The Illusion of Defendant Autonomy and the Moral Harm of Self-Incrimination in McCoy v. Louisiana

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THE ILLUSION OF DEFENDANT AUTONOMY
AND THE MORAL HARM OF SELF-INCRIMINATION IN MCCOY V. LOUISIANA

Titus Levy*

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INTRODUCTION

In McCoy v. Louisiana, the U.S. Supreme Court held that defense counsel’s decision to admit guilt over his client’s “intransigent objection to that admission” violated the defendant’s rights under the Sixth Amendment.1 The Court explained that a criminal defendant has the right to decide the fundamental objective of their defense.2 Although evidence of Robert McCoy’s guilt appeared to be overwhelming, and his alibi defense “difficult to fathom,” the decision whether to admit guilt or assert innocence was his alone.3 In the Court’s view, to override a client’s choice as to the fundamental objective of their defense is to deny a core aspect of their very personhood as an autonomous individual.4

The decision has been controversial. On the one hand, McCoy has been celebrated as a victory for criminal defendants, carving out a new constitutional right that strengthens defendant autonomy and acts as a bulwark against the paternalistic agendas of lawyers and judges.5 The holding would also appear to vindicate the client-centered approach to lawyering, which instructs attorneys to maximize defendant autonomy by

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2. See id. at 1508.
3. Id. at 1507–08.
4. See id.
centering the specific goals, values, and perspectives of an individual client.\textsuperscript{6} Conversely, critics of the decision have argued that the result actually heightens the vulnerability of already-vulnerable criminal defendants by placing crucial decision-making authority in the hands of individuals not equipped to wield it.\textsuperscript{7} On the critical view, the Court — by granting too much decisional autonomy to defendants — opened the door to self-destructive courses of action that will have especially harmful consequences for defendants of uncertain mental capacity navigating complex, high-stakes proceedings such as capital trials.\textsuperscript{8}

A related line of criticism contends that this decision will encourage low-quality representation from overworked attorneys too quick to defer to their clients’ preferred course of action.\textsuperscript{9} This concern is especially pronounced when considered against the backdrop of the existing indigent defense crisis afflicting urban areas across the country.\textsuperscript{10} Lack of sufficient funding for public defender offices leads to higher caseloads and puts tremendous pressure on individual attorneys.\textsuperscript{11} For instance, as a result of inadequate funding, the Legal Aid Society in New York City has suffered significant attrition as their attorneys buckle under the strain of “immense workloads and chronically low salaries.”\textsuperscript{12} And when attorneys are overburdened by too many cases, the quality of their representation suffers: cases are not fully investigated, motions are not filed, and triage becomes the norm rather than the exception.\textsuperscript{13} Under these conditions, it is easy to imagine a harried, exhausted defense attorney all-too-willing to uncritically pursue their client’s theory rather than conduct the due diligence necessary to properly advise and effectively advocate for the client.


\textsuperscript{7} See, e.g., Steven Zeidman, Whose Case is it Anyway? Florida v. Nixon and McCoy v. Louisiana: Pro-Defendant or Pro-Government?, 37 CRIM. JUST., no. 2, Summer 2022 at 28, 31.

\textsuperscript{8} See id. at 29.


\textsuperscript{10} See Nicholas M. Pace et al., National Public Defense Workload Study 4–6 (2023); see also Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases: Still a National Crisis?, 86 GEO. WASH. L. REV. 1564, 1578–89 (2018) (documenting excessive caseloads shouldered by defense attorneys across the country and the resulting negative effects on the quality of indigent defense).

\textsuperscript{11} See Pace et al., supra note 10, at 9–11.


\textsuperscript{13} See Pace et al., supra note 10, at xv.
This Comment expands upon the existing critiques of McCoy, arguing that the Court’s construction of autonomy-as-choice is deeply problematic, not just in terms of practical implementation but also as a matter of conceptual coherence. The Sixth Amendment autonomy-as-choice framework, utilized in McCoy and invoked in cases going back at least to Faretta v. California, is appealing in that it purports to resolve difficult questions relating to the constitutional rights of criminal defendants while resonating with powerful notions of human dignity. But this framing is misguided in two principal ways. First, in the context of criminal prosecutions where the range of choices available to defendants is severely circumscribed and the coercive authority of the State operates in full force, the assurance of decisional autonomy is an empty promise. Second, the Court has mistakenly conflated choice-driven autonomy with individual dignity. This version of autonomy represents a blinkered conception of human dignity centered around “willing and choosing” that ultimately distracts from other forms of intervention better suited to affirming the dignity of criminal defendants.

In place of a misguided focus on “Sixth Amendment-secured autonomy,” this Comment argues that the proper basis for reversal of McCoy’s conviction was to be found in a different constitutional provision altogether: the Fifth Amendment privilege against compulsory self-incrimination. Rather than locating the defect in the criminal process afforded McCoy in the attorney-client relationship, a Fifth Amendment reading focuses on the State’s failure to properly vindicate his constitutionally protected privilege, thus compelling McCoy to act as “a witness against himself” at his own trial. A Fifth Amendment self-incrimination analysis stands on firmer conceptual and constitutional ground than a Sixth Amendment autonomy rights analysis, while simultaneously refusing to obscure the structural defects of the criminal legal system.

This Comment proceeds in three parts. Part I provides a deeper analysis of McCoy, delving into the factual background of the case and exploring the bases and implications of the Court’s holding. Part II critiques the Court’s choice-driven conception of autonomy as an incoherent and misguided

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14. Faretta v. California, 422 U.S. 806, 819, 833–34 (1975) (finding a constitutional right to self-representation to be “implied by the structure” of the Sixth Amendment and further supported by the Founders’ understanding of “the inestimable worth of free choice”).
17. Id. at 826.
19. U.S. CONST. amend. V.
attempt to preserve individual dignity. The autonomy-as-choice focus ends up impairing the attorney-client relationship and obscuring the structural features of the criminal legal system that actually harm human dignity. Part II further argues that the Sixth Amendment provides the wrong framework for analyzing the case because the deprivation of McCoy’s rights at trial was most directly attributable to the trial judge’s failure to intervene, rather than any error on the part of McCoy’s attorney. Part III argues that the proper way to understand the constitutional and dignitary harm suffered by McCoy is as a violation of the defendant’s Fifth Amendment protection against compulsory self-incrimination, and that under agency principles, the concession of guilt made by McCoy’s attorney in front of the jury amounted to an act of vicarious self-incrimination. Additionally, the circumstances countenanced by the trial judge compelled McCoy to testify because absent cooperation from his attorney, taking the stand was the only means left by which he could tell the jury his story. Rather than implicating an issue of autonomy, the deprivation of McCoy’s right against self-incrimination violated his individual dignity by “enlist[ing] his will in the process of his own moral condemnation.”

I. THE MCCOY CASE AND THE ISSUE OF DEFENDANT AUTONOMY

The events at Robert McCoy’s trial furnished the Supreme Court with a strikingly clear-cut opportunity to address the scope of a criminal defendant’s autonomy to make fundamental decisions about their own case. Section I.A describes the factual background of McCoy, including an account of the crime at issue in the case, the events leading up to the trial, and the trial itself. Section I.B analyzes the Supreme Court’s decision, explaining the relevant Sixth Amendment jurisprudence invoked by the majority and how the Court applied that precedent to McCoy’s case. Section I.C summarizes objections to the majority’s view raised by the dissent.

A. The Crime and the Trial of Robert McCoy

On the evening of May 5, 2008, Robert McCoy’s mother-in-law, father-in-law, and stepson were shot and killed at their home in Bossier City, Louisiana.21 On a 911 call placed from the decedents’ residence, McCoy’s mother-in-law could be heard yelling: “She ain’t here, Robert . . . I don’t know where she is. The detectives have her. Talk to the detectives. She

ain’t in there, Robert.”22 Dispatchers then heard a gunshot before the line was disconnected.23 A police officer arrived at the scene in time to see a white Kia driving away.24 The officer gave chase and cornered the vehicle on a dead-end street a few blocks from McCoy’s house.25 A Black man matching McCoy’s description jumped out of the driver’s side door, scaled a fence, and successfully evaded capture by running across an interstate highway.26 The abandoned car was registered to McCoy and his wife; inside, police discovered the phone used to make the 911 call and a box of ammunition that had been purchased earlier that day.27

A manhunt ensued, culminating in McCoy’s arrest in Idaho several days later.28 While awaiting extradition, McCoy unsuccessfully tried to hang himself.29 He was eventually returned to Louisiana and assigned representation from the local public defender’s office.30 On May 29, 2008, he was indicted on three counts of first-degree murder.31 At his arraignment, McCoy entered a plea of not guilty, and shortly thereafter the State gave notice of its intent to seek the death penalty.32

From the beginning of his prosecution through the pendency of his trial, McCoy continually clashed with his defense attorneys. The relationship between McCoy and his assigned counsel quickly deteriorated.33 A few months after the indictment, defense counsel moved for a psychological evaluation of their client, which ultimately found McCoy competent to stand trial.34 Soon thereafter, McCoy fired his public defenders and retained a private attorney named Larry English.35 McCoy’s relationship with his new attorney proved to be no less troubled. As he prepared for trial, English became convinced “that the evidence against McCoy was overwhelming and that, absent a concession at the guilt stage that McCoy was the killer, a death sentence would be impossible to avoid at the penalty phase.”36 McCoy,

22. Id. at 541–42. At the time of the murders, McCoy’s wife, Yolanda Colston, was in out-of-state protective custody after accusing McCoy of an incident of domestic abuse. See id. at 541.
23. Id. at 542.
24. See id.
25. See id.
26. See id.
27. See id.
28. Id. at 542–43.
29. Id. at 544.
30. Id.
31. Id.
32. Id.
33. Id. at 545, 554.
34. Id. at 544.
35. Id. at 545.
however, insisted on his innocence, claiming that local police had committed the murders and were framing him as part of a “farflung conspiracy of state and federal officials, reaching from Louisiana to Idaho.”\footnote{Id. at 1513 (Alito, J., dissenting).} Indeed, McCoy sought to present an alibi defense that “could not be substantiated” and “had no reasonable chance of success.”\footnote{McCoy, 218 So. 3d at 566.}

In the lead up to trial, English started to believe that McCoy suffered from severe mental illness and was not, in fact, competent to stand trial.\footnote{Id. at 565–66.} At a pretrial hearing, English tried to explain that his client had “severe mental issues,” was “irrational,” and had “exhibited very bizarre behavior . . . that warrants . . . being further evaluated.”\footnote{Id. at 614.} The trial court denied English’s subsequent request to withdraw and the case proceeded to trial.\footnote{Id. at 548–49.}

During his opening statement at the guilt phase of the trial, English conceded that McCoy had committed the murders but argued he should be convicted of a lesser included offense under a theory of diminished capacity.\footnote{McCoy, 138 S. Ct. at 1506 n.1.} McCoy interjected to insist on his innocence and protested to the trial court that English was “selling [him] out.”\footnote{Id. at 1506–07.} The trial court refused to intervene and permitted English to continue with his concession strategy.\footnote{Id.} The jury returned a guilty verdict on all three counts and McCoy was sentenced to death.\footnote{Id.}

\section*{B. The Supreme Court’s Decision}

The Supreme Court granted certiorari to resolve the question of “whether it is unconstitutional to allow defense counsel to concede guilt over the defendant’s intransigent and unambiguous objection.”\footnote{Id. at 1512.} In a 6–3 opinion authored by Justice Ginsburg, the Court answered in the affirmative: a defense attorney admitting guilt against their client’s express wishes to the contrary constitutes a violation of the defendant’s rights under the Sixth Amendment.\footnote{Id.}
1. Defendant Autonomy and Ineffective Assistance of Counsel Under the Sixth Amendment

In reaching its decision, the Court invoked a line of Sixth Amendment cases that collectively emphasize the critical importance of protecting defendant autonomy.48 The Sixth Amendment guarantees a criminal defendant “the Assistance of Counsel for his defence.”49 Over time, the Court has clarified that “an assistant, however expert, is still an assistant.”50 Trial management decisions about arguments to pursue and evidentiary objections to make are “the lawyer’s province.”51 But certain critical decisions — such as the decision to represent oneself at trial,52 take the stand,53 waive a jury trial,54 or plead guilty55 — are reserved exclusively for the client. To deny a criminal defendant the autonomy to make such fundamental decisions about their own case, freighted with enormous personal consequences, is to deny them “that respect for the individual which is the lifeblood of the law.”56

The Court’s Sixth Amendment jurisprudence also provides the framework for evaluating whether defense counsel’s performance was so substandard as to be considered constitutionally defective, thus requiring reversal of a conviction. In Strickland v. Washington, the Court articulated a two-pronged test for assessing the effectiveness of defense counsel’s performance.57 Under Strickland, the reviewing court first determines whether counsel’s performance “fell below an objective standard of reasonableness” as measured by “prevailing professional norms.”58 Second, in addition to deficient performance, the defendant must also show prejudice by establishing that “but for counsel’s unprofessional errors, the result of the proceeding would have been different.”59

2. Sixth Amendment Autonomy and Structural Error in McCoy

In McCoy, the Court concluded that “[a]utonomy to decide that the objective of the defense is to assert innocence” falls into the category of

48. See id. at 1507–08.
49. U.S. CONST. amend. VI.
51. McCoy, 138 S. Ct. at 1508.
52. Faretta, 422 U.S. at 832.
56. McCoy, 138 S. Ct. at 1507–08 (quoting Faretta, 422 U.S. at 834).
58. Id. at 688.
59. Id. at 694.
fundamental decisions that must ultimately be reserved for the defendant.\textsuperscript{60} Consistent with their holdings in previous autonomy rights cases, the Court framed the issue as a question of the proper allocation of decisional authority between client and attorney. At McCoy’s trial, “it was not open to English to override McCoy’s objection,” no matter how bleak prospects for an acquittal appeared in his professional judgment.\textsuperscript{61} The decision to concede guilt or assert innocence is a decision about the “fundamental objective” of the defense.\textsuperscript{62} That decision was Robert McCoy’s alone to make.

The Court’s decision pointedly sought to reaffirm the importance of protecting defendant autonomy. While a lawyer might think, as English did, that conceding guilt would produce the best outcome for his client, the defendant might be more concerned with repercussions not strictly tied to the disposition of the case.\textsuperscript{63} “He may wish to avoid, above all else, the opprobrium that comes with admitting he killed family members. Or he may hold life in prison not worth living and prefer to risk death for any hope, however small, of exoneration.”\textsuperscript{64} In the Court’s view, divesting McCoy of the authority to assert his innocence constituted an insupportable violation of his Sixth Amendment-secured autonomy.\textsuperscript{65}

The concern over denial of autonomy also formed the basis of the Court’s decision to find structural error. Normally, in the Sixth Amendment context, the Court would have used \textit{Strickland}’s two-part test to determine whether English’s performance had been constitutionally ineffective. But in \textit{McCoy}, the Court circumvented this analysis entirely: “Because a client’s autonomy, not counsel’s competence, is in issue, we do not apply our ineffective-assistance-of-counsel jurisprudence to McCoy’s claim.”\textsuperscript{66} The Court saw the error as structural because of the profound intrinsic value of the autonomy right at issue.\textsuperscript{67} The Court explained that “[a]n error may be ranked structural” if the violated right in question is not meant to protect against erroneous conviction, but rather, is designed to advance some other fundamental legal principle — in this case, a “defendant’s right to make the fundamental choices about his own defense.”\textsuperscript{68} The Court made clear that in this instance, “the violation of McCoy’s protected autonomy right”

\begin{itemize}
\item \textsuperscript{60} McCoy, 138 S. Ct. at 1508.
\item \textsuperscript{61} Id. at 1509.
\item \textsuperscript{62} Id. at 1510.
\item \textsuperscript{63} See id. at 1508.
\item \textsuperscript{64} Id.
\item \textsuperscript{65} See id.
\item \textsuperscript{66} Id. at 1510–11 (citations omitted).
\item \textsuperscript{67} See id. at 1511.
\item \textsuperscript{68} Id.
\end{itemize}
outstripped any other concern, including concerns about the fairness of the trial or reliability of the outcome. 69

3. The Dissent

Writing in dissent, Justice Alito asserted that the majority had simplified and distorted the facts of McCoy’s case in order to achieve a particular “desired result.”70 In the dissent’s view, English never actually admitted his client’s guilt as to the charge of first-degree murder.71 Rather, English conceded that his client had committed one element of that offense — killing the victims — but that he lacked the requisite intent to be found guilty of first-degree murder.72 Justice Alito pointedly criticized the majority for handing down a decision that raised more questions than answers as to what exactly constitutes an impermissible concession of guilt by a defense attorney.73 For instance, the majority’s holding was unclear as to whether an attorney’s unilateral concession as to only one element of a charged offense is ever permissible, or whether it is always unconstitutional for defense counsel to admit guilt to a lesser included offense against their client’s wishes.74

The dissent also argued that the fundamental right articulated by the Court was “likely to appear only rarely” because of the factual uniqueness of McCoy’s case.75 Justice Alito described the situation confronted by English as the byproduct of “a freakish confluence of factors that is unlikely to recur.”76 In practice, he argued, the fundamental right in question would be limited to a small class of cases: capital trials involving irrational defendants who seek to assert their innocence in the face of overwhelming evidence of guilt.77 For the dissent, the circumstances presented by McCoy’s case represented a cloudy juridical backwater not worth wading into.

II. The Trouble with McCoy

The Court’s decision in McCoy has drawn significant criticism, even from scholars and practitioners who advocate for expanding the constitutional rights of criminal defendants. Section II.A explores one broad category of

69. Id.
70. Id. at 1512 (Alito, J., dissenting).
71. See id.
72. See id.
73. See id. at 1516.
74. See id. at 1516–17.
75. Id. at 1515.
76. Id. at 1512.
77. See id. at 1514.
criticism that might be labeled “instrumentalist” concerns with *McCoy*. Section II.B discusses a second line of criticism that takes aim at the conceptual coherence of autonomy as the driving philosophical construction underlying the Court’s decision.

### A. Instrumentalist Concerns

Instrumentalist critiques of *McCoy* have raised concerns about how practical application of the decision has the potential to severely harm the interests of criminal defendants while further undermining the fairness and reliability of criminal proceedings. This Section explores two areas of practical concern raised by commentators in the wake of *McCoy*: the implications for cases involving questionably competent defendants of uncertain mental capacity; and the risk that the decision will incentivize substandard representation by defense attorneys.

#### 1. Mental Illness and Questionably Competent Clients

One iteration of the instrumentalist critique focuses on the decision’s failure to address how mental illness and other forms of cognitive impairment might complicate the issue of defendant autonomy. There are particularly troubling implications for so-called “gray-area” defendants: individuals who suffer from severe mental illness but are still found competent to stand trial. Legal ethics scholar W. Bradley Wendel sounded this particular alarm shortly after *McCoy* was decided:

> The most important note of caution to sound about *McCoy* is that, as a matter of constitutional law and professional ethics, the preference for autonomy and the standard allocation of decision-making authority presupposes a fully competent client, not a client who merely passes the extremely low constitutional bar of competency to stand trial.

Wendel argued that the decision was in general principal correct, but only “on the assumption that a fully-informed, competent client made a rational decision not to plead guilty” after walking through the pros and cons of going to trial with their attorney.

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79. See Wendel, supra note 9, at 102–03.

80. Wendel, supra note 9, at 102.

81. Wendel, supra note 9, at 102.
But the Court’s decision barely gestures at this complexity. As Professor Steven Zeidman observed, “[w]hat is strangely and inexcusably missing from Justice Ginsburg’s opinion[] in . . . McCoy is recognition of the central role of mental illness.”82 The Court’s lofty language about the need to protect defendant autonomy and affirm individual dignity doesn’t resonate to the same degree when the defendant’s cognitive and decision-making capacities are called into question. Zeidman pointedly added: “[A]re dignity and autonomy bestowed upon someone by granting them decision making power in legal proceedings when they suffer from mental illness, lack legal training or expertise, and face dire consequences, including a death sentence?”83

McCoy’s lawyer was attuned to this very concern. In a series of pretrial hearings in the weeks leading up to the trial, English desperately tried to explain to the judge the severity of his client’s mental illness, and the implications of being required to put forward a defense theory based on McCoy’s distorted and delusional thinking84:

MR. ENGLISH: Mr. McCoy is severely mentally compromised, Your Honor, . . . and I’m asking this Court to grant my Motion to Continue so that he can be evaluated because this is going to be the case. It’s going to be a zoo . . . . It’s going to be a zoo, Judge, because I’m not going to do what he wants me to do . . . . I do not believe this man is rational.

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I have no ethical duty as a lawyer to hold Mr. McCoy’s hand while he walks into the death chamber . . . . I have an ethical duty, Your Honor, to try to defend him and do the . . . best I can to save his life.85 These representations reflect English’s belief that following his client’s preferred course of action would not only guarantee a death sentence, but also produce a trial that was neither fair nor reliable. Far from protecting McCoy’s dignity and autonomy, the “zoo” that English foresaw would serve only to demean and further marginalize his client by offering him up as a defenseless target for the State to eviscerate.

Contrary to the dissent’s view of the case as presenting a unique factual paradigm unlikely to reoccur with any regularity, the situation English found himself in is a familiar one for capital defense practitioners. As Wendel notes, “McCoy is not a marginal problem for the capital defense community.”86 The prevalence of “mental diseases or disorders is well

82. Zeidman, supra note 7, at 30.
83. Zeidman, supra note 7, at 31.
85. Id. at 616.
86. Wendel, supra note 9, at 130–31 n.166.
documented” among death row inmates. And in capital cases, it is not uncommon for defense counsel to be confronted with overwhelming evidence of their client’s guilt. Indeed, the strategy English pursued is one frequently utilized by capital defenders precisely because the outsized strength of the State’s guilt-innocence case can leave attorneys with few good options beyond conceding guilt and making a strong case for life at the penalty phase. McCoy was far from the first case — and certainly not the last — to involve a questionably competent client put in a situation with few appealing legal options and life or death consequences.

In fact, a decade before McCoy was decided, the Court had openly grappled with the complexities that arise at the intersection of competency issues and autonomy rights. Indiana v. Edwards dealt with a scenario in which a mentally ill defendant, Ahmad Edwards, sought to dismiss his trial attorney and exercise his right to self-representation. Edwards was initially found incompetent to stand trial. A series of subsequent assessments toggled back and forth between findings of competence and incompetence to stand trial, even as the severity of Edwards’ mental illness was never seriously called into question. Just before his second trial, Edwards invoked his right to self-representation under Faretta — one of the Court’s strongest statements on the importance of defendant autonomy — but the trial court denied the request because of concerns about Edwards’ mental capacity to defend himself.

The Supreme Court agreed with the trial court, holding that the Constitution permits a State to require that a defendant be represented by counsel when there are serious doubts about a defendant’s mental capacity to stand trial.


88. Welsh S. White, Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care, 1993 U. Ill. L. Rev. 323, 368 (1993) (“In many capital cases, the prosecutor will be able to present an overwhelming case at the guilt stage.”).

89. See Wendel, supra note 9, at 95 n.3 (“Experienced capital defense lawyers understand — and this has been confirmed by empirical investigation — that it is a losing strategy for the defendant to claim innocence during the guilt phase of the trial and then argue for life during the sentencing phase.”); see also Jesse Cheng, “Mitigate From Day One”: Why Effective Defense Advocates Do Not Prioritize Liberty over Life in Death Penalty Cases, 14 Ohio St. J. Crim. L. 231, 233 (2016).


91. Id. at 167.

92. See id. at 168–69.

93. Id. at 169.
to conduct their own defense.\textsuperscript{94} The Court’s decision weighed the autonomy and dignitary interests underlying the right to self-representation against the State’s interest in ensuring a fair trial.\textsuperscript{95} In this instance, the Court determined that the latter concern prevailed:

\begin{quote}
[In our view, a right of self-representation at trial will not “affirm the dignity” of a defendant who lacks the mental capacity to conduct his defense without the assistance of counsel . . . . To the contrary, given that defendant’s uncertain mental state, the spectacle that could well result from his self-representation at trial is at least as likely to prove humiliating as ennobling. Moreover, insofar as a defendant’s lack of capacity threatens an improper conviction or sentence, self-representation in that exceptional context undercuts the most basic of the Constitution’s criminal law objectives, providing a fair trial.\textsuperscript{96}
\end{quote}

The Edwards Court acknowledged the importance of protecting defendant autonomy, but recognized that under certain circumstances, a defendant’s autonomy right might require some degree of circumscription. Following the Court’s reasoning in Edwards, Wendel concludes that in cases involving questionably competent clients, “the best ethical and constitutional course of action for lawyers will be to act on fairness and reliability considerations, not the client’s expressed preferences.”\textsuperscript{97}

### 2. The Risk of Encouraging Inadequate Representation

Another instrumentalist concern that emerged in the wake of McCoy is the prospect that the decision will “encourage lackadaisical representation by misguided, overworked, or incompetent lawyers.”\textsuperscript{98} McCoy’s pointed emphasis on the primacy of client autonomy might cause attorneys to “shirk responsibility” by abdicating difficult decisions to clients under the theory that they are strictly bound by the client’s wishes.\textsuperscript{99}

This concern is particularly relevant in the context of capital defense work. Capital defendants are prone to resist investigations into the sensitive terrain of their personal background and life circumstances,\textsuperscript{100} which often yield the mitigating evidence essential for crafting a “coherent, compelling,

\begin{itemize}
\item \textsuperscript{94} Id. at 174.
\item \textsuperscript{95} Id. at 177.
\item \textsuperscript{96} Id. at 176–77 (citation omitted).
\item \textsuperscript{97} Wendel, supra note 9, at 106.
\item \textsuperscript{98} Wendel, supra note 9, at 103.
\item \textsuperscript{99} Zeidman, supra note 7, at 29.
\item \textsuperscript{100} See Bradley A. MacLean, Effective Capital Defense Representation and the Difficult Client, 76 Tenn. L. Rev. 661, 670 (2009) (“Experienced capital defense attorneys commonly encounter clients who, at one point or another, object to the investigation or presentation of mitigation evidence.”).
\end{itemize}
and comprehensive narrative of the defendant’s life for the [penalty phase] mitigation presentation.” It is not uncommon for clients to explicitly instruct their attorneys not to pursue such investigations, even though there is a broad consensus among capital defenders that this often the best strategy for avoiding a death sentence. Despite a line of Supreme Court cases clearly directing defense teams to conduct such investigations with or without the client’s affirmative blessing, attorneys lacking in commitment to these methodologies could invoke McCoy as support for their decision to neglect undertaking necessary investigations.

B. Conceptual Concerns

The second line of criticism relating to McCoy calls into question the conceptual underpinnings of the autonomy-as-choice framework advanced by the Court’s decision. On this view, the vision of autonomy put forward by the Court in McCoy is at best incoherent, and at worst, actively working to obscure the features of the criminal legal system that strip defendants of their dignity.

1. The Illusion of Individual Autonomy Within Systems of Coercive Control

One line of attack focuses on emptiness of the autonomy principle when applied against an existing backdrop of severely circumscribed choices and coerced behavior. This argument contends that the criminal legal system does not include the necessary conditions that allow for an individual to act

102. See The Supreme Court, 2006 Term — Leading Cases, Constitutional Law, Criminal Law and Procedure, Sixth Amendment — Ineffective Assistance of Counsel, 121 HARV. L. REV. 185, 255, 260 (2007) (“[C]apital defendants have numerous compelling reasons to refuse to present . . . mitigating evidence. Defendants may experience ‘defensiveness, shame, [or] repression,’ regarding episodes of abuse. Psychiatrists have observed that defendants are often hesitant to disclose to a psychiatrist, or in open court, that they were mentally or physically abused by a family member. Defendants may also want to prevent certain . . . individuals from testifying.” (footnotes omitted) (quoting Alan M. Goldstein et al., Assessing Childhood Trauma and Developmental Factors as Mitigation in Capital Cases, in FORENSIC MENTAL HEALTH ASSESSMENT OF CHILDREN AND ADOLESCENTS 365, 373 (Steven N. Sparta & Gerald P. Koocher eds., 2006))).
104. See, e.g., Wiggins v. Smith, 539 U.S. 510, 534–35 (2003) (defense counsel’s failure to adequately investigate their client’s background constituted ineffective assistance of counsel under the Sixth Amendment); Porter v. McCollum, 558 U.S. 30, 40 (2009) (per curiam) (“[Defendant] may have been fatalistic or uncooperative, but that does not obviate the need for defense counsel to conduct some sort of mitigation investigation.”).
as a truly autonomous agent. The philosopher Joseph Raz identified three necessary conditions of autonomy.\textsuperscript{105} This Section focuses on two of those conditions for the purposes of this argument: adequacy of options; and independence, defined as freedom “from coercion and manipulation by others.”\textsuperscript{106}

Raz argued that for a person to be autonomous, they “must not only be given a choice,” but rather “an adequate range of choices.”\textsuperscript{107} To illustrate this principle, Raz constructed the parable of the Hounded Woman, in which a woman stranded on a desert island is perpetually hunted by a fierce and carnivorous predator.\textsuperscript{108} The woman uses all of her physical and mental capacities exclusively for the purpose of evading the creature that relentlessly pursues her: “She never has the chance to do or even to think of anything other than how to escape from the beast.”\textsuperscript{109} The Hounded Woman does not enjoy an autonomous life — “[a]ll her choices are potentially horrendous in their consequences.”\textsuperscript{110} Although choice has not been completely eliminated from her lived experience, “a choice between survival and death” is not really choice in any meaningful sense as a signifier of autonomy.\textsuperscript{111} When an individual’s choices are constrained to such a degree, they can no longer be considered autonomous.

Raz also saw independence as a crucial element in creating the proper conditions for true autonomy. Two significant threats to a person’s independence are coercion and manipulation. Coercion “diminishes a person’s options,” while manipulation “perverts the way that person reaches decisions, forms preferences, or adopts goals.”\textsuperscript{112} Deployed in tandem, “[c]oercion and manipulation subject the will of one person to that of another. That violates his independence and is inconsistent with his autonomy.”\textsuperscript{113}

With these necessary conditions for autonomy in view, “it is simply not coherent to speak of autonomy in the context of the artificial and limited decisions that arise in criminal trials.”\textsuperscript{114} The criminal legal system is coercive by design, manipulating a defendant’s relevant choices through the

\textsuperscript{106} Id.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 374.
\textsuperscript{109} Id.
\textsuperscript{110} Id.
\textsuperscript{111} Id. at 376.
\textsuperscript{112} Id. at 377–78
\textsuperscript{113} Id. at 378.
\textsuperscript{114} Toone, supra note 15, at 655.
various limitations imposed by its maze of legal rules and procedures. Professor Kathryn E. Miller has observed that the coercive nature of the criminal legal system "is inherently inconsistent with self-governance and self-determination." Many criminal defendants are often subjected to intensely coercive systems of pretrial detention in institutions that severely limit bodily control, "with government agents dictating their movement, surveilling their person, and restricting their communication, association, and consumption."117

The conditions for autonomy are glaringly absent for capital defendants in particular. Capital defendants like McCoy are nearly always detained in advance of their trials, and it is not uncommon for years to go by between the initial arrest and the start of trial.118 As Miller puts it, "[t]he 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."119

If a case proceeds to trial, "[a]gain, the state’s coercive authority sharply limits the options available to the defendant."120 The rules of evidence, procedure, and other substantive law offer the defendant a narrow range of limited choices that "are a far cry from . . . even the minimal degree of free movement, independence, and choice that ordinary Americans would consider essential to their sense of self."121

McCoy was subject to all of these background legal constraints, revealing the Court’s intervention on the basis of preserving individual autonomy to be an empty promise. In the context of a “racially subordinating system” of punishment, "an assertion of an autonomy interest . . . 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.”122

2. The Erroneous Conflation of Human Dignity with Autonomy

The concept of autonomy-as-choice articulated by the McCoy Court is also flawed in that it conflates autonomy with dignity. The philosopher David Luban has argued convincingly that the “identification of human

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115. Id. at 657.
117. Id. at 380 (citing Laura I. Appleman, Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment, 69 WASH. & LEE L. REV. 1297, 1312 (2012)).
118. Id. at 422.
119. Id.
120. Toone, supra note 15, at 658.
122. Miller, supra note 116, at 424.
dignity with autonomy is . . . wrongheaded.”123 Luban identifies two primary conceptions of autonomy. One conception is autonomy as freedom of choice: “Freedom of choice means consumer sovereignty. It means don’t tread on me. It means my way or the highway.”124 Luban contrasts this version of autonomy with the version of autonomy advanced by Immanuel Kant. For Kant, autonomy describes an individual’s capacity to construct and adhere to an internal moral code. “Kantian autonomy,” as characterized by Luban, “represents freedom achieved through stoic self-control and self-command; it means reasoned self-restraint.”125

Luban, however, ultimately rejected the notion that either version of autonomy is synonymous with human dignity:

Autonomy focuses on just one human faculty, the will, and identifying dignity with autonomy likewise identifies human dignity with willing and choosing. This, I believe, is a truncated view of humanity and human experience. Honoring someone’s human dignity means honoring their being, not merely their willing. Their being transcends the choices they make. It includes the way they experience the world — their perceptions, their passions and sufferings, their reflections, their relationships and commitments, what they care about.126

For the McCoy Court, autonomy means having the power to make important choices about one’s own life in situations that hold enormous personal consequences. Investing the defendant with this right to make fundamental decisions in the trial context ultimately affirms their dignity, no matter the outcome. But for Luban, affirming human dignity is not about the proper allocation of decisional authority. The real risk to a defendant’s human dignity is not a lawyer’s “interfere[nce] with their client’s autonomous choices,” but rather the lawyer’s potential to “ride roughshod over the commitments that make the client’s life meaningful and so impart dignity to it.”127 To affirm someone’s dignity is to acknowledge that the person has their “own story to tell” and to afford them the opportunity to tell it.128

From this vantage point, it might appear that the McCoy Court reached the correct outcome despite its reliance on a faulty conception of autonomy. McCoy wanted to tell the Court his story of innocence, but his attorney rode “roughshod” over his client’s primary concern.129 The Court, of course, was

123. Luban, supra note 16, at 817.
124. Luban, supra note 16, at 826.
125. Luban, supra note 16, at 826.
126. Luban, supra note 16, at 826.
129. See Luban, supra note 16, at 827.
sensitive to this dynamic, as evidenced by its discussion of client objectives as distinct from the lawyer’s assessment of what course of action best advances their client’s interests. For instance, at oral argument Justice Sotomayor framed the issue in terms that align neatly with Luban’s view: “People can walk themselves into jail. They can walk themselves, regrettably, into the gas chamber. But they have a right to tell their story.”¹³⁰

Eloquent as these pronouncements are, they ignore a crucial fact about the trial: McCoy did end up telling his story to the jury. Against the advice of his attorney, McCoy insisted on taking the stand to testify in his own defense at the guilt phase of his trial.¹³¹ After the trial judge advised him of his Miranda rights, McCoy “testified to his alibi defense and sought to refute the State’s evidence with his theories of a vast conspiracy that landed him on trial for his life.”¹³² Of course, the fact that McCoy was ultimately able to put forward his theory of the case does not nullify the significance of his attorney’s decision to concede guilt. But insofar as McCoy’s dignity or autonomy hinged on his being afforded the right to tell his story, it would appear that the right was, in fact, vindicated.

3. Relocating the Core Constitutional Violation in McCoy

At bottom, the Court’s view of McCoy’s case as being primarily about a violation of an individual’s Sixth Amendment protected autonomy right is misguided. The Sixth Amendment was simply the wrong constitutional mechanism through which to assess McCoy’s conviction. The Sixth Amendment focuses attention on defense counsel’s performance, and the opinion spends much of its time critiquing English’s actions. But as the majority itself stated, “counsel’s competence” was explicitly not at issue in the case.¹³³ Although there is indeed much to criticize in English’s performance, the core of the constitutional violation in McCoy emanates from the trial court’s failure to intervene when English confessed his client’s guilt to the jury. As Elizabeth M. Klein has observed, “the trial court actually ruled on McCoy’s objection to the concession strategy, so the resulting deprivation of McCoy’s rights was most directly attributable to the trial court’s mistake, not to English’s actions.”¹³⁴

There is, however, another way to make sense of the constitutional and dignitary harms suffered by McCoy at his trial. As discussed in the next Part,

¹³². Id.
¹³³. McCoy, 138 S. Ct. at 1510–11.
the proper way to analyze the case is as a violation of the Fifth Amendment protection against compulsory self-incrimination, made applicable to the states through the Due Process Clause of the Fourteenth Amendment.135

III. COMPULSORY SELF-INCRIMINATION AS THE PROPER WAY OF ANALYZING AND UNDERSTANDING THE VIOLATION OF MCCOY’S RIGHTS

Although the Supreme Court was right to reverse McCoy’s conviction, the bases for its decision were irredeemably flawed. The true basis for reversal was to be found in the Fifth Amendment protection against compulsory self-incrimination. The Fifth Amendment provides, in relevant part, that no person “shall be compelled in any criminal case to be a witness against himself.”136 English’s concession of guilt at trial — and the trial court’s implicit endorsement of his actions — violated McCoy’s Fifth Amendment privilege in two separate but interrelated ways. First, English violated the privilege by confessing his client’s guilt while acting as his client’s agent, which can be understood as a form of vicarious self-incrimination. Second, by admitting guilt against his client’s wishes, English compelled McCoy’s testimony because, under these conditions, taking the stand became the only way for McCoy to assert his unequivocal innocence to the jury.

Section III.A argues that under well-settled principles of agency law that bind criminal defendants to the acts and omissions of their attorneys, English’s admission of guilt is best understood as a violation of McCoy’s privilege against compulsory self-incrimination. Section III.B argues that English’s concession improperly coerced his client into taking the stand by forcing McCoy to choose between asserting his Fifth Amendment privilege or making his case directly to the jury. Section III.C argues that viewing the violation of McCoy’s rights through a Fifth Amendment lens elucidates the true nature of the moral and dignitary harm suffered by McCoy — a harm flowing from the profound self-alienation of being conscripted into acting as a witness in one’s own condemnation. Finally, Section III.D explains the significance of rejecting the Sixth Amendment autonomy rights basis for reversing McCoy’s conviction. By standing its decision on such deeply compromised conceptual ground, the Court further eroded its legitimacy and created a risk that its faulty reasoning will be appropriated in other cases to support unjust outcomes. Worst of all, reducing the issue in McCoy’s case to a simple question of “who decides” distracts from the structural failures of the criminal legal system that cry out for systemic interventions.

136. U.S. CONST. amend. V.
A. Incriminated by Your Own Attorney: Lawyer as Double Agent

The attorney-client relationship is an archetypal “illustration of agency.”137 When a lawyer represents a client, they act on behalf of the client, “with consequences that bind the client.”138 In Link v. Wabash Railroad Co., the Supreme Court held that in the context of representative litigation, “each party is deemed bound by the acts of his lawyer-agent.”139 In that case, the plaintiff in a negligence action argued that the trial court improperly dismissed his case for failure to prosecute after his attorney failed to attend a pretrial conference.140 The Court ultimately rejected the plaintiff’s claim that his lawyer’s “unexcused conduct impose[d] an unjust penalty on the client.”141 The Court explained that because “[p]etitioner voluntarily chose this attorney as his representative in the action, . . . he cannot now avoid the consequences of the acts or omissions of this freely selected agent.142 Since then, the rule has been extended to criminal cases, “without regard for whether counsel” was retained by the party “or assigned by the court.”143

This rule has applied with full force even in the capital context, where an attorney’s “acts or omissions” hold life or death consequences for their clients. In Coleman v. Thompson, defense counsel for a death row inmate missed a filing deadline that resulted in procedural default of the petitioner’s post-conviction claims.144 The Court rejected Coleman’s claim that the severity of his attorney’s error effectively severed the lawyer-client agency relationship, reasoning that the petitioner’s proposed rule “would be contrary to well-settled principles of agency law.”145 Despite the gravity of counsel’s error — an action that was clearly against their client’s interests — the Court determined that the petitioner was still bound by the acts and omissions of his attorney.146

When McCoy’s trial began, there was no doubt that English was counsel of record, representing his client in the proceedings and therefore acting as his agent. Thus, when English stood before the jury during his opening

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138. Id.
140. See id. at 633.
141. Id.
142. Id. at 633–34.
145. Id. at 754.
146. See id. at 752–53.
McCoy himself was bound by that act of confession. Of course, McCoy protested his attorney’s actions, but the trial court simply “reiterated that English was ‘representing’ McCoy,” and allowed English to proceed with his defense. The attorney-client relationship remained intact, as did the corresponding agency relationship.

The strictures of the agency framework tied McCoy to his attorney’s actions in a manner that seems manifestly unjust and unfair. Why should a defendant be bound by their attorney’s actions even if those actions appear to directly contravene the professed interests of their client? Ironically, rather than acting as an inescapable trap, the rigidity of agency principles should have formed the basis of McCoy’s relief, effectively reframing the concession of guilt as a violation of McCoy’s Fifth Amendment privilege against self-incrimination. Under agency principles, English’s concession was equivalent to McCoy himself standing before the jury to pronounce his own guilt. The trial court, fully aware of McCoy’s opposition to English’s strategy, should have intervened to safeguard his Fifth Amendment privilege. But by refusing to intervene, the trial court essentially countenanced a compelled statement of incrimination — one made by the defendant’s attorney but ultimately imputed directly to the defendant himself.

B. A Costly Privilege: When Testifying is the Only Way to be Heard

McCoy’s Fifth Amendment privilege against self-incrimination was also violated because the totality of the circumstances during and preceding trial compelled McCoy to take the stand and testify in his own defense.

The Fifth Amendment is designed to shield criminal defendants from improper coercion, ensuring that the accused is “not involuntarily impelled to make a statement when but for improper influences he would have remained silent.” In Miranda v. Arizona, the Court held that the privilege against self-incrimination “is fulfilled only when the person is guaranteed the right ‘to remain silent unless he chooses to speak in the unfettered exercise of his own will.’” The Court has been particularly wary of

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150. Id. at 460 (quoting Malloy v. Hogan, 378 U.S. 1, 8 (1964)).
permitting judicial or government action that “cuts down on the privilege by making its assertion costly.”\textsuperscript{151}

McCoy was compelled to take the stand because English had already admitted his guilt and refused to advance his client’s theory of innocence. From McCoy’s perspective, the value of the right to remain silent was reduced to a nullity in light of his attorney’s insistence on conceding guilt. What good is the protection against self-incrimination if your own attorney stands up in court to incriminate you? If your defense attorney does not serve as your voice in the courtroom, then for all intents and purposes, you have no voice in the courtroom. That is, unless you choose to speak for yourself.

The cost to McCoy of asserting his right was simply too great. Asserting the privilege meant there would be no way for McCoy to tell the jury his story. Desperate to communicate directly to the jury, McCoy insisted on testifying. This was not testimony drawn from the “unfettered exercise” of free will. It was testimony compelled by coercive circumstances, in violation of the Fifth Amendment.

\textbf{C. The Moral Harm of Compulsory Self-Incrimination}

Understanding \textit{McCoy} as a case about a violation of the privilege against self-incrimination brings the actual moral harm suffered by McCoy into focus. Luban argues that compelling an individual to act as a witness against themselves — to essentially force them to participate in their own condemnation and punishment — constitutes an egregious violation of human dignity.\textsuperscript{152} There is a special kind of humiliation that “lies in enlisting a person’s own will in the process of punishing her, and thereby splitting her against herself.”\textsuperscript{153} Luban sees this splitting of the self into disinterested observer and vulnerable defendant as “an extraordinary kind of self-alienation” that harms and humiliates the individual by compelling them to act against their own interest:\textsuperscript{154}

Being a witness against yourself divides you in two, one half the individual with an interest in evading condemnation, the other half, the state’s representative; and compelling you to be a witness against yourself subordinates the former to the latter. In effect, it treats the individual as insignificant — as if his subjectivity simply doesn’t exist or doesn’t matter.\textsuperscript{155}

\begin{itemize}
\item \textsuperscript{151} Griffith v. California, 380 U.S. 609, 614 (1965) (holding that a prosecutor’s comment on the defendant’s silence, or a court’s instructions that such silence is evidence of guilt, violates the defendant’s Fifth Amendment privilege against self-incrimination).
\item \textsuperscript{152} Luban, supra note 16, at 833.
\item \textsuperscript{153} Luban, supra note 16, at 834.
\item \textsuperscript{154} Luban, supra note 16, at 834.
\item \textsuperscript{155} Luban, supra note 16, at 834.
\end{itemize}
McCoy’s vicarious self-incrimination, manifested through English’s confession of guilt, resulted in exactly the kind of dignitary harm and humiliation articulated by Luban. McCoy was forced to sit and watch helplessly as his agent, purportedly speaking on his behalf, turned against him, telling the jury that his client had indeed killed three of his family members. McCoy’s protest against this course of action was wholly ignored. He was treated as an insignificant feature of his own prosecution, save for the few moments when he was allowed the possibility of incriminating himself through his lawyer’s concession of guilt and his own testimony. His subjectivity was utterly discounted in the highest stakes legal proceeding that one could find themselves in — a trial for one’s life, for one’s right to go on existing.

This denial of subjectivity in the context of a capital prosecution represents a kind of social death that presages the eventual imposition and execution of a death sentence. As Lisa Guenther eloquently explains, “the . . . social dead are excluded from full participation in life, like ghosts who can still speak and act but whose speech and actions no longer make an impact on the world.” McCoy was rendered a non-entity at his own trial, an ontologically diminished person whose words and actions only had meaning insofar as they could be weaponized to ensure his own condemnation.

One might argue that the moral harm implicated in compelling a defendant to incriminate themselves is the violation of that individual’s autonomy. As discussed above, this was clearly the Court’s concern, albeit seen through the lens of the Sixth Amendment. A defender of autonomy might say that the self-incrimination privilege preserves autonomy by allowing a defendant “to reject the state and the community and the law,” protecting their individual agency from coercive forces that might otherwise compel their testimony.

But protection of individual autonomy ultimately fails to get at the heart of the moral violation that comes with compelling someone to incriminate themselves. As Luban points out, “[t]he law is willing to compel people to bear witness against others when they passionately wish not to . . . but the law is unwilling” to compel defendants to bear witness against themselves.


158. Luban, supra note 16, at 834.

159. Luban, supra note 16, at 835.
While autonomy is about individual will, the self-alienation wrought by compulsory self-incrimination “goes to something more basic than will — it goes to protecting the self, which the law must never override on pain of violating human dignity.”

The self-incrimination privilege works to ensure that the defendant’s will cannot be enlisted “in the process of his own moral condemnation” and eventual execution at the hands of the State. It serves as a bulwark against the State’s power to distort, manipulate, and ultimately extirpate a criminal defendant’s individual personhood. Over the course of his prosecution, McCoy was improperly stripped of this constitutional privilege — a vital protection that preserves human dignity and individual personhood in the face of powerfully coercive legal actors seeking to determine the fate of the accused, from judges and prosecutors to the defendant’s own attorney.

D. The Importance of Rejecting the Autonomy Rights Framework in McCoy

Reviewing this argument, one might reasonably be tempted to ask, so what? Is there any meaningful difference in saying that the Court was right to overturn the conviction, even if they got there in the wrong way? Is this all just one big exercise in constitutional hairsplitting?

In several meaningful respects, this is a distinction with a difference worth articulating. First, it is important that our Constitutional jurisprudence stand on a firm foundation of logical reasoning and philosophical coherence. Enshrining flawed, internally inconsistent concepts in the decisions of our highest court further erodes the legitimacy of that institution, even when it happens to arrive at the right result. Additionally, that flawed reasoning might be utilized in later cases to produce wrong, manifestly unjust decisions.

Second, the Court’s undue focus on defendant autonomy deepens the systemic harms wrought by our criminal legal system. In cases like McCoy, the autonomy framework tends to focus the debate on the attorney-client relationship and the proper allocation of decision-making authority. But adopting this narrow lens ignores the complicated structural issues that actually harm dignity and drive conflicts between defenders, their clients, and the courts: issues of mental illness; systemic underfunding of public...
defender offices;¹⁶³ racialized policing;¹⁶⁴ and the cruelty of our system of punishment,¹⁶⁵ reflected in our society’s continued willingness to rubberstamp state-sanctioned murder.¹⁶⁶ Autonomy as an individual right is the flip side of the hyper-individualistic bent that allows us to locate criminal culpability completely and totally within a single individual, ignoring the broader societal failures that drive people to desperation and violence.¹⁶⁷

CONCLUSION

The Court’s treatment of McCoy’s case as a violation of a defendant’s Sixth Amendment-secured autonomy is deeply flawed, unable to withstand sustained scrutiny and criticism as a matter of both conceptual coherence and practical implementation. Instead, McCoy’s conviction should have been overturned because the events at trial violated his Fifth Amendment privilege against self-incrimination, working a grievous harm against his human dignity by reducing his personhood to an instrument of self-harm. The self-incrimination framework is more coherent than the Sixth Amendment autonomy rights framework, while appropriately identifying the wrong

¹⁶³ See Molly Heidorn, Note, An “Obvious Truth”: How Underfunded Public Defender Systems Violate Indigent Defendants’ Right to Counsel, 52 NEW ENG. L. REV. 159, 174–75 (2018). Faretta exemplifies the Court’s persistent evasion of structural issues in favor of superficial fixes that tinker with the allocation of decisional authority. In that case, Anthony Faretta sought to represent himself because “he believed that [the public defenders’] office was ‘very loaded down with . . . a heavy case load.’” Faretta v. California, 422 U.S. 806, 807 (1975). Rather than addressing the root cause of Faretta’s dilemma — an overburdened public defender’ office seemingly unable to provide adequate representation — the Court resolved the issue by using the autonomy-as-choice framework to support its conclusion that the structure of the Sixth Amendment implied a constitutional right to self-representation. See id. at 819–20. But the Court’s soaring rights-creating language displaced any meaningful discussion of the deficiencies in the criminal legal system that had produced the problem in the first instance. See id. at 845 (Burger, C.J., dissenting) (“It hardly needs repeating that courts at all levels are already handicapped by the unsupplied demand for competent advocates . . . .”). Understanding Faretta’s choice as one between compromised representation and self-representation lays bare the inadequacy of the Court’s approach — an approach reanimated in McCoy.


¹⁶⁶ See John D. Bessler, Why the Death Penalty is Wrong and Should be Strictly Prohibited by American and International Law, 58 WASHBURN L.J. 1, 6 (2019) (arguing that “because death sentences and executions . . . cause severe trauma and have the immutable characteristics of torture, . . . state-sanctioned killing should be reclassified in American and international law as a form of torture”).

¹⁶⁷ See DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 3 (2019) (“Most violence is not just a matter of individual pathology — it is created. Poverty drives violence. Inequity drives violence. Lack of opportunity drives violence. Shame and isolation drive violence. And like so many conditions known all too well to public health professionals, violence itself drives violence.”).
experienced by McCoy as one of extreme dignitary harm flowing from a coercively imposed form of self-alienation, rather than denial of choice.

In the end, the Supreme Court’s decision properly reversed his conviction, but in this and so many other ways, Robert McCoy deserved better.