LA3-HEAF] (explaining that Florida requires preapproval for visitors to death row); Mark Elliott, *Death Warrant!—Living with a Family Member on Death Row.*, FLORIDIANS FOR ALTS. TO DEATH PENALTY (Aug. 25, 2020), https://www.fadp.org/death-warrant-living-with-a-family-member-on-death-row [https://perma.cc/WQ25-W5T6] (indicating that a man was denied approval to visit his brother on Florida Death Row due to "his own struggles with the legal system"); STATE OF ALA. DEP'T OF CORR., VISITATION 5 (2012), http://www.doc.state.al.us/docs/AdminRegs/AR303.pdf [https://perma.cc/6YRN-KYXA] ("A married inmate may *not* have a friend of the opposite sex on their approved [visitor's list]. An unmarried inmate may have one (1) friend of the opposite sex and one (1) friend of the same sex on his/her approved [visitor's list].").

plexiglass.[287] Members of death row experience significant feelings of isolation and loneliness and experience a loss of relationships with others.[288] Many suffer from symptoms consistent with declining mental health, including feelings of depression, anxiety, and paranoia, and experience visual and auditory hallucinations.[289]

While the desire to volunteer for execution is frequently a desire that ebbs and flows,[290] the decision to forgo an appeal is usually irrevocable,[291] hobbling all future litigation challenging the capital defendant's conviction and sentence. This is because of the nature of capital postconviction litigation and the doctrines of exhaustion of state remedies and procedural default. Most states have procedural bars prohibiting defendants from raising a claim they validly waived in the past.[292] Consistent with principles of comity and federalism, federal courts typically cannot review a federal constitutional claim that was not first raised in state court or a previously denied federal constitutional claim where the denial rests on a state procedural ground.[293] Thus, a constitutional claim, once validly waived, is waived forever.[294] Even assuming some possibility for meaningful choice existed through the legal safeguarding of the right to forgo appeals, the right protects the capital defendant's autonomy to decide only once and only for the purpose of *waiving* rights, as opposed to asserting them. Such a narrow window of autonomy is no autonomy at all.

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287 TEX. DEP'T CRIM. JUST., OFFENDER RULES AND REGULATIONS FOR VISITATION 20 (2015), https://www.tdcj.texas.gov/documents/cid/Offender_Rules_and_Regulations_for_Visitation_English.pdf [https://perma.cc/RQD5-KEG6]. I have personally attended visits with individuals incarcerated on Texas's death row on multiple occasions.

288 Blume, *supra* note 282, at 966.

289 *See* Oleson, *supra* note 281, at 214–15 (detailing several studies of individuals, who, like residents of death row, are housed in solitary confinement).

290 White, *supra* note 280, at 855.

291 An appellate waiver may only be challenged on the limited grounds that it is involuntary, not simply because the defendant later changed his mind. *See* Gilmore v. Utah, 429 U.S. 1012, 1013 (1976) (indicating that the determination of a voluntary waiver is sufficient for execution to proceed); Osborn v. State, 695 So. 2d 570, 575 (Miss. 1997) ("[N]one of our cases place a duty on an attorney whose client has provided a written waiver of his right to appeal to keep checking with him during the thirty-day period during which an appeal may be brought to make sure he has not changed his mind."); *see also* Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) ("[A] defendant who explicitly tells his attorney *not* to file an appeal plainly cannot later complain that, by following his instructions, his counsel performed deficiently.").

292 *See, e.g.*, ALA. R. CRIM. P. 32.2(a)(1)–(5).

293 CONG. RSCH. SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 8–11 (2010), https://www.everycrsreport.com/files/20100108_RL33391_512feba8ae739cb355e78fa1b48a82de88fecf8b.pdf [https://perma.cc/TDY7-P34X].

294 *See supra* note 291.

6. The Right to Insist on Innocence at a Capital Trial

The right to insist on one's innocence at one's capital trial is the newest of the autonomy rights, resulting from the holding in *McCoy* and grounded in the Sixth Amendment right to make a defense.[295] The Court's holding expressly applied to capital cases,[296] which, due to their bifurcated structure,[297] typically require the same jury to determine the defendant's guilt or innocence and, in the cases with a guilty verdict, whether the appropriate sentence is death or life imprisonment without parole.[298]

In addition to the racist legacy of the capital criminal legal system and its biased selection and punishment process, nearly everyone accused of capital murder is detained from the moment of their arrest until their trial.[299] Judges typically do not grant bail in capital cases. Moreover, due to the complexity of capital trials and the congestion of court calendars, an individual can expect to spend years in jail between their arrest and trial.[300] The surveillance and control of pretrial detention, in combination with the threat of death or life imprisonment, do not create a scenario where autonomous decision-making is possible. Instead, like Raz's Hounded Woman, the individual charged with a capital crime can only react to threats that endanger their survival.[301] The decision with which Robert McCoy was presented—deny factual guilt and lose the jury's trust at sentencing or concede guilt and hope that the jury's trust outweighs its ire—contained two scenarios, both of which could reasonably end in a death sentence. Indeed, Mr. McCoy's lawyer pursued the latter option in the hopes of securing mercy but failed to do so.[302]

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295 McCoy v. Louisiana, 138 S. Ct. 1500, 1508 (2018).

296 *Id.* at 1505; *see also id.* at 1514 (Alito, J., dissenting).

297 Jesse Cheng, *Frontloading Mitigation: The "Legal" and the "Human" in Death Penalty Defense*, 35 L. & SOC. INQUIRY 39, 42 (2010) (discussing the requirement of bifurcated trials in capital cases).

298 It is unclear if the right would permit defense counsel to concede guilt to a lesser included offense, over a defendant's express objections, to secure acquittal on the top charge in a noncapital trial.

299 *See, e.g.*, *Pretrial Release*, A.B.A., https://www.americanbar.org/groups/criminal_justice/publications/criminal_justice_section_archive/crimjust_standards_pretrialrelease_blk [https://perma.cc/A5GZ-CEJJ].

300 For an extreme case, see Serge F. Kovaleski, *Justice Delayed: 10 Years in Jail, but Still Awaiting Trial*, N.Y. TIMES (Sept. 19, 2017), https://www.nytimes.com/2017/09/19/us/alabama-kharon-davis-speedy.html [https://perma.cc/D3NU-UTWR].

301 *See* RAZ, *supra* note 276, at 374.

302 McCoy v. Louisiana, 138 S. Ct. 1500, 1507 (2018).

However, Mr. McCoy's desired defense—an alibi theory—neither explained the State's evidence against him nor was corroborated by any additional evidence.[303] His attorney told the court that he believed Mr. McCoy was "suffering from some severe mental and emotional issues"[304] and "has exhibited very bizarre behavior."[305] Two weeks before the trial, he reiterated that "Mr. McCoy lacks the mental capacity to even help [him] defend himself in this case" and that he "believe[d] that Mr. McCoy is insane."[306] But none of these details made it into the Supreme Court opinion because the Court did not deem them relevant. The trial judge had found Mr. McCoy to be competent,[307] and this was sufficient for the Court to frame its opinion around the protection of his autonomy interest.

While popular fiction and media have encouraged the general public to believe that individuals charged with capital crimes resemble a real-life Hannibal Lecter,[308] in reality, these people are typically the most vulnerable of criminal defendants.[309] They are nearly always indigent: a common saying in the capital defense realm is, "[Those] without the capital get the punishment."[310] Mental illness is rampant.[311] From 2000 to 2015, forty-three percent of individuals who were executed had a *diagnosed* mental illness.[312]

In addition, most capital defendants have complex trauma histories, which influence their behavior and can impair functionality.[313] Clinical psychologist Kathy Wayland has observed that many of these clients have suffered traumatic events "usually within the context of profoundly destructive relationships, often at the hands of

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303 *See* Brief for Respondent at 6–13, *McCoy*, 138 S. Ct. 1500 (No. 16-8255).

304 *Id.* at 10.

305 *Id.* at 11.

306 *Id.* at 13.

307 *McCoy*, 138 S. Ct. at 1509.

308 Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation*, 35 SANTA CLARA L. REV. 547, 552–53 (1995).

309 Adam Tamburin, *Mental Health, Racism Prominent in Latest Debates over Death Penalty in Tennessee*, TENNESSEAN (Jan. 6, 2018), https://www.tennessean.com/restricted/?return=https%3A%2F%2Fwww.tennessean.com%2Fstory%2Fnews%2Fcrime%2F2020%2F01%2F06%2Ftennessee-death-penalty-debate-capital-punishment%2F2824466001%2F [https://perma.cc/6W83-6VYV].

310 BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 6 (2014).

311 Blume, *supra* note 282, at 962.

312 Frank R. Baumgartner & Betsy Neill, *Does the Death Penalty Target People Who Are Mentally Ill? We Checked.*, WASH. POST (Apr. 3, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/04/03/does-the-death-penalty-target-people-who-are-mentally-ill-we-checked [https://perma.cc/7QDX-U8CJ].

313 Kathleen Wayland, *The Importance of Recognizing Trauma Throughout Capital Mitigation Investigations and Presentations*, 36 HOFSTRA L. REV. 923, 930–31 (2008).

caregivers or others who should have provided safety, nurturance, and protection."[314] Exposure to traumatic stress, particularly during childhood, can delay neurodevelopment, impact brain structure, and affect behavior into adulthood.[315] Three risk factors that increase the likelihood of developing Post-traumatic Stress Disorder (PTSD) include: prior psychiatric history, a history of childhood abuse, and a family history of psychiatric disorder.[316] Most capital defendants have at least one of these risk factors; many have all three.[317]

To be clear, by acknowledging the existence of this increased vulnerability among those charged with capital crimes, I do not mean to suggest that there should exist no possible world where a vulnerable defendant could be empowered to make a fundamental decision concerning their defense, simply because such a decision might lead to a negative consequence. Disability scholars have long championed the dignity of risk as a philosophical concept that recognizes that personhood requires exposure to some degree of risk, and they have cautioned against overprotecting individuals with disabilities by eliminating their ability to make decisions that result in negative or risky consequences.[318] Instead, I argue that here, the choice preserved by McCoy's autonomy right does not comport with the concept of dignity of risk because it is not a meaningful one for capital defendants given the constraints of the criminal legal system discussed throughout this Article.

The Court's intervention to protect an individual's constrained choice within a racially subordinating system that confines individual action through pretrial detention and addresses potential mental health impairments with a simple binary competency inquiry does not create opportunity for meaningful autonomy. Instead, an assertion of an autonomy interest in this context only reproduces the existing social hierarchy, with the Court deeming the capital defendant's effective choice to die as an exercise in proper self-governance.

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314 *Id.* at 931.

315 *Id.* at 935–36.

316 *Id.* at 937–38.

317 *Id.* at 938.

318 WOLF WOLFENSBERGER, BENGT NIRJE, SIMON OLSHANSKY, ROBERT PERSKE & PHILIP ROOS, THE PRINCIPLE OF NORMALIZATION IN HUMAN SERVICES 194–95 (1972). Since 1972, dignity of risk has become a key theoretical concept both in the disability rights movement and legal scholarship. *See, e.g.*, Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921, 997–98 (2003); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 179 (2010); Roy G. Spece, Jr., John K. Hilton & Jeffrey N. Younggren, *(Implicit) Consent to Intimacy*, 50 IND. L. REV. 907, 919–20 (2017).

III. AUTONOMY AS RESISTANCE

Having argued that the law does not protect the individual autonomy of criminal defendants, in this Part, I contend that their agency is expressed through acts of resistance to the criminal legal system. Accordingly, I propose a shift in the scholarly discourse of autonomy in the criminal legal system from that of autonomy rights to what I call Autonomy as Resistance. I begin by exploring the roots of Autonomy as Resistance in the study of the agency of people subjected to chattel slavery. I then explain how the observations of historians of this era can inform the discourse on autonomy in the criminal legal system. I propose a conceptual framework for understanding resistance by criminal defendants and argue that a failure to recognize these actions as the only true agency permitted by the criminal legal system fosters a discourse incompatible with structural reform.

A. *A New Conceptual Framework*

Expressions of defendant autonomy are, of course, possible in the criminal legal system; they are just not protected and facilitated by legal rights. In this way, mass incarceration resembles the American institution of chattel slavery. In both systems, the structural components of white supremacy and "massiveness" extinguish the potential for protective measures. In each system, autonomy is expressed as acts of resistance.

Recognizing autonomy in acts of resistance has long been a practice of historians studying American slavery.[319] While there were laws under slavery that theoretically benefited enslaved people—for example, the right to marry with a master's consent,[320] or the prohibition on murdering an enslaved person[321]—no historian would seriously contend that these laws protected personal autonomy. Historian James Oakes explains, "The fact that such laws were common to slave societies throughout history suggests they were vague enough to encompass sadistic beatings and near-starvation," adding, "[t]he law,

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319 John Hope Franklin and Loren Schweninger's *Runaway Slaves* summarizes the historiography of the early scholarship of the resistance of enslaved Americans, which arose in reaction to the romantic descriptions of plantation life by Pulitzer Prize–winning historian Ulrich B. Phillips. *See* JOHN HOPE FRANKLIN & LOREN SCHWENINGER, RUNAWAY SLAVES: REBELS ON THE PLANATION xiii–xv (1999).

320 *See* JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH loc. 2642 (1990) (ebook).

321 *Id.* at loc. 2869.

of course is not a reliable guide to everyday practice."[322] Instead, slavery historians like Oakes saw autonomy in the everyday resistance exemplified by the actions of enslaved people.[323] Despite the law's role in instilling total subordination, Oakes notes that not all enslaved people were "absolutely dehumanized" in practice.[324] Instead, many engaged in daily resistance by breaking tools, slowing or stopping work, pretending illness, taking food, fleeing for short periods of time, and manipulating overseers or masters or sometimes even physically striking them.[325] Such resistance was not always intended as a challenge to the institution of slavery itself but often occurred when an enslaved person "got angry and refused to accept punishment."[326] Importantly, resistance was not always successful—and was, in fact, frequently unsuccessful—resulting in harsh punishment or death.[327]

In their classic text, *Runaway Slaves: Rebels on the Plantation*, historians John Hope Franklin and Loren Schweninger focused on flight as resistance.[328] In examining seventy years of short- and long-term escape, Franklin and Schweninger revealed both how enslaved people sometimes relied on violence to aid in resistance and how their efforts were frequently met with a brutal response, as the owners of enslaved people sought to demonstrate their authority.[329] Although immediate motivations for flight included conflict with overseers,[330] desire to escape imminent brutality or punishment,[331] hope for reunification with family or loved ones,[332] or an unquenchable thirst for freedom,[333] the act of flight was consistent with the enslaved person's

322 *Id.* at loc. 2877.

323 *See id.* at loc. 2516–53. The literature on slave resistance became commonplace in the mid-twentieth century. *See, e.g.*, Raymond A. Bauer & Alice H. Bauer, *Day to Day Resistance to Slavery*, 27 J. NEGRO HIST. 388 (1942); HERBERT APTHEKER, AMERICAN NEGRO SLAVE REVOLTS (1943); KENNETH M. STAMPP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH (1956); GERALD W. MULLIN, FLIGHT AND REBELLION: SLAVE RESISTANCE IN EIGHTEENTH-CENTURY VIRGINIA (1972); PETER H. WOOD, BLACK MAJORITY: NEGROES IN COLONIAL SOUTH CAROLINA: FROM 1670 THROUGH THE STONO REBELLION (1975). Historian Stephanie M. H. Camp noted that the study of resistance under slavery transformed the field. STEPHANIE M. H. CAMP, CLOSER TO FREEDOM: ENSLAVED WOMEN AND EVERYDAY RESISTANCE IN THE PLANTATION SOUTH 1 (2004).

324 OAKES, *supra* note 320, at loc. 300.

325 *Id.* at loc. 2516–53; FRANKLIN & SCHWENINGER, *supra* note 319, at 2–3, 6–8.

326 OAKES, *supra* note 320, at loc. 2531.

327 *See, e.g.*, FRANKLIN & SCHWENINGER, *supra* note 319, at 6, 16.

328 *Id.* at xiv.

329 *Id.* at xv.

330 *Id.* at 8–11.

331 *Id.* at 42–48.

332 *Id.* at 50–67.

333 *Id.* at 37–42.

choice to refuse compliance with the rules of slavery. Franklin and Schweninger also noted that because most white owners viewed themselves as benevolent masters who acted "kindly" and "humanely" toward enslaved people, they frequently expressed mystification at acts of flight, describing them as having occurred "without any provocation."[334]

Contemporary slavery historians paint a complex picture of the lives of enslaved people. Stephanie M. H. Camp writes that enslaved people were "both agents and subjects, persons and property, and people who resisted and who accommodated—sometimes in one and the same act."[335] Camp goes on to say that studies of resistance are neither naïve nor romantic but instead "offer a keen appreciation of the forms of abuse and exploitation against which the enslaved struggled and to which they often submitted."[336]

Slavery historians also saw autonomy in collective resistance, which typically consisted of organized rebellions aimed at the institution itself. The enslaved artisan Gabriel organized a multicity conspiracy to seize Richmond and end slavery.[337] Although the plan failed, it inspired one of the participants to organize a second uprising two years later, later deemed the Easter Plot.[338] Hundreds of armed enslaved men marched on New Orleans in 1811.[339] Denmark Vesey organized a rebellion of nine thousand men who planned to march on Charleston with the intention of killing not just white people but also Black people who failed to join in the rebellion.[340] Of Nat Turner's rebellion, Patrick Breen writes, "By targeting whites indiscriminately, Turner and the rebels hoped to dispel the aura of power associated with whiteness. Killing whites was not simply an act of vengeance but an act that would free the multitude of [B]lacks to join the rebellion."[341]

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334 *Id.* at 248–49 (emphasis omitted).

335 CAMP, *supra* note 323, at 1.

336 *Id.* at 2.

337 DOUGLAS R. EGERTON, GABRIEL'S REBELLION: THE VIRGINIA SLAVE CONSPIRACIES OF 1800 AND 1802 ix–xi, 50–51, 58–59 (1993).

338 *Id.* at xi, 119–31.

339 DANIEL RASMUSSEN, AMERICAN UPRISING: THE UNTOLD STORY OF AMERICA'S LARGEST SLAVE REVOLT 1–2 (2011).

340 MARY FRANCES BERRY, BLACK RESISTANCE/WHITE LAW: A HISTORY OF CONSTITUTIONAL RACISM IN AMERICA 18 (1995). *But see generally* Michael P. Johnson, *Denmark Vesey and His Co-Conspirators*, 58 WM. & MARY Q. 915 (2001) (arguing the rebellion was invented by South Carolina whites as a pretext for repression and contending that Vesey's true act of rebellion was refusing to name and testify against fellow enslaved people).

341 PATRICK H. BREEN, THE LAND SHALL BE DELUGED IN BLOOD: A NEW HISTORY OF THE NAT TURNER REVOLT 33 (2015).

Like enslaved people, criminal defendants display autonomy through acts of resistance to the criminal legal system. Sometimes calculated, sometimes reactive, these actions amount to expressions of frustration and protest within an all-encompassing oppressive system where meaningful choice and self-expression are not legally protected. As with resistance under slavery, resistance within the criminal legal system frequently inspires reaction and harsh punishment.

A few legal scholars have considered resistance as a frame for examining agency in the criminal legal system, but much of their work has been largely descriptive. An exception, Monica Bell, has proposed resistance—along with subordination, consumption, and transformation—as one of four modalities experienced by members of marginalized communities in relation to the criminal legal system.[342] Bell contrasts consumption, or ways in which individuals engage with or "make use of" the criminal legal system, with resistance, or ways in which they struggle against it.[343] For Bell, consumption is low in agency but comes with low risk of institutionalized stigma, whereas resistance is high in agency but typically comes with a price of moral dishonor.[344] Bell defines resistance as intentional, explaining:

> This understanding of resistance is akin to what James C. Scott . . . has called "weapons of the weak," the ways subordinated people signal that they do not passively accept domination but instead struggle against it . . . . It is, perhaps, a mode of survival and a means of hanging on to one's dignity and self-respect in a world that diminishes them.[345]

Bell focuses her analysis on marginalized communities and not criminal defendants per se. She emphasizes resistance in the context of police encounters although her examples recall those noted by slavery historians. Like Franklin and Schweninger, Monica Bell emphasizes the act of flight, characterizing Black men running from law enforcement officers as resistance to racialized policing.[346]

Trevor Gardner's Cultural Resistance Theory also focuses on resistance that occurs before individuals enter the criminal legal system—that is, before they become criminal defendants.[347] Gardner ties African-American street crime to "elements of political resistance,

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342 Monica C. Bell, *The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation*, 16 DU BOIS REV. 197, 197, 206–07 (2019).

343 *Id.* at 198, 204, 206.

344 *Id.* at 198.

345 *Id.* at 206.

346 *Id.* at 206–07.

347 Trevor Gardner II, *The Political Delinquent: Crime, Deviance, and Resistance in Black America*, 20 HARV. BLACKLETTER L.J. 137, 137–38 (2004).

inherent in African American culture after years of struggle against structural racism."[348] Gardner writes that Cultural Resistance Theory is not meant to detract from traditional explanations for street crimes, such as poverty, racism, disparate law enforcement, and disparate sentencing; rather, it is meant to highlight that there is a "vital oppositional element" that is "[w]oven into the fabric of African American culture," sparked by the brutality of slavery and continued under the oppressive regime of Jim Crow.[349] When expressed as street crime, the desire is to "get over on these people, on their system without playing by their rules."[350]

Chaz Arnett has also explored the resistance of communities, arguing that modern-day Baltimore residents can draw inspiration from African-American resistance under slavery, as enslaved people used creative methods to evade patrol and escape to freedom via the Underground Railroad.[351] Although like Bell and Gardner, Arnett writes of moments outside of the process of arrest and prosecution, his observations are broadly applicable to the criminal legal system: "Black communities have forged channels of resistance when legal systems have not only failed them but have been complicit in the maintenance of racial hierarchy."[352]

Two scholars have directly explored the pretrial resistance of criminal defendants. In *Talking Back in Court*, M. Eve Hanan examines moments when criminal defendants speak in unorthodox ways during their court appearances.[353] Employing a definition first proposed by bell hooks, Hanan's "talking back" means "speaking as an equal to an authority figure."[354] She contrasts talking back with hooks's "silence," which includes both refraining from speaking and speaking in such a way that is acquiescent or accommodating instead of challenging.[355] Hanan concludes that court actors typically reward defendants for silence but punish them for talking back because doing so interferes with the "orderliness" of the courtroom.[356]

Sociologist Matthew Clair has discussed the resistance of indigent defendants, focusing on the very relationship delineated by the

348 *Id.* at 138.

349 *Id.* at 137.

350 *Id.*

351 *See* Chaz Arnett, *Race, Surveillance, Resistance*, 81 OHIO ST. L.J. 1103, 1106 (2020).

352 *Id.*

353 *See* M. Eve Hanan, *Talking Back in Court*, 96 WASH. L. REV. 493, 495–96 (2021).

354 *Id.* at 496 (citing BELL HOOKS, TALKING BACK: THINKING FEMINIST, THINKING BLACK 5 (1989)).

355 *Id.* (citing HOOKS, *supra* note 354, at 6).

356 *Id.* at 521–39.

autonomy rights: the attorney-client relationship.[357] Clair concludes that, far from being agentic relationships where attorneys carry out the decisions of their clients, for indigent defendants, "a relationship with a lawyer often results in coercion, silencing, and punishment."[358] In his qualitative study of defendants in Boston-area criminal courts, Clair finds that indigent defendants are much more likely to experience what he terms "a relationship of withdrawal" with their attorneys than are nonindigent defendants.[359] Clair classifies one type of withdrawal as "withdrawal as resistance," which manifests as explicit conflict with either attorney directives or courtroom norms or both and which may occur behind closed doors or in open court.[360] Some of Clair's examples of withdrawal as resistance include a defendant's vocal protestation in open court of his attorney's participation in a sidebar conversation in which he was not included,[361] an exclamation on the record that "[t]his is my life we're talking about here,"[362] and a refusal to obey a judge's order to take his hands out of his pockets.[363] Others include a defendant who responded directly to a prosecutor's argument that a video was admissible as evidence of resisting arrest by repeatedly stating that it was "impossible" for one person to resist an arrest attempt by four officers, despite the judge's admonishment to remain silent.[364] In a final example, a defendant refused to decide whether to go to trial or take a plea offer, choosing instead to simply leave the courthouse.[365]

Clair found that for some of these defendants, resistance constituted a display of frustration at the criminal legal system's inability to address their needs and validate personal goals, "such as explaining the extenuating circumstances around their alleged wrongdoing or contesting corrupt police practices."[366] For others, resistance grew out of a belief that "court-appointed defense attorneys, as a group, could not be trusted to protect their interests or seek justice."[367] Like Hanan, Clair observed that defendants were nearly always punished for engaging in resistance—including by their attorneys, who typically responded by moving to withdraw their

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357 MATTHEW CLAIR, PRIVILEGE AND PUNISHMENT: HOW RACE AND CLASS MATTER IN CRIMINAL COURT xv–xvi, 7 (2020).

358 *Id.* at 7.

359 *Id.* at 19–20, 25–27 (emphasis omitted).

360 *Id.* at 19 (emphasis omitted).

361 *Id.* at 2–3.

362 *Id.*

363 *Id.* at 3.

364 *Id.* at 159.

365 *Id.* at 153.

366 *Id.* at 65.

367 *Id.*

representation.[368] Also like Hanan, Clair observed that the pressure to maintain the decorum of the courtroom often inspired punitive measures. Judges, at best, refused to hear defendants who attempted to speak in court without the aid of their attorneys and, at worst, took retributive action.[369] In one example, a defendant complained to a judge that his lawyer was refusing to file appropriate motions. Rather than encouraging the lawyer to speak with his client and work out the disagreement, the court permitted the lawyer to withdraw and ordered the defendant to hire counsel—in effect punishing the defendant for not deferring to his lawyer and instead "making a scene."[370]

Building on the work of these scholars, I propose a new conceptual frame to identify and interpret authentically agentic actions of criminal defendants: Autonomy as Resistance. Autonomy as Resistance captures acts of insubordination by criminal defendants to authorities within the criminal legal system. Sometimes these authorities are explicitly oppositional to the defendant: prosecutors, court officers, judges; other times, they are the very actors purported to act as the defendants' guides and confidants: public defenders and appointed counsel. Autonomy as Resistance applies when criminal defendants make choices beyond those sanctioned by the criminal legal system—especially, the hollow binaries offered by the autonomy rights—and when they engage in unauthorized self-expression. To qualify as autonomous, acts of resistance need not be intentional political statements of opposition to the criminal legal system. They also include any refusal to submit to perceived injustice, unfairness, discomfort, or futility. These acts need not have positive outcomes; instead, as Hanan and Clair observed, punishment is the more likely result. Finally, as demonstrated above, Autonomy as Resistance draws inspiration from the African-American tradition of resistance to the subordinating institution of slavery.

Like Hanan and Clair, I chose to focus not on communities generally, but on indigent criminal defendants, emphasizing the period between arrest and case disposition where counsel is assigned. I do so because this is the context in which the six autonomy rights apply but fail to protect the agency of criminal defendants. Unlike Bell and Hanan, who contrast acts of resistance with acts of acquiescence that individuals may take—for Bell "consumption" and for Hanan "silence"—I contrast Autonomy as Resistance with the common belief that individual rights safeguard opportunities for autonomy. Unlike this "autonomy rights discourse," which emphasizes the role of law as a

368 *See, e.g.*, *id.* at 2–3, 137.

369 *See, e.g.*, *id.* at 2–3, 68–69, 80, 137–39.

370 *See id.* at 137–39.

protective mechanism for the autonomy of criminal defendants, the Autonomy as Resistance repositions law in the current legal system as antithetical to agentic aims. In this way, my theory of Autonomy as Resistance differs from those of scholars like Jenny Carroll, Eric Miller, and Alice Ristroph, who have argued rights claims create and enshrine opportunities for defendant resistance.[371]

To aid in the examination of the resistance of criminal defendants, I offer the following taxonomy, which is both overlapping and non-exhaustive. Autonomy as Resistance can be grouped into five primary categories: verbal resistance, physical resistance, boundary pushing, opting out, and collective resistance. "Verbal resistance" occurs when defendants attempt to express their point of view orally in unsanctioned ways. It includes Hanan's "talking back," as well as what court actors commonly label "outbursts," where defendants attempt to communicate their point of view in a way that threatens the decorum of the courtroom. Examples include defendants who received increased sentences after calling judges "racist"[372] or telling them to "go fuck yourself."[373] But verbal resistance can also include less confrontational communication, such as questioning the impartiality of system actors or the fairness of criminal procedure. For example, it includes the defendant who "questioned the fairness" of the judge's decision to suspend his license for six months, prompting the judge to increase the suspension to nine months.[374] Verbal resistance also describes the actions of another defendant, who made "facial gestures" and "sounds" to indicate that he "strongly disagreed with the court's rulings."[375] After this defendant made statements to the same effect, the judge ordered him to be shackled to a wheelchair.[376] Verbal resistance includes the actions of a Texas defendant who repeatedly asked the judge to recuse himself, resulting in an order to activate the defendant's stun belt.[377] It also includes a defendant's request to return to jail during his trial

371 *See supra* note 28.

372 Lucy Connolly, *Defendant Calls Judge 'Racist Ass B*tch', Gets Sentenced Six More Years*, UNILAD (Mar. 22, 2019, 6:30 PM), https://www.unilad.co.uk/news/defendant-calls-judge-racist-ass-btch-gets-sentenced-six-more-years [http://perma.cc/APE7-AQF8].

373 Rob Beschizza, *Courtroom Smackdown! Judge and Defendant Get Nasty*, BOING BOING (July 22, 2016, 9:36 AM), https://boingboing.net/2016/07/22/courtroom-smackdown-judge-and.html?_ga=2.248206660.23977775.1629302137-1376905159.1629302137 [https://perma.cc/H332-ABHK].

374 *In re* Graham, 620 So. 2d 1273, 1274 (Fla. 1993).

375 Wilber v. Thurmer, 476 F. Supp. 3d 785, 790, 793–94 (E.D. Wis. 2020).

376 *Id.* at 791–94.

377 Olivia Messer, *Texas Judge Tortured Defendant with Stun Belt to Show 'Power,' Court Rules*, DAILY BEAST (Mar. 7, 2018, 5:25 PM), https://www.thedailybeast.com/texas-judge-tortured-defendant-with-stun-belt-to-show-power-court-rules [https://perma.cc/66C9-S2GG].

because he "had enough of this," and his exclamation that the jury did not constitute a jury of his peers "because he is [B]lack."[378]

Other verbal resistance is aimed at appointed attorneys, whom defendants believe to be unprepared or oppositional. In a paradigmatic example, one defendant took issue with his attorney's statement that the defense was ready for trial, saying he had only met the attorney for five minutes and that the attorney declined to show him the police reports associated with his case.[379] The defendant argued that any system that would permit such an attorney to begin a trial was "ridiculous" and "racist," but the judge ordered that the trial should proceed.[380]

Finally, verbal resistance includes the self-expression that Clair observed criminal defendants display in Boston, including both the man who exclaimed, "This is my life we're talking about here,"[381] and the man who opposed the prosecutor's attempt to introduce an arrest video because it was "impossible" to resist four police officers.[382] It also includes the actions of a defendant whose efforts to register complaints about his lawyers and jail conditions resulted in the judge taping his mouth shut during sentencing.[383] Undaunted, the defendant continued to make efforts to talk through the tape.[384]

"Physical resistance" occurs when criminal defendants use their bodies as instruments to express opposition to system actors or the criminal process. Physical resistance includes both active physical resistance, such as attacks or challenges to fight, and passive physical resistance, such as becoming limp or refusing to move. Physical resistance is comparatively rare and harshly punished. Examples of active resistance include a defendant who pushed over a courtroom table after the judge denied his request for more time to prepare for trial;[385] a defendant who attacked his attorney (against whom he had made repeated complaints) on his way to the witness stand to testify;[386]

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378 Adams v. Superintendent SCI Huntingdon, No. 19-CV-01455, 2020 WL 6158296, at *2 (M.D. Pa. Oct. 21, 2020).

379 State v. Nicholas, 735 So. 2d 790, 792–93 (La. Ct. App. 1999).

380 *Id.* at 792–94.

381 CLAIR, *supra* note 357, at 3.

382 *Id.* at 159.

383 FOX 8 News Cleveland, *Judge Orders Suspect to Have Mouth Taped During Sentencing*, YOUTUBE (July 31, 2018), https://www.youtube.com/watch?v=rmvMzFGFAww&ab_channel=FOX8NewsCleveland [https://perma.cc/G3RP-9J8G].

384 *Id.*

385 A&E, *Court Cam: Defendant FLIPS TABLE in Courtroom*, YOUTUBE (Apr. 25, 2021), https://www.youtube.com/watch?v=QgViQqDqMpk [https://perma.cc/QE4Y-L8TA].

386 Padillow v. Crow, No. 18-CV-122, 2021 WL 1131715, at *12 (N.D. Okla. Mar. 24, 2021).

and defendants who threw backpacks,[387] computer and phone equipment,[388] and podiums[389] at court personnel. Examples of passive resistance include a defendant who smoked a marijuana cigarette during his arraignment for marijuana possession;[390] a defendant who remained seated and refused to accompany deputies back into detention;[391] a defendant who went limp while being escorted by deputies, following an arrest for escape;[392] and a defendant who refused to rise as the judge left the bench.[393] Nearly all who engage in active physical resistance—and some who engage in passive physical resistance—acquire additional criminal charges, often after having been physically restrained and punished by court officers.

"Boundary pushing" occurs when defendants challenge the norms of the courtroom. Boundary pushing appears to be more successful than other forms of resistance in the sense that defendants are not always formally punished for engaging in this behavior. One example of boundary pushing involves defendants who wear clothing that court actors find to be provocative. Examples of this range from a teenage defendant who wore a t-shirt that said "killer" to his sentencing hearing,[394] to one who intentionally wore his jail uniform at trial,[395] to a

387 A&E, *Court Cam: Defendant THROWS Backpack at Judge (Season 2)*, YOUTUBE (Aug. 21, 2020), https://www.youtube.com/watch?v=m3KPCGbbGko [https://perma.cc/G4YL-ZRZG].

388 Doha Madani, *Video Shows Suspect Attack Judge in Mississippi Courtroom*, NBC NEWS (Feb. 2, 2021, 2:17 PM), https://www.nbcnews.com/news/us-news/video-shows-suspect-attack-judge-mississippi-courtroom-n1256512 [https://perma.cc/JD6V-2VV2].

389 Doug Phillips, *Disorder in the Court: Unhappy Defendant Tosses Podium*, S. FLA. SUN SENTINEL (Mar. 1, 2019, 7:35 AM), https://www.sun-sentinel.com/local/broward/fl-ne-defendant-tosses-podium-20190301-story.html [https://perma.cc/9YMA-PABH].

390 *See* A&E, *Court Cam: Top 5 Most Disrespectful Defendants*, YOUTUBE (Nov. 20, 2020), https://www.youtube.com/watch?v=PIotJjzDyHM [https://perma.cc/XDD2-HGZ6].

391 cleveland.com, *Cleveland Man Convicted of Bar Shooting Refuses to Leave Courtroom After Verdict*, YOUTUBE (Mar. 20, 2018), https://www.youtube.com/watch?v=L6PBnbjaneE [https://perma.cc/6CU4-LLQH].

392 Jones v. State, 290 So. 2d 251, 257 (Ala. Crim. App. 1974).

393 M.D.M. v. State, 179 So. 3d 362, 363 n.1 (Fla. Dist. Ct. App. 2015).

394 Ryan Haidet, *Ohio Teen Wears 'Killer' Shirt, Curses at Victims' Families*, USA TODAY (Mar. 20, 2013, 8:19 AM), https://www.usatoday.com/story/news/nation/2013/03/19/ohio-school-shooting-chardon/1999369 [https://perma.cc/2VAS-VAVH].

395 Conrad Wilson & Meerah Powell, *Jeremy Christian Opts to Wear Jail Scrubs During Murder Trial*, OPB (Jan. 21, 2020, 3:29 PM), https://www.opb.org/news/article/jeremy-christian-portland-murder-trial-jury-selection [https://perma.cc/WQ8Z-TBSD].

third who sought to wear a Black Lives Matter shirt,[396] to a fourth who appeared for a remote court appearance wearing no shirt at all.[397]

Boundary pushing also includes a direct analogue to resistance under slavery: delay. While criminal defendants lack tools to break, they have employed creative methods to delay court proceedings. One example is a defendant who slowly dressed himself for trial and removed his clothing during court recesses to prevent himself from being summoned back into the courtroom.[398] Another is a defendant who delayed his trial by drinking excessive amounts of water in order to request frequent bathroom breaks.[399] Boundary pushing also includes the defendant who explained that the judge should not worry about the defendant's arguments causing delays in the case because "[y]ou are getting compensated for the delay by taxpayers."[400]

My prior career as a public defender in the Bronx[401] allowed me to observe additional instances of boundary pushing. One noteworthy example involved defendants who, though at liberty awaiting sentence, had pled guilty to a crime that required incarceration. These men and women had to come to court on the day of their sentencing to be "stepped in," meaning they would be taken into custody inside the courtroom and then transported to jail—typically, to Rikers Island. Although judges instructed them to arrive in court at 9:30 a.m., these individuals nearly always arrived late in the afternoon, just minutes before the courtroom closed, in an effort to extend their freedom to the last possible second. Provided they arrived before closing, this marked a rare instance where a defendant could engage in resistance without punishment (which may have accounted for the act's ubiquity). The consequences of arriving a minute too late were devastating: the sentencing judge issued an arrest warrant, and the defendant was brought before the judge the following day for a resentencing hearing, wherein the judge could, and typically did, increase the period of incarceration.

"Opting out" occurs when defendants refuse to participate in the criminal legal system, often by refusing to make decisions, speak,

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396 Lindsay Corcoran, *Judge Says Worcester Protestor Can't Wear Black Lives Matter Shirt During Trial (Video)*, MASSLIVE (Jan. 7, 2019, 2:15 PM), https://www.masslive.com/news/worcester/2015/11/judge_says_worcester_protestor.html [https://perma.cc/BEZ2-7PYK].

397 Cole Waterman, *Judge Stresses Proper Court Attire After Man Appears Shirtless in Zoom Hearing*, MLIVE (Feb. 27, 2021, 11:43 AM), https://www.mlive.com/news/saginaw-bay-city/2021/02/judge-stresses-proper-court-attire-after-man-appears-shirtless-in-zoom-hearing.html [https://perma.cc/TK83-SNNE].

398 Paige v. Eckert, No. 16-CV-6802, 2020 WL 9816017, at *13 (E.D.N.Y. July 8, 2020).

399 State v. Davis, 461 P.3d 1204, 1207 (Wash. 2020).

400 Pantchev v. Martel, No. 17-CV-02807, 2020 WL 4005651, at *20 (C.D. Cal. June 22, 2020).

401 I worked as a Staff Attorney at Bronx Defenders from 2007 to 2012.

comply with court orders, or attend court. Examples include a defendant who refused to speak with his attorney, recognize his attorney as his counsel, or enter a plea of guilty or not guilty in response to the reading of his indictment.[402] It includes one of Clair's defendants, who chose to leave the courthouse rather than being forced to choose the hollow binary of going to trial or taking a plea offer.[403] Other examples of opting out include defendants who refused to submit handwriting or voice exemplars, despite orders to do so;[404] those who refused to attend court;[405] and, most recently, those who refused to take a test for COVID-19.[406] In an analogue to resistance under slavery, opting out is most vividly displayed by attempts to escape the criminal legal system entirely by fleeing the courthouse.[407]

"Collective resistance" appears to be rare among criminal defendants. There are at least two possible reasons for this. First, the current criminal legal system is focused on individuals: personal responsibility, individual rights, and individualized sentencing are all basic tenets that obscure the roles of systems and communities. Because defendants' cases have independent outcomes, they are incentivized to minimize the harm done to their own person. These incentives are reinforced by the myth perpetuated by the autonomy rights that criminal defendants can navigate the system successfully and fairly by making good choices. Second, given the potential costs of engaging in resistance—which can include public humiliation, additional criminal charges, deprivation of liberty, or infliction of violence—collective resistance may seem not worth the risks.

Yet some collective resistance does occur, particularly at the hands of criminal defendants detained during the pendency of their cases. In August of 2020, individuals incarcerated in multiple jails in Santa Clara, California, began a coordinated hunger strike with the dual aims of protesting detention that resulted in a COVID-19 outbreak and

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402 Pool v. State, No. 07-18-00358-CR, 2020 WL 4260377, at *2–3 (Tex. App. July 14, 2020).

403 CLAIR, *supra* note 357, at 153.

404 *See, e.g.*, State v. Flinn, 455 N.E.2d 691, 692 (Ohio Ct. App. 1982) (handwriting exemplar); People v. Winston, 552 N.Y.S.2d 860, 860 (App. Div. 1990) (voice exemplar).

405 Larry Welborn, *Murder Defendant Refuses to Leave Cell, Delays Trial*, ORANGE CNTY. REG. (Sept. 13, 2013, 6:20 PM), https://www.ocregister.com/2013/09/13/murder-defendant-refuses-to-leave-cell-delays-trial/ [https://perma.cc/74DG-7Z7K].

406 Shellsea Lomeli, *Defendant Refuses COVID-19 Test Multiple Times, Frustrating Sacramento Court*, DAVIS VANGUARD (June 27, 2020), https://www.davisvanguard.org/2020/06/defendant-refuses-covid-19-test-multiple-times-frustrating-sacramento-court [https://perma.cc/6XQG-X8GK].

407 *See, e.g.*, A&E, *Court Cam: Guilty Defendant Casually Walks out of Courtroom*, YOUTUBE (May 28, 2021), https://www.youtube.com/watch?v=kboytWZSKcQ [https://perma.cc/H58C-YJKN]; A&E, *Court Cam: Top 5 Greatest Escapes*, YOUTUBE (Oct. 2, 2020), https://www.youtube.com/watch?v=pjDS578FROw [https://perma.cc/H4CG-ZMEL].

participating in the nationwide protests on policing inspired by the killing of George Floyd.[408] When the Metropolitan Detention Center, a jail housing those accused of federal crimes in Brooklyn, lacked heat in the dead of winter, several residents began a hunger strike, while others shot and distributed video on contraband cell phones.[409] In both Santa Clara and Brooklyn, many of these individuals had not been convicted of anything. They were awaiting trial and thus imbued with the presumption of innocence. At least in theory, they could still leave the criminal legal system without a criminal conviction or punishment. That these people were willing to engage in collective resistance and accept its inherent risk of reprisal demonstrates both the value they place on the conditions motivating their protest and the comparative lack of value the presumption of innocence may seem to have while detained. More scholarly attention to such actions is warranted.

Whether criminal defendants at liberty engage in collective resistance with any regularity is less clear. Scholars have proposed collective exercise of the right to trial as an act of resistance.[410] Jenny Roberts has argued that the misdemeanor criminal legal system would become overburdened, and likely collapse, if defendants were to collectively refuse guilty pleas and demand a trial in misdemeanor cases.[411] Roberts aims her proposal at public defenders, urging them to present clients with "an invitation (in appropriate cases) to participate in a collaborative effort to change the system by forcing it to bear some of the real costs of mass misdemeanor processing."[412] But, of course, there is no reason such a plan could not be organized (and perhaps, more successfully) by the defendants themselves—regardless of their attorneys' participation or support. Michelle Alexander considered this possibility by recounting a conversation she once had with Susan Burton, a woman who, after several periods of incarceration for drug offenses, went on to establish the reentry organization, A New Way of

408 Robert Salonga, *Santa Clara County Jail Inmates, Families Launch Hunger Strike to Protest Conditions*, MERCURY NEWS (Aug. 14, 2020, 6:20 PM), https://www.mercurynews.com/2020/08/14/santa-clara-county-jail-inmates-families-launch-hunger-strike-to-protest-conditions [https://perma.cc/CZ9G-SKMA].

409 Emma Whitford & Nick Pinto, *Locked Inside a Freezing Federal Jail, They United to Protest Their Conditions—Only to Face Reprisals*, INTERCEPT (Feb. 16, 2019, 8:48 AM), https://theintercept.com/2019/02/16/metropolitan-detention-center-mdc-brooklyn-jail [https://perma.cc/B2TF-JPUS].

410 Jenny Roberts, *Crashing the Misdemeanor System*, 70 WASH. & LEE L. REV. 1089, 1099–1100 (2013).

411 *Id.*

412 *Id.* at 1100.

Life.[413] Burton contemplated the idea of organizing a project to encourage people enmeshed in the criminal legal system to refuse plea bargains on a large scale, despite knowing firsthand the harm it could bring to them on an individual basis:

> As you know, another brutal system of racial and social control once prevailed in this country, and it never would have ended if some people weren't willing to risk their lives. It would be nice if reasoned argument would do, but as we've seen that's just not the case. So maybe, just maybe, if we truly want to end this system, some of us will have to risk our lives.[414]

There is some irony in the fact that exercise of this particular "autonomy right" might, in fact, constitute a genuine act of autonomy if intended as collective resistance. But, of course, it is not the legal codification of meaningful choice and self-expression that is at work here. Instead, it is a collective decision to take action to undermine the criminal legal system. It is not the right that enables autonomy; it is the resistance.

B. *Shifting the Autonomy Discourse*

I propose that scholars shift the discourse on autonomy from one of rights to one of resistance because the latter frame more accurately captures the agency of criminal defendants. But I also contend that this shift is necessary because the current autonomy rights discourse is harmful. The myth of autonomy rights both legitimizes a flawed system and perpetuates the notion that such a system is redeemable if only we can find the right combination of procedural mechanisms to actualize these rights. To begin with, the focus on individual rights obscures systemic defects. Scholars and advocates who assume that autonomy in the criminal legal system is possible emphasize procedural adjustments and reforms to better protect individual defendants. But, within this discourse, the aim (and limit) of reform is necessarily harm reduction. For example, the same public defender offices that advertise client-centered representation have developed policy arms that propose legislation aimed at reforming bail statutes, civil forfeiture, and jury selection—but rarely endorse abolition-inspired measures such as defunding policing and "invest/divest," where communities give

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413 Michelle Alexander, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 10, 2012), https://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/6KT3-PFHU]; *Who We Are*, A NEW WAY OF LIFE: REENTRY PROJECT, http://anewwayoflife.org/who-we-are [https://perma.cc/58G3-W2ZN].

414 Alexander, *supra* note 413.

resources to educational and health initiatives in lieu of the carceral system.[415] While this legislation no doubt improves the lives of individual clients, it fails to address the underlying structural deficits of the criminal legal system: white supremacy and massiveness. By suggesting the redeemability of the criminal legal system, the autonomy rights discourse is another arrow in the quiver for those who deem abolition both radical and unnecessary.

In addition, the corresponding "autonomy rights" discourse reinforces existing race and class hierarchies. The Court's focus on individual rights is a colorblind one, with no indication that one's experience within the criminal legal system—from selection to punishment—is identity driven. Scholars engaging with autonomy also tend to give race and class cursory treatment.[416] While client-centered defenders and clinicians are more cognizant of white supremacy, by stylizing their philosophy of representation as one in which criminal defendants "choose" objectives, they present an idealized portrait where white supremacy stops just outside their office doors.[417]

By taking for granted the law's ability to protect defendant autonomy in the criminal legal system, courts, scholars, and advocates allow narratives that harm criminal defendants to flourish. Prosecutors continue to reduce complex questions of culpability to simple moral tales about "choices,"[418] while judges may accept assurances that defendants are pleading guilty because they are guilty.[419] Then, as Anna Roberts has pointed out,[420] these dubious convictions end up serving as the basic unit of data concerning the criminal legal system, are employed in support of misleading statistics, and ultimately create the

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415 *See, e.g.*, Press Release, Brooklyn Def. Servs., Bronx Defs., Legal Aid Soc'y, Neighborhood Def. Serv. of Harlem & N.Y. Cnty. Def. Servs., NYC Defenders Renew Call for Urgent Reforms of the Criminal Legal System Following New Democratic Supermajority (Nov. 23, 2020), https://www.bronxdefenders.org/nyc-defenders-renew-call-for-urgent-reforms-of-the-criminal-legal-system-following-new-democratic-supermajority [https://perma.cc/62CH-4NVR]; *Advancing Rights Through Policy Advocacy*, LEGAL AID SOC'Y, https://www.legalaidnyc.org/policy-advocacy [https://perma.cc/8TXZ-JUZ5]; *see also* Ryan Pitkin, *Habekah Cannon Launches Abolitionist Law Firm After Being Fired*, QUEEN CITY NERVE (Dec. 14, 2020), https://qcnerve.com/habekah-cannon-abolitionist-law-firm [https://perma.cc/NZ5E-RS9L].

416 *See, e.g.*, Hashimoto, *Resurrecting*, *supra* note 1; Hashimoto, *Defending*, *supra* note 1.

417 *See, e.g.*, *Policy*, NEIGHBORHOOD DEF. SERV., https://neighborhooddefender.org/services/policy [https://perma.cc/PCF2-NFV3] ("Race and class prejudice are deeply embedded in the U.S. legal system. NDS fights them daily in the courthouse while eradicating them in policy.").

418 Tom McMahon, *Prosecution: Wife Made Choices in Marriage, Murder*, DAILY NONPAREIL (Apr. 22, 2004) https://nonpareilonline.com/news/prosecution-wife-made-choices-in-marriage-murder/article_1459e101-99e2-521d-9451-d99517bbe29f.html [https://perma.cc/H394-CPGW].

419 *See* NYCOURTS.GOV, *supra* note 267.

420 *See* Roberts, *supra* note 125, at 991.

false portrait that the system accurately identifies and punishes the culpable. This permits judges and prosecutors to accept without question their own roles as integral to public safety and the rule of law.

The autonomy rights myth also likely affects public defenders—particularly progressive, client-centered defenders—because it upholds the illusion that their clients have meaningful choices for them to empower. This creates two problems. First, the defender passes along the myth to the client, suggesting falsely that the system presents opportunities for narrative expression and meaningful choice that simply do not exist. The emphasis on opportunities to "have your day in court" or "tell your story" can supplant conversations about the structural limitations and white supremacist realities of the criminal legal system, favoring a harm reduction approach. Second, when a client responds with resistance—not just to the criminal legal system, but to the attorney's representation—the defender may respond by punishing the client by displaying frustration with the client, spending less time on the client's case, or formally withdrawing their representation.[421]

This Article makes clear that, as with slavery, the structural constraints of the criminal legal system run too deep for individual autonomy to be expressed as anything other than resistance to an unjust system. As such, the scholarly discourse must change to reflect reality; it must focus on the discourse of resistance. The discourse of resistance is similar to the discourse of autonomy rights in that both focus on agency, but unlike rights-based autonomy, resistance involves agency that occurs not because of the law but in reaction to the law. A shift from autonomy rights to resistance has two critically important effects. First, it accurately situates the criminal legal system as a modern complement to race-based slavery. Second, it illuminates the need for radical structural change instead of mere procedural tinkering.

Just as with slavery, autonomy within the criminal legal system exists despite, and not because of, the law. Adopting a resistance frame enabled slavery historians to find evidence of individual and collective agency in an obviously oppressive system. For the criminal legal system, a resistance frame would do the opposite: it would illuminate the criminal legal system as an all-encompassing system of racial subordination and oppression. Such thinking is in line with that of Monica Bell, who argues that a resistance frame emphasizes the oppressive structure of the criminal legal system and can inspire fundamental transformation:

> [A]n understanding of . . . everyday resistance is critical for illuminating pathways toward more innovative systemic criminal

421 *See, e.g.*, CLAIR, *supra* note 357, at 2–3, 137.

> justice transformation, for finding touchpoints that community members find the most dehumanizing or the least productive, and for building a legal structure that is more responsive to community concerns.[422]

Resistance is the better frame for examining defendant agency within the criminal legal system both because it explicitly and accurately connects the criminal legal system to the institution of slavery and because it exposes the failure of the law to protect autonomy. In doing so, the resistance frame illuminates the oppressive nature of the criminal legal system and the need for radical structural change and, ultimately, abolition. Put another way, when autonomy may only be expressed by resistance to a system, the system is broken: the system must be abolished and its subjects emancipated.

CONCLUSION

When the Framers conceived of our criminal legal system, they sought to ensure protection of the self-determination and self-expression of criminal defendants. Instead, the criminal legal system has morphed into a bloated tool of racial subordination, where criminal defendants lack the ability to make meaningful choices. Rather than grapple with context and structural defects, the Court has employed lofty rhetoric in support of six "autonomy rights" that seem to apply more to theoretical criminal defendants than to the flesh-and-blood individuals who find themselves ensnared by the criminal legal system. The Court's decisions have driven the scholarly discourse on autonomy. Criminal legal scholars and practitioners have debated how best to protect defendant autonomy and when other values should eclipse its importance but have always taken for granted the ability of the law to protect self-determination and self-expression within the criminal legal system. These scholars are wrong: the law has failed to protect the autonomy of criminal defendants. Instead, the agency of criminal defendants—just as with enslaved people before them—occurs despite, and not because of, the law in the form of resistance. A resistance frame illuminates the subordinating nature of the criminal legal system and, with it, the need for radical structural change.

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422 Bell, *supra* note 342, at 206.