DEFENDING THE RIGHT TO SELF-REPRESENTATION: AN EMPIRICAL LOOK AT THE *PRO SE* FELONY DEFENDANT

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> There is "no empirical research . . . that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution's basic guarantee of fairness."[1]

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[1] Martinez v. California, 528 U.S. 152, 164 (2000) (Breyer, J., concurring).

INTRODUCTION

Thirty years ago, the Supreme Court recognized a constitutional right to self-representation in criminal cases. Since that time, both academics and the popular media have been fascinated by, and almost uniformly critical of, *pro se* defendants.[2] Dr. Jack Kevorkian, Colin Ferguson, Congressman James Traficant, John Muhammad, and, most recently, Zacarias Moussaoui all tried their hands at self-representation with seemingly disastrous (and highly publicized) consequences.[3] Colin Ferguson, for example, rambled incoherently about a vast conspiracy during his opening statement, asserting to the jury that the only reason there were 93 counts of the indictment was because the year was 1993.[4] The

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[2] *See, e.g.,* T. Schevitz, *In Self-Defense Literally Some Fools Ignore Lincoln's Maxim and Represent Themselves in Court*, S.F. EXAMINER, Feb. 20, 1995, at A4; R. Topping, *The Pitfalls of Self-representation*, NEWSDAY, Feb. 1, 1995, at A29. Even when *Faretta* was decided, there were those who doubted the wisdom of recognizing a right to self-representation. *See* Faretta v. California, 422 U.S. 806, 852 (1975) (Blackmun, J., dissenting) ("If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself.").

[3] Dr. Kevorkian was charged with murder after assisting in the suicide of terminally ill patients. He was convicted at trial. *See* Edward Walsh, *Kevorkian Sentenced to Prison; Mich. Judge Tells Doctor: "Consider Yourself Stopped,"* WASH. POST, Apr. 14 1999, at A2. Colin Ferguson, convicted of gunning people down on the Long Island Railroad, represented himself throughout his trial and was sentenced to 200 years in prison. Eleanor Randolph, *Ferguson Ordered to Prison for Life; New York Judge Calls Killer of Six "Self-Centered" and a "Coward,"* WASH. POST, Mar. 23, 1995, at A4. Congressman Traficant represented himself at his trial on corruption charges, and he was convicted on all counts. He was represented by counsel at sentencing and was sentenced to eight years incarceration. This trial was Traficant's second at which he represented himself. In 1982, Traficant was indicted on bribery charges and chose to represent himself. He was acquitted at that trial. *See* Robert E. Pierre & Juliet Eilperin, *Traficant Is Found Guilty; Ohio Congressman Could Face House Sanctions*, WASH. POST, Apr. 12, 2002, at A1, and *see Ex-Rep. Traficant Sentenced to 8 Years*, WASH. POST, July 31, 2002, at A2. John Allen Muhammad, one of the Washington-area snipers, was charged with multiple counts of murder and conspiracy after a shooting rampage terrorized the Washington D.C. metropolitan area. He represented himself through opening statements at his trial in Virginia, but then allowed counsel to represent him for the rest of the trial. He was convicted and sentenced to death. *See Fool for a Client,* WASH. POST, Oct. 23, 2003, at A30, and *see* Josh White, *Defiant Muhammad Sentenced to Death For Sniper Slaying*, WASH. POST, Mar. 10, 2004, at A1. Zacarias Moussaoui, known as the 20th Hijacker, was charged with conspiracy for the September 11th bombings of the World Trade Center and the Pentagon. Moussaoui pleaded guilty *pro se* and still awaits the death penalty stage of the case. *See* Neil A. Lewis, *Moussaoui Tells Court He's Guilty of a Terror Plot*, N.Y. Times, Apr. 23, 2005, at A1, and *see* Jerry Markon, *Moussaoui Pleads Guilty in Terror Plot; Defendant Says Bin Laden Ordered Post-Sept. 11 Attack on White House,* Wash. Post, Apr. 23, 2005, at A1.

[4] During opening statements, Mr. Ferguson said, "There are 93 counts in the indictment only because it matches the year 1993. Had it been 1925 it would have been 25 counts. This is a

media circuses surrounding these cases, combined with the ludicrous courtroom behavior of at least some of these defendants, has led to a perception that defendants who represent themselves are foolish at best and mentally ill at worst.[5]

Are these well-publicized *pro se* defendants representative of all *pro se* defendants? Or to put it another way, are *pro se* defendants necessarily either crazy or foolish? In the past five years, the importance of this empirical question has taken on increased significance because the Supreme Court, troubled by the possibility that *pro se* defendants are ill-served by the decision to represent themselves, has called into question the wisdom of continuing to recognize a constitutional right to self-representation.[6] According to the Court, the reasons for originally recognizing a right to self-representation no longer have "the same force when the availability of competent counsel for every indigent defendant has replaced the need–although not always the desire–for self-representation," and experience with the right to self-representation has demonstrated "that a *pro se* defense is usually a bad defense."[7] In similar fashion, most scholars have assumed, without empirical support, that the right to proceed *pro se* is "an instrument of self-destruction" that serves no interest of the defendant.[8]

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case of the stereotypic victimization of a black man. A subsequent conspiracy to destroy him. Nothing more." *See* MARK C. BARDWELL & BRUCE A. ARRIGO, CRIMINAL COMPETENCY ON TRIAL: THE CASE OF COLIN FERGUSON 303 (2002).

5 *See, e.g.,* John F. Decker, *The Constitutional 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, 498 (1996) (concluding that defendants who represent themselves are either crazy or fools).

6 *See Martinez,* 528 U.S. at 156.

7 *Id*. (internal quotation marks omitted).

8 Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C.L. REV. 621, 628 (2005) (stating that the Court's decision in Faretta "empower[ed] the self-destructive impulses of criminal defendants . . . [who] have turned trials into circuses through the device of self-representation"). *See*, *e.g.*, Bruce Arrigo & Mark C. Bardwell, *Law, Psychology, and Competency to Stand Trial: Problems With and Implications for High-Profile Cases*, 11 CRIM. JUST. POL'Y REV. 16, 33 (2000) (arguing that the competency standard needs to be changed because of the outcome in the Colin Ferguson case); Decker, *supra* note 5, at 598 ("[A] pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney. Considering the stakes involved, one must consider the wisdom of permitting persons to enjoy the right to shoot oneself in the foot."); 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, 164-65 (2000) ("In this article, we join our voices to the growing chorus of judicial officers, practitioners, and commentators who question the legitimacy and wisdom of *Faretta* because the right to self representation in practice undermines the fairness of the criminal justice system."). *See also* Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 41, 71 (2004/2005) (concluding that "nearly all decisions should be committed to the discretion of

This Article presents the results of a comprehensive empirical study that undermines both the assumption that felony criminal defendants are ill-served by proceeding *pro se* and the notion that no legitimate reasons can underlie the decision to engage in self-representation.[9] First, the data demonstrate that defendants who choose to proceed *pro se* in felony cases do not necessarily suffer negative consequences from that decision. Although *pro se* defendants make different choices than their represented counterparts (for instance, a higher percentage of *pro se* felony defendants go to trial than represented felony defendants), *pro se* defendants do not fare significantly worse in terms of outcomes than their represented counterparts. Indeed, at the state court level, felony defendants representing themselves at the time their cases were terminated appear to have done better than their represented counterparts in that they were less likely to have been convicted of felonies.

Second, the vast majority of *pro se* defendants do not exhibit overt signs of mental illness. Of the over two-hundred felony *pro se* felony defendants in

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lawyers" because the trials of pro se defendants "undermine the sound functioning of the adversary process by pitting a professional prosecutor against a lay defendant, "likely to do himself more harm than good""); Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 120 (1984) (citing the prevailing view that "for most persons it may well be that the individual right afforded by Faretta is nothing other than "an instrument of self-destruction,"" but states that the Court in Faretta overcame this "deeply ingrained objection[s]" attending self-representation); Anne Bowen Poulin, *The Role of Standby Counsel in Criminal Cases: In the Twilight Zone of the Criminal Justice System,* 75 N.Y.U.L. REV. 676, 677 (2000) (arguing that courts should always appoint fully-involved standby counsel to pro se defendants because such defendants jeopardize the fairness and efficiency of the trial and "impose a greater burden on the trial court and the justice system." Professor Poulin fails to discuss as legitimate any reasons for a defendant's choice to represent himself aside from a fear of ineffective assistance, and even then would require standby counsel to protect the defendant from his own defense. *Id.*); Joseph A. Colquitt, *Hybrid Representation: Standing the Two-sided Coin on its Edge*, 38 WAKE FOREST L. REV. 55, 68 (2003) (advocating for wide availability of hybrid representation as an alternative to self-representation. Many "courts recognize that on balance the decision to proceed pro se is a poor one. For example, in a capital case, granting the accused's demand to proceed pro se may empower the accused's "death wish." Merely because the right of self-representation exists does not mean that the exercise of the right is prudent. The Faretta dissent even saw fit to include the proverbial wisdom that an accused who represents himself has "a fool for a client."" *Id.*).

[9] There are three databases that form the basis for this study. Each is discussed more fully in Section II. *See infra* p. XX. The two pre-existing data sets, one of which contains data on all felony defendants prosecuted in federal court, and the other of which contains data on selected felony defendants prosecuted in selected state courts, are publicly available. My analysis of that data is available upon request. I created the third data set from information contained in docket sheets available online and through Westlaw.

federal court that I studied, competency evaluations were ordered in just over 20% of the cases.[10] This figure is telling because in virtually every case in which a defendant manifests any sign of mental illness, a federal district court judge will order a competency evaluation.[11] The fact that close to 80% of *pro se* felony defendants were not ordered to undergo competency evaluations thus strongly suggests that the vast majority of these defendants did not exhibit signs of mental illness.

Why do felony *pro se* criminal defendants choose to represent themselves if not because of mental illness? The evidence demonstrates that in many cases, the choice results from concerns about or dissatisfaction with appointed counsel. Most significantly, nearly half of the *pro se* federal felony defendants in the database I created asked the court to appoint new counsel prior to invoking the right to self-representation.[12] This dissatisfaction appears to come from two sources. First, the data suggest that some *pro se* defendants are concerned about the quality of court-appointed counsel. *Pro se* defendants in the database I created were more likely to have court-appointed counsel than federal felony defendants as a whole. There is a substantial body of evidence demonstrating that states are struggling to provide even marginally adequate court-appointed counsel to indigent defendants, and because those defendants have no right to counsel of their choice, self-representation is their only real alternative if they are unhappy with the counsel that the judge has appointed. *Pro* se defendants also went to trial at significantly higher rates than their represented counterparts.[13] Because deficiencies in the quality of counsel are more apparent in the lead-up to trial than during the course of plea negotiations (particularly since negotiating a plea requires less consultation with a client than preparing for trial), and because the stakes for the defendant at trial arguably are higher than the stakes in plea negotiations, it follows that overworked or substandard counsel will be of greater concern to defendants going to trial than those taking pleas. The trial rate of *pro se* defendants therefore inferentially supports the theory that concerns about the quality of counsel may drive some defendants to represent themselves.

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[10] This data comes from a database I compiled of felony defendants in federal court who represented themselves at the time of case disposition. *See infra* p. XX.

[11] *See* Bruce J. Winick, *Restructuring Competence to Stand Trial*, 32 U.C.L.A. L. Rev. 921, 924-25 (1985) ("Virtually every criminal defendant who appears to be mentally ill at any time within the criminal trial process is examined for competency.").

[12] In addition, there are a number of cases in which a federal felony criminal defendant expressed dissatisfaction with counsel and invoked the right to self-representation, only to later withdraw the request to proceed *pro se* when he was appointed new counsel. *See infra* p. XX.

[13] As discussed *infra* at XX, felony defendants in the *pro se* database I created went to trial at a rate over ten times the rate of represented defendants.

The data suggest one other source of dissatisfaction with counsel—defendants' ideological considerations. *Pro se* defendants in the database I created were much more likely to be charged with crimes that lend themselves to ideological defenses (such as tax evasion) than federal felony defendants as a whole, and it appears that at least some of the defendants chose self-representation in order to present those ideological defenses. In short, the right to self-representation protects valuable constitutional interests of the defendant. To the extent that indigent defendants represent themselves either as a result of legitimate concerns about the quality of court-appointed counsel, or because of ideological considerations, the right to self-representation protects the defendant's *personal* right to defend in the way the defendant believes most advantageous.[14]

That having been said, the data also demonstrate that recognizing a right to self-representation creates opportunities for abuse by the state, and several modifications of the existing legal structure therefore are needed to protect the constitutional rights of defendants. First, jurisdictions need to ensure that the waiver of counsel in fact is knowing and voluntary. Particularly in jurisdictions where the sheer number of indigent defendants has overwhelmed the system, the court has an incentive to encourage or even compel defendants to represent themselves, but to the extent that defendants do not knowingly and voluntarily waive the right to counsel, their constitutional rights are violated. The data strongly suggest that such involuntary or unknowing waivers are occurring, particularly in misdemeanor cases, and some form of protection therefore needs to be adopted in order to ensure that all such waivers are both knowing and voluntary.

Second, because at least some of the defendants who choose to represent themselves are mentally ill, trial judges need mechanisms to ensure that those defendants are knowingly and voluntarily relinquishing the right to counsel. The extent to which a trial judge can take account of the defendant's mental illness in making the constitutional determination is somewhat unclear because of the Supreme Court's most recent pronouncement in this area.[15] Legislative action therefore may be needed in order to make clear that judges can and should consider the presence of mental illness in determining whether the defendant has knowingly and voluntarily waived the right to counsel.

Finally, although there now is little information on the extent to which courts appoint standby or advisory counsel, such appointments can play a vital role in protecting the fair trial rights of *pro se* defendants. Standards therefore should be

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[14] *See* Faretta v. California, 422 U.S. 806, 834-35 (1975) (emphasizing that the "right to defend is personal" and belongs to the defendant, not his lawyer).

[15] *See* Godinez v. Moran, 509 U.S. 390 (1993).

adopted to ensure that courts appoint standby counsel as a matter of course.[16] These three refinements to the existing structure will ensure that the right to self-representation, which protects valuable rights of the defendant, does not infringe other constitutional rights.

This Article contains three parts. Part I explains the original justification for recognizing a right to self-representation and the Court's recent critique of the right. It also sets forth the empirical issues that appear critical to the Court's disapproval of the right. Part II contains the data that answer those empirical questions. Specifically, it includes data that rebut the presumption that *pro se* felony defendants necessarily do worse because of their decisions to self-represent and evidence that the vast majority of *pro se* felony defendants are not mentally ill. It also includes data suggesting reasons that might have caused these defendants to represent themselves. Finally, Part III sets forth recommendations to help ensure that the right to self-representation is not used to deprive the defendant of other trial rights, including the right to counsel and the right to a fair trial.

I. Framing the Issue: The Debate Over the Constitutional Right to Self-Representation

A. The Right Defined: *Faretta v. California*

Anthony Faretta thought his court-appointed public defender too "loaded down with . . . a heavy case load" to adequately represent him, so he requested permission to represent himself.[17] The trial judge initially granted Faretta's request, but later reversed course, concluding that Faretta had not made a knowing and intelligent waiver of his right to counsel and that he did not have a constitutional right to represent himself.[18] The court appointed the same public

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[16] Currently, there is very little in the way of standards to help guide those who are appointed as standby or advisory counsel. *See* Poulin, *supra* note 8. Even as an ethical matter, the parameters of the lawyer's role are not at all clear. More research and scholarship on this issue could help those appointed in a standby role to better serve the *pro se* defendant.

[17] *Faretta*, 422 U.S. at 807.

[18] At the colloquy preceding the ruling that Faretta had not knowingly and voluntarily waived his right to counsel, the court asked Faretta a series of questions about peremptory and cause challenges of jurors, and it was based upon Faretta's responses that the court concluded that he should not be permitted to represent himself. Interestingly, although unable to cite the particular code provision governing juror challenges, Faretta demonstrated a fair degree of understanding of the two types of strikes and the instances in which it was proper to assert each. *Id*. at 810.

defender who previously had represented Faretta and denied Faretta's repeated requests to represent himself, to present his case jointly with counsel, or to have different counsel appointed to represent him.[19] At trial, Faretta was convicted, and the court sentenced him to a term of imprisonment.[20]

Repudiating the trial court's rejection of a constitutional right to self-representation, the Supreme Court held that the Sixth Amendment protects a criminal defendant's right to waive his Sixth Amendment right to counsel and to represent himself.[21] The Court recognized the difficulties inherent in self-representation. "It is undeniable," the Court observed, "that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts."[22] Nonetheless, the Court held that just as the Sixth Amendment guarantees a right to counsel, so also it guarantees a right to self-representation. The Court acknowledged that the reasoning underlying the Sixth Amendment right to counsel as articulated in *Gideon v. Wainwright*–the importance of counsel in adversarial proceedings–conflicted somewhat with the right to self-representation.[23] But, according to the Court, as long as a defendant "'knowingly and intelligently'" waives the right to counsel before representing himself, both the right to counsel, and the right to self-representation could be respected.[24]

The Court's conclusion that the Sixth Amendment guaranteed a right to represent oneself rested on three grounds. First, the Court cited the extensive history of self-representation at both the state and federal levels in this country. Thirty-six state constitutions conferred a right to self-representation. Moreover, the right to self-representation in federal courts has been protected by statute since the inception of this country.[25] "We confront here a nearly universal conviction, on the part of our people as well as our courts," the Court found, "that forcing a

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[19] Brief for Petitioner, Faretta v. California, 422 U.S. 806 (1975) (No. 73-5772), 1974 WL 174861, at *10. Faretta three separate times requested that the Court appoint counsel other than the public defender, but the court refused to do so.

[20] *Faretta*, 422 U.S. at 811.

[21] Faretta petitioned for writ of certiorari *pro se*, but the Supreme Court then appointed counsel to represent him. Faretta v. California, 417 U.S. 906 (1974) (appointing counsel on Faretta's motion).

[22] *Faretta*, 422 U.S. at 834.

[23] Gideon v. Wainwright, 372 U.S. 335 (1963). In *Gideon* the Court held that indigent defendants have a constitutional right to the appointment of counsel. The Court later clarified that this right extended to any criminal case in which imprisonment was imposed. Argersinger v. Hamlin, 407 U.S. 25, 33-37 (1972).

[24] *Faretta*, 422 U.S. at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938)).

[25] *Faretta*, 422 U.S. at 813-814.

lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."[26]

Second, the nature and source of the Sixth Amendment supported the conclusion that it protects a right to self-representation. The Court reasoned that the right to defend oneself is granted to the accused "for it is he who suffers the consequences if the defense fails."[27] Because it is the defendant who holds the right to defend, the defendant also must have the right to actuate the defense–to defend himself either with the assistance of counsel or without that assistance if he so desires. Thus, the Sixth Amendment contemplates that "counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant–not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."[28] The English common law tradition, well-established at the time of the Sixth Amendment's ratification, also permitted self-representation.[29] Given the "centuries of consistent history" supporting a right to self-representation, the Court concluded that "there is no evidence . . . that the Framers ever doubted the right to self-representation, or ever imagined that this right might be considered inferior to the right of assistance of counsel."[30]

Finally, the Court emphasized the infringement of personal autonomy that would result from failing to recognize a right to self-representation.[31] "[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable worth of free choice."[32] To the Court, requiring a defendant to accept state-selected representation undermined any patina of autonomy that defendants retained in the process of being prosecuted by the state. Although the Court recognized that "the help of a lawyer is essential to assure the defendant a fair trial," it ultimately concluded that the "'respect for the individual which is the lifeblood of the law'" outweighed any potential diminution of just outcomes that might result from allowing criminal defendants to represent themselves.[33]

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[26] *Id*. at 817.

[27] *Id*. at 819.

[28] *Id*. at 820.

[29] According to the Court, the only tribunal in British history to have "forced counsel upon an unwilling defendant in a criminal proceeding" was the Star Chamber, an institution that existed in the late 16th and early 17th centuries and that "for centuries symbolized disregard for basic individual rights." *Id*. at 821.

[30] *Id*. at 832.

[31] *See* Martinez v. California, 528 U.S. 152, 156 (2000) (discussing the reasoning of *Faretta*).

[32] *Faretta*, 422 U.S. at 833-34.

[33] *Id*. at 834 (quoting Illinois v. Allen, 397 U.S. 337 (1970) (Brennan, J., concurring)).

B. Challenges to the Constitutional Right to Self-Representation and the Increasing Relevance of Empirical Data

In the three decades since the Court's decision in *Faretta*, both the Court and academics have expressed concern that whatever might be said about the value of personal autonomy, the right to self-representation has worked to the detriment of criminal defendants in the real world.[34] This suggestion reflects two sets of concerns about the right to self-representation, both of which rely on empirical assumptions. First, there is a strong sense that the right to self-representation as a matter of practice undermines the defendant's constitutional due process right to a fair trial. In other words, unfairly skewed processes–pitting legally-trained prosecutors against non-lawyer defendants–produce unfairly skewed results for defendants unwise enough to choose to represent themselves at trial.[35] A second and related concern is that defendants who represent themselves do not generally do so for reasons of autonomy and independence, *i.e.*, out of a concern about state representation. Instead, they do so either because they are mentally ill or because they want to disrupt the criminal proceedings.[36]

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[34] The right to self-representation does not have a particularly wide fan base. Certainly prosecutors and judges are concerned that *pro se* defendants might disrupt the courtroom and may be invoking the right to self-representation specifically in order to cause chaos. Interestingly, though, the criminal defense community also has been critical of the right to self-representation. *See*, *e.g.*, Sabelli & Leyton, *supra* note 8. Many criminal defense attorneys are concerned that those invoking the right to self-representation are simply hurting themselves. *Id*. And it is impossible to be appointed advisory counsel in a case going to trial without feeling as though one is being required to stand by and watch as a client steps in front of an oncoming bus. This odd state of affairs essentially leaves *Faretta* without any true advocates.

[35] *See, e.g.,* Decker, *supra* note 5, at 498 (concluding that defendants who represent themselves are either crazy or fools); Sabelli and Leyton, *supra* note 8, at 164 (questioning the wisdom of the right to self representation because of a concern that mentally ill defendants "abuse . . . the right to self representation in order to block presentation of mental health evidence."); Arrigo & Bardwell, *supra* note 8, at 33 ("[B]y exercising one's constitutional right to self-representation, as articulated in *Faretta*, defendants potentially forfeit their ability to argue their case persuasively under the law and, regrettably, succumb to the perils of believing that they 'can do it all themselves.' This conviction can be particularly problematic with mentally impaired defendants. The [Colin] Ferguson trial and verdict substantiates this claim.") (internal citations omitted). *See also*, Johnson, *supra* note 8, at 41, 71 (concluding that "nearly all decisions should be committed to the discretion of lawyers" because the trials of pro se defendants "undermine the sound functioning of the adversary process by pitting a professional prosecutor against a lay defendant, 'likely to do himself more harm than good'").

[36] *See, e.g.,* Decker, *supra* note 5, at 486 ("While it is difficult to pinpoint the exact motivation behind a criminal defendant's request to proceed pro se at trial, a number of themes

In *Martinez v. California*, the Court drew on these concerns in intimating that *Faretta* had been wrongly decided.[37] The holding of *Martinez*–that there is no right to self-representation on appeal–was unremarkable.[38] Because the *Faretta* Court found the right to self-representation in the Sixth Amendment, and the Sixth Amendment guarantees *trial* rights, not *appeal* rights, it was not surprising that the Court concluded that the Constitution creates no right to self-representation on appeal. Dicta in the Court's opinion, however, cast a shadow over *Faretta* itself by challenging its core reasoning.

As an initial matter, the Court dismissed *Faretta*'s reliance on the history of self-representation as a reason for recognizing the constitutional right, noting that self-representation was a matter of necessity prior to the Court's decision in *Gideon v. Wainwright* in 1963.[39] Because indigent defendants had no right to counsel in the pre-*Gideon* period, "[f]or one who could not obtain a lawyer, self-representation was the only feasible alternative to asserting no defense at all."[40] Thus, said the Court, although *Faretta* was accurate in observing that there is a long history of recognizing a right to self-representation in this country, that history becomes less compelling in view of the Court's decision to make competent counsel available to all defendants.[41] As the Court put it, "[t]he original reasons for protecting that right do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need–although not always the desire–for self representation."[42]

The Court also questioned whether recognizing a right to self-representation helps criminal defendants, expressing concern that it might instead undermine the

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emerge. Some defendants may proceed pro se to symbolize their lack of respect for any kind of authority . . .or because they are unable to get their way and so represent themselves as an act of defiance. Some pro se defendants have committed such heinous atrocities that life imprisonment or the death penalty is the most likely result. Other criminal defendants may be cleverly manipulating the criminal justice system for their own secret agenda . . . . On the other hand, while some pro se defendants may not harbor a hidden motive behind the request, they are so totally out of touch with reality that they believe they can do it all themselves.") (internal footnotes omitted); *Martinez*, 528 U.S. at 158 ("The original reasons for protecting that right [to self-representation] do not have the same force when the availability of competent counsel for every indigent defendant has displaced the need–although not always the desire–for self representation."). *See also* Toone, *supra* note 8, at 628 (stating that the Court's decision in Faretta "empower[ed] the self-destructive impulses of criminal defendants . . . [who] have turned trials into circuses through the device of self-representation").

37 *Martinez*, 528 U.S. at 152.

38 *Id*.

39 *Id.* at 156-57.

40 *Id*.

41 *See* Gideon v. Wainwright, 372 U.S. 335 (1963).

42 *Martinez*, 528 U.S. at 158.

defendant's due process right to a fair trial. Historically, said the Court, the "right" to self-representation was "not always used to the defendant's advantage as a shield, but rather was often employed by the prosecution as a sword."[43] The Court emphasized that "[n]o one, including Martinez and the *Faretta* majority, attempts to argue that as a rule *pro se* representation is wise, desirable, or efficient. . . . Our experience has taught us that a pro se defense is usually a bad defense, particularly compared to a defense provided by an experienced criminal defense attorney."[44]

Essentially, the Court suggested that the existence of the constitutional right to self-representation depended on an empirical analysis of the costs and benefits of recognizing the right.[45] Because in the Court's view the cost to defendants of recognizing a right to self-representation outweighed any actual benefits defendants gained from the right, it doubted the wisdom of *Faretta*. Although empirical evidence ostensibly drove the Court's conclusion, the Court made its sweeping pronouncement about the effect of the right to self-representation without citation to any empirical evidence.[46]

C. The Dearth of Empirical Evidence

In part, the Court's failure to cite any empirical evidence can be explained by the fact that data was not readily available.[47] As Justice Breyer recognized in his concurrence in *Martinez*, there is "no empirical research . . . that might help determine whether, in general, the right to represent oneself furthers, or inhibits,

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[43] *Id.* at 156.

[44] *Id*. at 161.

[45] The use of empirical data as a means for deciding issues of constitutional criminal procedure is not without precedent. *See* Tracy L. Meares & Bernard E. Harcourt, *Foreward: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 739 (2000) (arguing that the Supreme Court should explicitly consider empirical evidence when balancing interests and citing United States v. Leon, 468 U.S. 897 (1984) as an example of a case in which the Court did just that).

[46] The Court has made similar pronouncements without empirical evidence in other contexts. *See id*. ("[C]onstitutional criminal procedure decisions are often marred by spotty or inconsistent application of balancing tests and by pseudo-empirical statements.").

[47] The only study on *pro se* criminal defendants was a monograph authored by psychologists. *See* Douglas Mossman, M.D. & Neal W. Dunseith, Jr., M.D., *"A Fool for a Client": Print Portrayals of 49* Pro Se *Criminal Defendants*, 29 J. AM. ACAD. PSYCHIATRY L. 408 (2001) (tracking the progress of forty-nine *pro se* defendants through popular media accounts). Until the publication of this article, there has been no empirical analysis of *pro se* defendants in the legal literature.

the Constitution's basic guarantee of fairness."[48] Although thirty years have passed since the Supreme Court recognized a constitutional right to self-representation, and although there has been an explosion over the past thirty years in the categories of information that are kept in the criminal system, there are virtually no available empirical studies about criminal defendants who represent themselves in court.[49] Most of the literature that addresses the subject of *pro se* representation offers no empirical information, even about critical questions such as how self-representation affects outcomes of cases.[50]

Even the article cited by the Supreme Court as authority for the proposition that a *pro se* defense necessarily is a bad defense contains no empirical evidence to support its position.[51] Beginning with the old adage that "he who represents himself has a fool for a client," that article assumes that people who represent themselves are either deeply misguided or mentally ill.[52] The same sort of assumptive reasoning marks other scholarly work in this field.[53] It is to this persistent view that this article seeks to respond.

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[48] *Martinez*, 528 U.S. at 164 (Breyer, J., concurring). Justice Breyer went on to state his view that "without some strong factual basis for believing that *Faretta's* holding has proved counterproductive in practice, we are not in a position to reconsider the constitutional assumptions that underlie that case." *Id*. at 164-65.

[49] *See* Mossman & Dunseith, *supra* note 47 at 408-419 (noting that although "an August 2000 search of the Lexis law review database yielded 145 articles that cited and/or discussed the decision in *Faretta v. California*. . . . [b]y contrast, only a few articles have contained empirical data on groups of persons who represent themselves" and none of those conducts an exhaustive survey of *pro se* criminal defendants).

[50] For instance, the one piece of legal academic literature that contains any reference to the overall number of defendants who represent themselves is wildly inaccurate. *See* Marie Higgins Williams, Comment, *The Pro Se Criminal Defendant, Standby Counsel, and the Judge: A Proposal for Better-Defined Roles*, 71 U. COLO. L. REV. 789, 792 (2000) ("[C]riminal defendants in the United States request to represent themselves in an estimated fifty trials per year."). According to my data, approximately .3-.5% of felony criminal defendants represent themselves. *See infra* at XX. In 1996, approximately 1,041,809 criminal defendants were convicted of felonies in federal and state courts. *See* Jodi M. Brown & Patrick Langan, *Bureau of Justice Statistics Bulletin: Felony Sentences in the United States*, 1996, U.S. DEP'T. OF JUST. BUREAU OF JUST. STAT. (1999). http://www.ojp.usdoj.gov/bjs (follow "Publications" hyperlink; then follow "Felony Sentences in the United States, 1996" hyperlink). Thus, somewhere between 3000-5200 felony defendants represented themselves in that year.

[51] *See Martinez*, 528 U.S. at 691 (citing John F. Decker, *The Constitutional 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, 498 (1996)).

[52] *See* Decker, *supra* note 5.

[53] *See supra* note 8 (listing articles concluding that the overwhelming majority of defendants who represent themselves either are mentally ill or have no legitimate reason for self-representation).

II. Vindicating the Right to Self-Representation: The Results of the Empirical Study

A. The Sources of Data

To determine whether the commonly-held assumptions were accurate, I studied three primary sources of data. The first, referred to throughout this article as the "federal court database," contains a line of coded data about each defendant prosecuted in federal court each year.[54] For each defendant, the file contains information including the jurisdiction, the number and nature of the charge(s), the outcome of the case, the method of disposition, the sentence, and the type of counsel at the termination of the case.[55] The data regarding type of counsel provide a snapshot of the type of representation at the termination of each case, with the termination point constituting dismissal, acquittal, or sentencing if there was a conviction.[56] Data for fiscal years 1998-2003 are included in this article.[57]

The second database, referred to as the "state court database" throughout this article, contains lines of data for a sample of cases prosecuted in state court in the

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[54] *See*, *e.g.*, FEDERAL JUSTICE STATISTICS RESOURCE CENTER, DEFENDANTS IN FEDERAL CRIMINAL CASES TERMINATED IN U.S. DISTRICT COURT, http://fjsrc.urban.org/index.cfm (follow "Download" hyperlink; then submit name and email address; then follow "Standard Analysis Files" hyperlink). Data used in this article is a compilation of information available under the "Agency" heading Administrative Office of the U.S. Courts and the "SAFs Name" heading for the years 1998-2003 under individual file names: adj98out, adj99out, adj00out, adj01out, adj02out and adj03out [hereinafter *Federal Court Database*]. The data comes from information provided by the Clerk's Office in each federal jurisdiction to the Administrative Office of the United States Courts. The database is maintained by the Bureau of Justice Statistics. Each line of data contains a snapshot of each case that was terminated in a particular fiscal year, and the data is separated by fiscal year.

[55] All personal information about individual defendants is deleted from the file. Thus, the data in the file is strictly case-related and does not include information about factors such as the gender, race, or age of defendants.

[56] As an example of the way in which the database works, the 232nd character position contains information on type of counsel. A value of 1 in the 232nd position indicates a non-public defender appointment under the Criminal Justice Act; a value of 2 means private, retained counsel; a value of 3 indicates that the defendant waived counsel or chose self-representation; a value of either 5 or 7 means that documentation regarding type of counsel is not available; a value of 6 indicates public defender representation; and a - in the 232nd position indicates that the type of counsel is not reported for that defendant. For purposes of the analysis in this section, "*pro se* defendants" includes any defendant with a value of 3 in the 232nd position. "Represented defendants" includes all defendants with a value of 1, 2, or 6 in the 232nd position.

[57] Information also is available for fiscal years 1994-1997, but I limited the study to 1998-2003.

seventy-five most populous urban counties.[58] State courts provide the forum for the overwhelming majority of criminal defendants: in 1996, for example, out of a total of 1,041,809 defendants convicted of felony offenses, 96% (a total of 997,970 defendants) were convicted in state courts.[59] While no central database tracks criminal cases in all fifty state courts, the Pretrial Services Resource Center collects data on a sample of cases filed during the month of May in even numbered years in forty of the 75 most populous urban counties in the United States.[60] The sample then is weighted to represent all felony cases filed in the month of May for the 75 largest counties in the country, and the data are compiled into State Court Processing Statistics.[61] I used the aggregate of the data collected across the five even-numbered years from 1990-1998 in this Article.[62]

The final database, referred to as the "federal docketing database" throughout this article, contains data that I collected from federal court docket sheets.[63] The clerks of court for each federal jurisdiction keep a record of every criminal case that is filed, and for each case, the docket sheet memorializes all written filings and orders (including the date of filing), any oral motions or rulings made in court, and the nature of each court proceeding.[64] I created this database because the existing databases did not contain any information regarding (1) the extent to

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[58] National Archive of Criminal Justice Data, State Court Processing Statistics, 1990- 2000: Felony Defendants in Large Urban Counties (Study No. 2038) http://www.icpsr.umich.edu/NACJD (follow "Download Data" hyperlink; then search for "Felony Defendants in Large Urban Counties" "in the title"; then follow "Download" hyperlink; then follow "Guest" hyperlink; then select "ASCII Data File + SAS Setup Files" and select "DS1: 1990-2000 Cumulative Data"; then follow "Add to Data Cart" hyperlink; the follow "Download Data Cart" hyperlink) [hereinafter *State Court Database*].

[59] Brown & Langan, *supra* note 50.

[60] National Archive of Criminal Justice Data, U.S. Dept. of Justice, Bureau of Justice Statistics, State Court Processing Statistics, 1999-2000: Felony Defendants in Large Urban Counties (Study No. 2038) Codebook, http://www.icpsr.umich.edu/NACJD (follow "Download Data" hyperlink; then search for "Felony Defendants in Large Urban Counties" "in the title"; then follow "Download" hyperlink; then follow "Browse Documentation" hyperlink; then follow "DS1: 1990-2000 Cumulative Data Codebook PDF" hyperlink) [hereinafter *Codebook*].

[61] *Id* at 2. Those 75 counties "account for more than a third of the U.S. population and approximately half of all reported crimes."

[62] I aggregated the data for the five years because the data represents only a small snapshot of the case flow on particular days in the month of May, so the sample size is relatively small. Over the five years, there is data for only 234 *pro se* defendants.

[63] Information collected for this database is available from the author.

[64] Docket sheets are publicly available through the federal government's Public Access to Court Electronic Records ("PACER") website at http://pacer.psc.uscourts.gov. At this website PACER records are only available by case name or number, but Westlaw has most of the recent PACER records, and the content of those records can be searched by keyword. [hereinafter *Docket Sheet Database*]

which defendants choosing to represent themselves exhibited signs of mental illness, or (2) other reasons *pro se* defendants might have for representing themselves.[65] Because the docket sheets record what happens at each court proceeding, they offered more information on these points than the other two databases. The database includes information about 208 defendants, each of whom represented himself or herself at the time of case disposition.[66] For each defendant included in this database, I coded data for the following: the jurisdiction, the nature of the charges, the type of counsel at the time the defendant invoked the right to self-representation (retained, appointed public defender, appointed panel attorney, or no representation), the point in the proceeding at which the defendant invoked his right to self-representation, whether the defendant requested new or different counsel prior to self-representation and whether that request was granted or denied, type of disposition (jury trial, bench trial, plea, or dismissal), outcome (guilty, acquitted, or dismissed), whether the defendant was evaluated to determine competence to stand trial and if so whether the evaluation was ordered before or after he invoked his right to self-representation, and whether standby counsel was appointed.

B. The Coexistence of the Rights to Due Process and Self-Representation

> "[I]t is not inconceivable that in some rare instances, the defendant might in fact present his

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[65] Although the federal court database does contain some helpful information, it does not contain any information that might be deemed "personal" to the defendant, including any mental health evaluations that may have been ordered during the case. The state court database, although it does contain some "personal" information, does not include information on mental health evaluations. Moreover, the state court database does not even begin to cover the depth and variation of state court cases. In particular, because it contains only a sampling of cases from the 75 most populous counties, it does not include any information whatsoever on cases prosecuted in more rural counties. *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. - - (2006). (lamenting the lack of data on cases prosecuted in state courts nationwide).

[66] I define "case disposition" as the stage of the case at which the guilt/innocence question is decided, *i.e.*, verdict, if there is a trial; plea; or dismissal. I used case disposition because I believe it is a more critical stage of the case than case termination (the stage at which both the federal and state databases measure type of counsel). The database includes information on 208 defendants in 177 cases. Twelve of the cases had multiple defendants representing themselves at the time of case disposition.

> case more effectively by presenting his own defense."[67]

The primary argument against the right to self-representation is based on fairness to the defendant.[68] On this view, the right to self-representation undermines the defendant's due process right to a fair trial by giving him a constitutional right to do something that ultimately can only hurt him.[69] As the Court bluntly stated the point in *Martinez*, "[o]ur experience has taught us that a pro se defense is usually a bad defense, particularly compared to a defense provided by an experienced criminal defense attorney."[70] The assessment that *pro se* representation in felony cases necessarily is a bad idea, however, is flatly contradicted by the empirical data. Although *pro se* defendants make different choices on the path to resolving their cases, they are not necessarily ill-served by those decisions.

In particular, in the state court database, felony defendants who represented themselves at case termination appear to have fared better than their represented counterparts. Even in the federal system, although *pro se* felony defendants were much more likely to go to trial than represented felony defendants and were more likely to be convicted at trial than represented defendants, the overall rate of

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

68 There is a tendency to equate a *pro se* defendant's bad outcome, *i.e.* conviction, with the denial of due process. As the Court recognized in *Faretta*, however, the two concepts are not at all equivalent. Thus, according to the Court, even though a criminal defendant might not perform as well as a lawyer, "[p]ersonal liberties are not rooted in the law of averages. 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." *Id.* at 834.

Like the Court in *Faretta*, I am not at all convinced that an outcome for a *pro se* defendant that is objectively less favorable than he would have received had he been represented necessarily means that the *pro se* defendant was denied due process. Nonetheless, the fact that there is data establishing that at least some *pro se* defendants do as well as or better than their represented counterparts, *see infra* at XX, undercuts the argument that *pro se* defendants necessarily are denied due process.

69 *See*, *e.g.*, Decker, *supra* note 5; United States v. Farhad, 190 F.3d 1097, 1106-07 (9th Cir. 1999) (Reinhardt, J., concurring specially) (arguing that allowing a defendant to proceed *pro se* necessarily undermines the defendant's due process right to a fair trial). *See also*, Johnson, *supra* note 8, at 41, 71.

70 Martinez v. California, 528 U.S. 152, 161 (2000).

conviction (including guilty pleas and convictions at trial) was not significantly higher for *pro se* defendants than for represented defendants.[71]

1. Outcomes for *Pro Se* Felony Defendants in State Court

Pro se defendants in the state court database fared at least as well, and in many instances significantly better than, their represented counterparts by almost any measure. A total of 238 defendants were *pro se* at case termination, and outcomes were provided for 234 of them.[72] Of the 234 *pro se* defendants for whom an outcome was provided, just under 50% of them were convicted of any charge.[73] And of the 50% who were convicted of something, just over 50% (or 26% of the total number of *pro se* defendants for whom outcome was reported) were convicted of felonies.[74] For represented state court defendants, by contrast, a total of 75% were convicted of some charge (either at trial or by guilty plea), and of those convicted, 85% were convicted of felonies. Thus, only 25% of the *pro se* defendants ended up with felony convictions, while 63% of their represented counterparts were convicted of felonies.[75]

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[71] This conclusion is consistent with that reached by Mossman and Dunseith, the authors of *"A Fool for a Client": Print Portrayals of 49* Pro Se *Criminal Defendants*, *supra* note 47. In that study, the authors read popular news accounts of fifty-four criminal cases involving forty-nine *pro se* defendants. They then compiled information regarding the mental health status of the defendant, and the outcomes of the cases. According to their study, of the fifty four cases, defendants in thirty-eight cases went to trial before a jury. Of those, four were acquitted. Out of the fifty four cases included within the sample, the acquittal rate of the pro se defendants (four acquittals out of the total fifty-four cases) was 7%. Indeed, several of the newspaper articles suggested that "*pro se* defendants (especially those who gained acquittals) did well in presenting their cases and sometimes enjoyed distinct advantages over attorney-represented defendants." *Id.* at 414.

[72] *State Court Database*, *supra* note 58.

[73] Of the 238 *pro se* cases, three cases had missing data, and one case was still pending. The total sample of *pro se* cases with reported outcomes therefore is 234.

[74] All of the defendants in this database were charged with felonies. For them to have been convicted only of misdemeanors, they therefore either were convicted only of lesser offenses at trial or pleaded guilty to a lesser offense

[75] I recognize that the 238 cases in which defendants represented themselves may differ from the cases of represented defendants in other, significant ways. For instance, defendants may be more likely to represent themselves in cases where the evidence against them is weak than in cases where the evidence against them is strong. Unfortunately, there is no way with the existing data to assess the strength of the evidence against defendants and to ensure that I am comparing cases of similar merit. The point remains, however, that *pro se* felony defendants in state court, for whatever reason, do not appear to suffer negative consequences from their decision to proceed *pro se*.

Table 1: Outcomes for Defendants in State Court

	Guilty Plea to Felony	Guilty Plea To Misdemeanor	Trial: Acquitted On All Charges	Trial: Convicted of Misdemeanor	Trial: Convicted Of Felony	Dismissals/ Deferred Adjudications
Pro Se Defendants	22% (52/234)	20% (46/234)	2% (5/234)	3% (8/234)	4% (10/234)	48% (113/234)
Represented Defendants	60% (27,868/46,699)	11% (5,202/46,699)	1% (542/46,699)	-- (192/46,699)	4% (1767/46,699)	24% (11,128/46,699)

As set forth in Table 1, for both *pro se* and represented defendants, guilty pleas represented the most common method of disposition, but *pro se* defendants pleaded not guilty, and thus went to trial, at significantly higher rates than represented defendants. A total of 42% of the *pro se* defendants (98 out of a total of 234 *pro se* defendants for whom outcome was reported) pleaded guilty, while a total of 71% of represented defendants pleaded guilty (33,070 out of a total of 46,699 represented defendants for whom an outcome was reported). The trial rates of *pro se* defendants were roughly double that of represented defendants: approximately 10% of the *pro se* defendants went to trial, as opposed to 5% of the represented defendants.

Of the defendants who pleaded guilty, *pro se* defendants appear to have fared better than represented defendants. Of the 98 *pro se* defendants who entered guilty pleas, only 53% pleaded guilty to felonies, while the remaining 47% pleaded guilty to misdemeanors.[76] For the represented defendants who pleaded guilty, 84% pleaded guilty to felonies (27,868 out of the 33,070 represented defendants who pleaded guilty), while the remaining 16% (5,202) pleaded guilty to misdemeanors. Thus, the *pro se* defendants were significantly more likely to have garnered misdemeanor plea deals than the represented defendants.

The acquittal rate of the *pro se* defendants expressed as a percentage of those going to trial was identical to that of the represented defendants, but a much lower percentage of those *pro se* defendants convicted at trial were convicted of felonies as compared to the represented defendants. A total of 23 *pro se* defendants went to trial, with 18 convicted and 5 acquitted, which means that 22% of the *pro se* defendants choosing to go to trial were acquitted on all charges. Similarly, of the 2501 represented defendants who went to trial, 1959, or 78% were convicted at trial, while 22% were acquitted on all charges. *Pro se* defendants, however, were

[76] *State Court Database*, *supra* note 58.

significantly less likely to be convicted of felonies than their represented counterparts. Only 10 of the 18 *pro se* defendants convicted at trial (or 56%) were convicted of felonies, while the other eight were convicted only of misdemeanors. By contrast, 90% of the represented defendants who were convicted at trial were convicted of felonies. Moreover, because the percentage of *pro se* defendants going to trial was higher than the percentage of represented defendants going to trial, if the acquittal rate is expressed as a percentage of the total defendants (rather than as a percentage of defendants going to trial), the *pro se* defendants fared twice as well as the represented defendant. Five out of the 234 *pro se* defendants for whom an outcome was provided, or 2%, were acquitted, while only 542 out of the 46,699 represented defendants for whom an outcome was reported, or 1%, were acquitted.

Pro se defendants also garnered a greater percentage of dismissals and deferred adjudications than their represented counterparts. Cases against 87 *pro se* defendants, or 37% of the total *pro se* defendants reporting adjudication, were dismissed.[77] Another 26 *pro se* defendants, or 11%, received diversion or deferred adjudications.[78] By contrast, the represented defendants had approximately just over half the dismissal rate and much less than half the rate of deferred adjudications: the dismissal rate was 20% (9,329 out of a total of 46, 699 represented defendants for whom an outcome was reported), and the diversion rate was 4% (1,799 out of a total of 46, 699 represented defendants for whom an outcome was reported).

The one difficulty with drawing any firm conclusions from this database about these outcomes for *pro se* defendants is that this particular database measures type of counsel at the time the case was *terminated* (at the time of sentencing in the event of a conviction, and at the time of acquittal or dismissal if the case did not result in a conviction). Thus, defendants who did not represent themselves at trial

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[77] This discrepancy may at least in part be explained by the fact that many dismissals occur almost immediately after the case is filed. For instance, after filing the charging documents, the prosecutor may discover that there is not proof sufficient to convict the defendant on a particular element and will dismiss the charge. In at least some of those instances, the dismissal will occur prior even to appointment of counsel for the defendant or appearance of counsel for the defendant, and the defendant therefore will be reflected in the database as "unrepresented or pro se." Because these defendants are not truly *pro se* in the sense that they probably never do anything to represent themselves, it is not entirely accurate to categorize them as *pro se*.

[78] Diversion and deferred adjudication operate slightly differently depending on the jurisdiction, but with both, provided that the defendant fulfills specified conditions over a set period of time, the case will be dismissed at the conclusion of the period of time or upon fulfillment of the condition. In some jurisdictions, the defendant is required to admit guilt in order to qualify for diversion, but the case still is dismissed upon successful completion of the terms or conditions.

or at plea but did represent themselves at sentencing would be included in this database, while those who represented themselves at trial or plea but then were represented at sentencing would not be included. Because defendants who have gone to trial with counsel and been convicted may be more likely to be unhappy with their counsel than those represented defendants who take pleas, the trial rate of *pro se* defendants included in this database may be slightly inflated.

Even recognizing that limitation, the evidence still supports the proposition that felony defendants representing themselves at the time of case disposition have case outcomes that are comparable to those achieved by represented defendants. For the three categories of cases in which type of counsel at case termination is the same as type of counsel at case disposition—cases which resulted in an acquittal, dismissal or deferred adjudication—*pro se* defendants appear to have done as well as, if not better than, represented defendants.[79] In short, while the evidence may not prove that *pro* se felony defendants in state court achieve *better* results than represented defendants, it certainly undermines the assumption that the decisions to engage in self-representation necessarily lead to bad outcomes.

2. Outcomes for *Pro Se* Felony Defendants in Federal Court

Pro se felony defendants in the federal court database, like their state court counterparts, were much more likely to go to trial than represented defendants. The *pro se* federal court felony defendants, however, did not achieve rates of success comparable to *pro se* state court felony defendants. Even so, *pro se* federal court felony defendants do not appear to have done significantly worse than federal court felony defendants who were represented by counsel. These conclusions are based upon the data in both the federal court database and the federal docketing database.[80]

Beginning with the federal court database, felony defendants who were reported as *pro se* at case termination pleaded guilty significantly less often than their represented counterparts and were almost twice as likely to go to trial as

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[79] As discussed *infra* at XX, this is not to suggest that counsel is not necessary. Instead, the point is that for those select few defendants who do make the conscious decision to represent themselves, the outcomes may not be as bad as popularly believed.

[80] As discussed *supra* at XX, the federal court database is a pre-existing database of all defendants prosecuted in federal court. The federal docketing database contains information that I collected from the federal court docket sheets of 208 felony defendants who were representing themselves at the time of case disposition.

their represented counterparts.[81] As set forth in Table 2, from 1998-2002, 88-91% of federal felony defendants who reported having counsel (retained, panel attorney, or public defender) pleaded guilty. By contrast, with the exception of the year 2000, federal felony defendants who were identified as *pro se* at case termination pleaded guilty in less than 80% of cases, ranging from 71-79%. Even in 2000, when the percentage of unrepresented felony defendants pleading guilty was significantly higher at 86%, the guilty plea rate still was lower than for represented defendants.[82] Perhaps more significantly, *pro se* federal felony defendants went to trial (usually jury trial) at approximately double the rate at which represented federal felony defendants went to trial. The percentage of *pro se* felony defendants going to trial ranged from a low of 6.45% in 2000 to a high of 12.9% in 1998. By contrast, the percentage of represented felony defendants going to trial ranged from a low of 3.6% in 2002 to a high of 5.6% in 1998. Essentially, in every year except 2000, the percentage of unrepresented defendants going to trial was either close to or exceeded double the percentage of represented defendants going to trial.[83]

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[81] *Federal Court Database, supra* note 54. The federal database, like the state database, measures type of counsel at the time of case termination.

[82] The lower rate of guilty pleas in *pro se* cases is explained in part by the fact that there is a higher rate of dismissal. As discussed *infra* at XX, the dismissal statistics in *pro se* cases may be somewhat overblown. Even excluding the dismissals, however, it is clear that defendants reported as *pro se* at case termination were significantly more likely to go to trial than represented defendants.

[83] As with the state database, it is difficult to draw firm conclusions from this database about the rate at which *pro se* defendants choose to go to trial because the database measures type of counsel at the time of case termination. Nonetheless, the difference between trial rates of represented and defendants who were *pro se* at case termination still is significant.

Table 2: Method of Disposition in Federal Court Database[84]

	Plea of Guilty	Jury Trial	Bench Trial	Dismissals	Statistical Dismissals[85]
1998	*Pro se*: 75% Represented: 88%	*Pro se*: 12% Represented: 5%	*Pro se*: .5% Represented: .4%	*Pro se*: 10% Represented: 6%	*Pro se*: 2% Represented: .4%
1999	*Pro se*: 71% Represented: 89%	*Pro se*: 9% Represented: 5%	*Pro se*: 0% Represented: .4%	*Pro se*: 15% Represented: 6%	*Pro se*: 4% Represented: .4%
2000	*Pro se*: 86% Represented: 90%	*Pro se*: 7% Represented: 4%	*Pro se*: 0% Represented: .3%	*Pro se*: 7% Represented: 5%	*Pro se*: 0% Represented: .3%
2001	*Pro se*: 79% Represented: 90%	*Pro se*: 8% Represented: 4%	*Pro se*: 0% Represented: .3%	*Pro se*: 11% Represented: 5%	*Pro se*: 2% Represented: .3%
2002	*Pro se*: 79% Represented: 91%	*Pro se*: 11% Represented: 3%	*Pro se*: 0% Represented: .3%	*Pro se*: 10% Represented: 5%	*Pro se*: 0% Represented: .3%

In terms of acquittal rates at trial, over the five year period between 1998-2002, sixty-five defendants in the federal court database identified as unrepresented went to jury trial, and five of them were acquitted, yielding a trial acquittal rate of 7.69% (5/65). Over that same five year period, 7744 defendants identified as being represented by counsel went to trial, with 1238 acquitted, for a trial acquittal rate of 15.99% (1238/7744). The acquittal rate for represented defendants therefore was over twice as high as that for unrepresented defendants.[86]

Measured a different way, however, *pro se* federal felony defendants were just as likely to be acquitted as their represented counterparts. Because the jury trial rate of unrepresented defendants was so much higher than that of represented defendants and because so many represented defendants are convicted by way of guilty plea, if the *pro se* acquittal rate is expressed as a percentage of the *total* number of *pro se* federal felony defendants, rather than as a percentage of *pro se* defendants *going to trial*, the acquittal rate for *pro se* defendants is virtually

[84] Totals may not equal 100% because of rounding and because I do not include the data for *nolo* pleas. The statistics for *nolo* pleas among represented defendants never exceeded .4%, and there were no such pleas among the *pro se* defendants.

[85] Statistical Dismissals are cases that are dismissed only for statistical purposes at some point prior to the conclusion of the case. For instance, if a defendant fails to appear while the case is pending and the trial court issues a bench warrant, the indictment will remain pending, but at some point, the case will be dismissed for purposes of determining the statistical caseload of the particular judge and jurisdictions. In that example, when the defendant is arrested on the bench warrant, the case is reopened.

[86] Over that five-year period, represented defendants had a higher acquittal rate at bench trials then at jury trials. Because only one unrepresented defendant chose a bench trial in that five year period, however, there are no statistics for comparison in the bench trial category.

identical to the acquittal rate for represented defendants: 5 *pro se* felony defendants were acquitted out of a total of 664 unrepresented felony defendants, for a .75% overall acquittal rate. By way of comparison, 1,495 represented felony defendants were acquitted either at bench or jury trials out of 190,647 total represented felony defendants, yielding a .78% overall acquittal rate. Thus, when viewed in the aggregate, *pro se* federal felony defendants do not seem to be faring significantly worse than their represented counterparts.[87]

Federal court *pro se* felony defendants, like their state court counterparts, achieved a higher rate of dismissal than the represented defendants. As with the state *pro se* defendants, however, this discrepancy may be explained by the fact that some of the cases included in this category may have been dismissed prior to any significant proceedings in court and therefore prior even to the appointment of counsel.

In the federal docketing database, the defendants included as *pro se* represented themselves at the time of case *disposition*, rather than at the time of case termination.[88] This group of *pro se* defendants was overwhelmingly more likely to go to trial than either *pro se* defendants in the federal database or represented defendants in the federal database. Indeed, of the 208 *pro se* defendants included within the study, a total of 137 went to trial, either before a jury (122) or before a judge (15). The trial rate of the *pro se* defendants in this database therefore approximated 66%, over ten times the trial rate of represented federal felony defendants in 1998.[89] The defendants in two of the *pro* se cases were acquitted of all charges, resulting in a trial success rate of 1.5%, a figure that obviously is significantly lower than the 16% acquittal rate of the represented defendants.[90] Nonetheless, as with the federal court database, if the success rate is measured by examining the number of defendants acquitted out of the *total* number of defendants, the *pro se* defendants are as successful as the represented

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[87] Particularly because this database contains data on federal felony cases, acquittals become significantly more valuable than guilty pleas. In the federal system during the time period to which this data relates, the United States Sentencing Guidelines governed the imposition of all felony sentences in federal court. The Guidelines do not provide for the significant sentence reduction that many state sentencing systems offer. Thus, the difference in federal court sentences between defendants who go to trial and defendants who plead guilty is not as significant as it may be in state systems.

[88] Case disposition is defined as dismissal, verdict at trial, or plea.

[89] I used 1998 because that was the year with the highest trial rate among the represented defendants. The trial rate of the *pro se* defendants in the federal docketing database is close to *twenty times* the trial rate of represented defendants in 2002.

[90] Interestingly, the judges in both of the acquittal cases ordered competency evaluations of the *pro se* defendants.

defendants, with an overall acquittal rate of 1% (2/208), compared to the .78% overall acquittal rate of the represented defendants.[91]

In addition, the dismissal rates of the *pro se* defendants were roughly equivalent to the dismissal rates of represented defendants, with cases against eleven of the *pro se* defendants (approximately 5%) being dismissed.[92] Because the overall complete success rate (counting both complete acquittals and dismissals) of represented defendants in federal court is so low–ranging from a low of 5.5% in 2002 to a high of 6.8% in 1998–the complete success rate of the *pro se* defendants in the federal docketing database (approximately 6.3%) still essentially mirrors that of the represented defendants.[93] Thus, although the evidence does not prove that *pro se* defendants are doing significantly *better* than represented defendants, it certainly undermines the assumption that *pro se* defendants necessarily do worse than they would have done with counsel, and by extension also undermines the assumption *pro se* defendants cannot receive constitutionally fair trials.

C. Furthering "the Constitution's Guarantee of Basic Fairness": The Benefits of Recognizing a Right to Self-Representation[94]

Having concluded that the right to self-representation is not inconsistent with the due process right to a fair trial, I now turn to the second major criticism of *Faretta*–that recognizing a right to self-representation does not benefit criminal

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[91] In addition to the outright acquittals in the federal docketing database, a number of the other defendants were acquitted on all but one of the charges against them or on the vast majority of charges. Three other defendants obtained mistrials.

[92] Unlike with the state and federal court databases, there is no question that the defendant was representing himself at the time of the dismissals in this database. In most of the cases that resulted in dismissal in the docketing database, the defendant was represented by counsel and then invoked his right to self-representation prior to dismissal. The one case in which no counsel entered an appearance prior to dismissal lasted for well over three months before dismissal.

[93] Unfortunately, the impact of *pro se* status on sentences is difficult to gauge from any of the databases. Given that all of the cases in the federal databases went to sentencing during the time that the United States Sentencing Guidelines were in effect, one would not expect to see radical differences in sentences based upon whether the defendant proceeded *pro se* or was represented. This is because the Guidelines attempt to regularize sentencing, providing for sentences based on the type of offense and the defendant's criminal history. It is, however, difficult to determine whether the *pro se* defendants received roughly comparable sentences to the sentences of similarly situated represented defendants, because the database does not include any information regarding the extent or nature of the defendant's criminal history.

[94] Martinez v. California, 528 U.S. 152, 164 (2000) (Breyer, J., concurring).

defendants in any way because they choose to proceed *pro se* as a result of mental illness or for illegitimate reasons (such as in order to disrupt the judicial proceedings) rather than for any rational reason.[95] This argument requires that at least one of the two following empirical assumptions be true: (1) most defendants who choose to represent themselves do so because they are mentally ill, or (2) the reason articulated in *Faretta* for recognizing a right to self-representation–namely to protect the defendant's autonomy interest in choosing and presenting his own defense–either does not in fact motivate defendants to proceed *pro se* or is no longer a legitimate concern.

Without conducting interviews with defendants who have represented themselves, it is impossible to definitively prove their reasons for choosing to proceed *pro se*.[96] Nonetheless, the data in the federal docketing database provide strong evidence that the overwhelming majority of felony defendants who represent themselves do *not* exhibit signs of mental illness (or at least do not exhibit sufficient signs of mental illness to warrant a competency evaluation).

Instead, there is evidence that many defendants who represent themselves do so because of dissatisfaction with counsel. Most significantly, over one-half of the *pro se* defendants in the federal docketing database who had counsel prior to self-representing had asked the judge to appoint a new lawyer *before* they invoked the right to self-representation. The data suggest two reasons for this dissatisfaction with counsel: (1) poor quality of court-appointed representation, and (2) ideological considerations that lead the defendant to distrust state-appointed representation.[97] Because there is ample evidence to establish that

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[95] *See, e.g.,* Decker, supra note 5, at 486 ("While it is difficult to pinpoint the exact motivation behind a criminal defendant's request to proceed pro se at trial, a number of themes emerge. Some defendants may proceed pro se to symbolize their lack of respect for any kind of authority . . .or because they are unable to get their way and so represent themselves as an act of defiance. Some pro se defendants have committed such heinous atrocities that life imprisonment or the death penalty is the most likely result. Other criminal defendants may be cleverly manipulating the criminal justice system for their own secret agenda . . . . On the other hand, while some pro se defendants may not harbor a hidden motive behind the request, they are so totally out of touch with reality that they believe they can do it all themselves.") (internal footnotes omitted); Sabelli & Leyton, *supra* note 8, at 164 (questioning the wisdom of the right to self representation because of their concern that mentally ill defendants "abuse . . . the right to self representation in order to block presentation of mental health evidence.").

[96] Interviews with *pro se* defendants alone also would not be sufficient since it is unlikely that mentally ill defendants would self-identify their own mental illness as a reason they proceeded *pro se*.

[97] I looked for evidence supporting these reasons for invoking the right to self-representation in part because they mirror the Court's analysis in *Faretta* and in part based upon my experience as an assistant federal public defender in Washington, D.C. During my years as a public defender, I was appointed as standby counsel to three different clients. Their reasons for

these both are legitimate concerns on the part of defendants, it appears that the right to self-representation in practice works to the benefit of defendants by protecting their right to control their defense in the face of inadequate or potentially conflicted counsel.

1. Mental Illness (or the Lack Thereof) Among those Representing Themselves

In recognizing the right to self-representation, *Faretta* emphasized the value of a criminal defendant's autonomy.[98] Imbedded within the notion of autonomy and free choice, however, is the idea that the decision to proceed *pro se* is going to be made freely, *i.e.*, without the cloud of mental illness.[99] Thus, if *pro se* defendants decide to represent themselves because of delusions or irrationality related to mental illness, it would appear that meaningful autonomy and free choice are not furthered by recognizing the right to self-representation. There is, of course, no perfect way to measure whether a *pro se* criminal defendant is mentally ill, let alone whether that mental illness affected the decision to proceed *pro se*.[100] For the reasons discussed below, however, I used a court-ordered competency evaluation as a proxy for the existence of overt signs of mental illness.[101] By that standard, over 78% of the *pro se* defendants in the federal docketing database did not exhibit signs of mental illness.[102]

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asserting the right to self-representation, as articulated by them in open court, included a combination of the reasons discussed in this article.

[98] Faretta v. California, 422 U.S. 806, 833-34 (1975) ("[W]hatever else may be said of those who wrote the Bill of Rights, surely there can be no doubt that they understood the inestimable value of free choice.").

[99] Unfortunately, even if a defendant is waiving his right to counsel and representing himself because of his mental illness (for example, because of delusional beliefs about his own abilities), a court can still accept that waiver of counsel provided that the defendant is competent to stand trial and the waiver of counsel is knowing and voluntary. *See* Godinez v. Moran, 509 U.S. 390 (1993) (holding that standard for competence to waive counsel is the same as for competence to stand trial).

[100] Paper records of criminal cases do not usually reveal things such as the demeanor of the defendant or any bizarre behavior the defendant may exhibit.

[101] I used the order that a defendant undergo a competency evaluation, rather than the results of that competency evaluation, as an indicator of mental illness in large part because, as discussed *infra XX*, the standard for competency is so low that virtually no criminal defendants are found incompetent to stand trial. Using the order that a defendant undergo a competency evaluation as a proxy for signs of mental illness, however, may be over-inclusive insofar as it may include defendants who are not really mentally ill.

[102] Mossman & Dunseith reached a similar conclusion. *See supra* note 47. The authors charted the extent to which evidence of mental illness or disturbance was apparent from the media accounts. In the media coverage of thirteen of the *pro se* defendants (out of the 49), the article

A criminal defendant has a constitutional right to not be tried if he is not competent, primarily because a competent defendant is "fundamental to an adversary system of justice."[103] As a matter of constitutional law, a finding of competence requires that the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and . . . a rational as well as factual understanding of the proceedings against him."[104] In the federal system, the statute governing competency requires a finding of incompetence if the defendant "is presently suffering from a mental disease or defect rendering him . . . unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[105] Although it is relatively rare for a defendant to be found incompetent to stand trial, competency evaluations in both the state and the federal system are done routinely upon any indication of mental illness.[106] Moreover, because a criminal defendant's conviction can be reversed for the failure to conduct a competency evaluation when reasonable grounds exist even absent a motion by defense counsel, both prosecutors and judges tend to err on the side of caution, with prosecutors moving for evaluations and judges granting those motions for defendants who show any signs of being mentally ill.[107] In federal court, the statute requires the court to grant a motion for a competency evaluation "if there is reasonable cause to believe that the defendant *may* be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the proceedings against him or to assist properly in his defense."[108] Therefore, as a practical matter, if the defendant exhibits any signs of bizarre behavior, one party (often the government) will move to have the defendant evaluated.

Given the low threshold at which judges in federal court order competency evaluations, and given the assumption that most *pro se* defendants are mentally ill, one would expect that the percentage of *pro se* defendants in federal court who are ordered to undergo competency evaluations would be relatively high. In fact, however, competency evaluations were ordered in only about 22% of the cases in

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reported statements or actions that "appeared to be symptoms of a serious Axis I mental disorder or indicated possible incompetence to stand trial." *Id.* The majority of the defendants, however, did not exhibit such behavior.

[103] Drope v. Missouri, 420 U.S. 162 (1975).

[104] Dusky v. United States, 362 U.S. 402 (1960).

[105] 18 U.S.C. § 4241 (2006).

[106] *See* Winick, *supra* note 11, at 924-25 ("Virtually every criminal defendant who appears to be mentally ill at any time within the criminal trial process is examined for competency.").

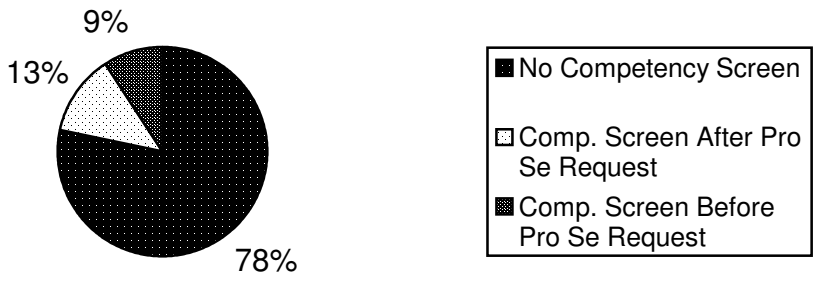
[107] *Id.*; SEYMOUR L. HALLECK, M.D., THE MENTALLY DISORDERED OFFENDER 20-22 (1986).

[108] *See* 18 U.S.C. § 4241 (2006). (emphasis added). The court also can order a competency evaluation upon its own motion.

the federal docketing database.[109] It is unclear exactly how many defendants receive competency evaluations nationwide, but one study estimates that 4-5% of felony defendants in 1994 received competency evaluations.[110] Although the rate of competency evaluations among the federal felony *pro se* defendants in the docketing database is higher than that of felony defendants as a whole, the fact remains that the overwhelming majority of *pro se* defendants in this database did not exhibit sufficiently bizarre behavior to receive even a baseline evaluation.

Moreover, not only did less than 22% of the *pro se* defendants receive competency evaluations, but as depicted below, in well over half of the cases (26/45) in which the defendant was ordered to undergo an evaluation, the evaluation was ordered *after* the defendant invoked his right to self-representation.

Chart 1: Competency Evaluations



Because of the long-held assumption that those who represent themselves are mentally ill, a defendant's decision to represent himself *pro se*, even absent other indications of mental illness, may well give rise to a concern on the part of the court that the defendant is mentally ill. A trial court judge therefore is much more likely to order a competency evaluation when a defendant invokes his right to self-representation, even absent any other indicia of mental illness, than she

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[109] Competency evaluations were ordered in 45 out of the 208 cases included within the federal docketing database, which amounts to approximately 22%. All of the defendants in the database who were evaluated were deemed competent to stand trial after the evaluation.

[110] *See* NORMAN G. POYTHRESS, ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 50 (2002). The authors arrived at the 5% figure from an estimate that 50,000 defendants receive competency evaluations annually, and extrapolated that if 5% of the 1.2 million felony indictments annually received competency evaluations, there would be 60,000 evaluations.

would be for a defendant who does not choose to proceed *pro se*. Counting only those defendants who had competency evaluations *prior* to the invocation of the right to self-representation, only 19/208 *pro se* defendants (9%) were ordered to undergo evaluations. While this figure still is higher than that of defendants in the federal system generally speaking, it certainly undermines the notion that all (or even most) defendants who represent themselves are mentally ill.[111] And while there perhaps are some mentally ill *pro se* defendants who simply were not ordered to undergo competency evaluation, it certainly cannot be the case that the predominant reason for choosing self-representation is mental illness. There must, in other words, be some other factor motivating the decision to self-represent.

2. Autonomy Interests Served by the Right to Self-Representation

> "To force a lawyer on a defendant can only lead him to believe that the law contrives against him."[112]

Although none of the databases contains information explicitly addressing why *pro se* defendants choose self-representation, the data in the federal docketing database provide at least some clues. Inherent in the choice to represent oneself is the notion that the defendant is dissatisfied with the representation he is receiving, either because of the quality of the lawyer representing him or because he simply does not want any lawyer to represent him.[113] Not surprisingly, the data in the federal docketing database suggest that at least some of the *pro se* defendants were dissatisfied with the quality of representation they received from counsel prior to invoking the right to self-representation. The data also provide evidence of the second proposition—that some defendants are representing themselves because they do not want a lawyer, and in particular an agent of the government, representing them. Set forth below

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[111] As discussed *infra* at XX, the fact that over 20% of the *pro se* defendants were ordered to undergo a competency evaluation certainly is significant and probably should give trial judges pause when evaluating whether the waiver of counsel is knowing and voluntary. The point remains, however, that the vast majority of *pro se* defendants are not exhibiting signs of mental illness, and they therefore are choosing to represent themselves for reasons unrelated to mental illness.

[112] Faretta v. California, 422 U.S. 806, 834 (1975).

[113] To put it another way, if a defendant is satisfied with the quality of representation and believes that lawyers can represent his best interests, he is unlikely to invoke the right to self-representation.

is the empirical evidence supporting these two theories, followed by potential explanations suggested by the data for that dissatisfaction with counsel.

a. The Empirical Evidence of Dissatisfaction with Counsel

More than half of the *pro se* defendants in the federal docketing database who had counsel at the initial stage of their case made a request, *prior to* invoking their right to self-representation, that the judge appoint new counsel.[114] This statistic bears repeating: over one out of every two *pro se* defendants in the federal docketing database who were represented by counsel initially had endured a sufficiently negative experience with counsel that they felt obliged to ask the court to appoint a new attorney. While there is no data regarding the overall rate at which federal felony defendants request new counsel, the fact that nearly half of the *pro se* defendants expressed dissatisfaction with counsel before they chose to represent themselves is significant.[115]

Moreover, in 29% of the cases in which such a request was made (or for roughly 16% of the *pro se* defendants who had counsel at some point), the request for new counsel was denied. Thus, 16% of the *pro* se defendants who had contact with a lawyer during their case made the decision to proceed *pro se* while they were being represented by a person in whom they had publicly expressed dissatisfaction.

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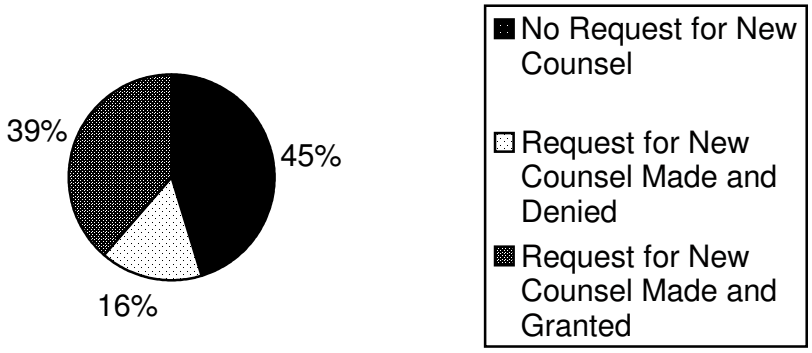
[114] Twenty-two of the defendants in this database invoked the right to self-representation at their initial appearances and therefore never had a lawyer with whom to be dissatisfied. Of the remaining 186 defendants, a total of 102 (or 55%) requested new counsel prior to invoking the right to self-representation.

[115] The federal court database, which contains data on represented defendants in federal court, does not record requests for new counsel, so there is no basis for comparison.

Chart 2: Requests for New Counsel



Further evidence of dissatisfaction with counsel as a reason for self-representation comes from the fact that it appears that at least some defendants invoke the right to self-representation but then later agree to be represented (and to waive the right to self-representation) when new counsel is appointed. Although the federal docketing database includes only those defendants who represented themselves at the dispositional stage of the case (at the time of trial verdict, guilty plea, or dismissal), there are a number of cases not included within this database in which the appointment of new counsel apparently led the defendant to withdraw his request to proceed *pro se*. In these cases, the docket sheets show the defendant moving for the appointment of new counsel, and the court denying that motion. The docket sheet then reflects the defendant invoking the right to self-representation. That invocation is followed by the judge reconsidering the earlier denial of the motion for new counsel and appointing new counsel to the defendant conditioned upon the defendant's waiver of the right to self-representation.[116] The defendant waives his right to self-representation, receives new counsel, and the case continues along the normal track of cases. These defendants are not included in the federal docketing database because they have counsel at the time of case disposition, but in the searches that led to the

[116] There are strong reasons for judges to prefer that the defendant proceed with counsel, particularly in federal court. First, a *pro se* defendant is statistically much more likely to go to trial than a represented defendant, and for reasons of efficiency, most trial judges prefer guilty pleas to trials. Second, trial with a *pro se* defendant requires at least some accommodation of courtroom procedures. For instance, if a judge ordinarily has counsel approach for bench conferences, does the *pro se* defendant approach the bench? And if the defendant is incarcerated, how closely can the courtroom marshals escort the defendant without impinging the defendant's right to a fair trial before the jury? For these reasons, judges in felony cases often will try to dissuade defendants from representing themselves.

creation of this database, this pattern of the right to self-representation leading to the appointment of new counsel occurred with some frequency.[117] In these cases, there appears to be a causal link between dissatisfaction with counsel and the decision to proceed *pro se*, since the defendant reversed course when the court appointed new counsel.

The data also suggest that some defendants choose self-representation not because of concerns about a particular lawyer but rather because of distrust of lawyers generally. More than 10% of the *pro se* defendants in the federal docketing database invoked the right to self-representation at their first appearance in court, before counsel was appointed or entered an appearance.[118] Since those defendants had no particular lawyer with whom to be dissatisfied, their decisions to self-represent appear to be motivated by a desire to speak for themselves, rather than trusting lawyers in that role.[119]

b. Furthering the Defendant's Autonomy Interests

For both the *pro se* defendants who appear to distrust lawyers generally and the *pro se* defendants who appear concerned about the quality of their representation, the primary motivation for self-representation seems to be dissatisfaction or distrust of lawyers. The question is whether there is any legitimate basis for that dissatisfaction.[120] In other words, is any constitutional interest served by guaranteeing these sets of defendants a right to self-representation? Both the data collected for this Article and other existing evidence on the quality of indigent representation demonstrate that the concerns of *pro* se defendants are legitimate and that the right to self-representation therefore protects a valuable constitutional interest of the defendant.

The first interest protected by the right to self-representation could be termed the right of self-preservation, and the data confirm that at least some *pro se* defendants are acting out of self-preservation. This need for a right to self-

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[117] To use one search as an example, the search term "Faretta" was entered into the Westlaw federal docket sheet database along with a criminal case limitation. Of the cases containing those terms that were not included within other searches, five are included within the federal felony *pro se* defendant database. In that search, at least seven of the defendants invoked the right to self-representation only to waive the right once new counsel was appointed in the pattern described above.

[118] Twenty-two defendants in the federal docketing database invoked their right to self-representation prior to any representation by a lawyer.

[119] For the defendants who requested and received new counsel, *see supra* at XX, this same explanation may hold true.

[120] This question is important because if there is not a *legitimate* reason for self-representing, perhaps *Faretta* does not protect any interest of the defendant.

representation results from the confluence of two facts: (1) the lack of competent and zealous representation for every defendant, and (2) the incredibly low standard for effective assistance of counsel (or the high standard for proving *ineffectiveness*). Each of these two facts is discussed in more detail below, but before turning to that, a simple example demonstrates the point.

The government charges an indigent criminal defendant with a felony punishable by ten years in prison, and a judge orders the defendant held at the jail pending trial. The judge, upon hearing that the defendant has only minimal income and no assets, appoints a lawyer and sets trial for two months later. The defendant is innocent and knows that he wants to go to trial. But as the two months before trial pass, the defendant cannot reach his lawyer. Every time the defendant calls, the lawyer is out of the office, assisting other clients, and the lawyer does not come to see him at the jail. As the trial approaches, the defendant becomes more frantic, and still he gets no visit from his lawyer.

In the meantime, the defendant talks to other inmates (held at the jail with him) who know of this lawyer. They tell him that the lawyer rarely, if ever, goes to trial, and that the lawyer is not prepared when he does. They tell him stories of the lawyer sleeping through portions of other trials or showing up to trial intoxicated. The other inmates tell the defendant he has four options: (1) plead guilty, (2) ask the judge to appoint another lawyer, (3) hire an attorney, or (4) represent himself. When the lawyer finally comes to visit, he stays only for fifteen minutes. And in those fifteen minutes, the defendant realizes that his life (or at the very least the next ten years of it) is in the hands of a lawyer who knows nothing about either him or his case.

The defendant does not want to plead guilty because he is innocent, and he has no money to hire an attorney, so the next time he appears in court, he asks the judge to appoint another attorney. [121] The judge refuses to do so.[122] At that point, the indigent defendant can continue to trial with a lawyer who is neither skilled nor knowledgeable about the defendant's case, or represent himself at trial. While the defendant may doubt his own ability to present the case to a jury, at the very

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[121] Arguing that criminal defendants are better-served by being represented than by proceeding *pro se*, one scholar asserts that "when F. Lee Bailey, one of the nation's most accomplished defense attorneys, was charged in 1982 with driving under the influence, he hired another attorney to represent him. F. Lee Bailey was no fool." Decker, *supra* note 5, at 488 (footnote omitted). This argument misses the point that indigent defendants cannot afford the type of attorney that F. Lee Bailey could afford.

[122] An indigent defendant has no right to counsel of his choice. *See* United States v. Iles, 906 F.2d 1122, 1130 (6th Cir. 1990) (holding that "[a]n indigent defendant has no right to have a particular attorney represent him"); Morris v. Slappy, 461 U.S. 1 (1983) (same). The trial court therefore has almost complete discretion regarding whether to grant a request for new counsel.

least he knows the facts of his case and his defense. Because of that, the defendant may well (and legitimately) choose self-representation. Without the right to self-representation, however, the defendant would have no choice but to sit through his trial mute as the lawyer fumbled through the opening statement (or waived it), cross-examined (or failed to cross-examine) the witnesses, failed to call witnesses on his behalf, and failed to argue his defense in his closing to the jury.[123]

The evidence demonstrates that this hypothetical may be reality for at least some defendants who choose to represent themselves. As an initial matter, the data establish that *pro* se defendants in the federal docketing database are more likely to have court-appointed counsel than federal felony defendants overall. In the federal system, court-appointed counsel—either public defenders or counsel appointed under the Criminal Justice Act—represent approximately 66% of felony criminal defendants.[124] By contrast, in the cases included within the federal docketing database, of those *pro se* defendants who were represented by counsel prior to invoking the right to self-representation, roughly 87% were represented by court-appointed counsel, either public defender or other Criminal Justice Act appointed counsel.[125] Because indigent defendants with court-appointed counsel are the very people who are at risk of being confronted with choosing between inept counsel and self-representation, the fact that *pro* se defendants are more likely to be indigent tends to support the argument that defendants choose to represent themselves because of concerns about the quality of counsel.

The trial rates of *pro se* defendants also suggest dissatisfaction with the quality of representation. Concerns about the quality of counsel are most acute for defendants who go to trial because the inadequacies of counsel become most

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[123] The right to self-representation gives the defendant in such a situation one other measure of control. The defendant's request to proceed *pro se* may well cause the judge to rethink the denial of the defendant's motion for new counsel. Assuming that the newly appointed counsel is more zealous in his representation, the defendant likely would waive the right to self-representation. The key point, however, is that it is the right to self-representation that gives the defendant some leverage in this situation. As discussed *supra* at XX, this pattern appears to be occurring in federal court.

[124] Caroline Wolf Harlow, *Bureau of Justice Statistics Special Report: Defense Counsel in Criminal Cases*, U.S. DEP'T. OF JUST. BUREAU OF JUST. STAT. (2000), http://www.ojp.usdoj.gov/bjs (follow "Publications" hyperlink; then follow "Defense Counsel in Criminal Cases" hyperlink).

[125] Twenty-two of the defendants (roughly 11%) represented themselves from the initial proceeding and never had counsel so it is not clear whether they would have been represented by appointed counsel. Out of the 186 remaining defendants, 71 had appointed public defenders, 91 had court-appointed counsel other than public defenders, and 24 retained their own attorneys.

apparent during the lead-up to trial. While lawyers certainly play a large role in negotiating pleas, the process of negotiating a plea in general requires less time and effort on the part of the lawyer than going to trial. Defendants also perceive the stakes of pleas and trials differently. In a plea negotiation, the defendant recognizes that both sides will have to compromise at least to some degree. Trial, by contrast, usually is an all or nothing proposition that depends, at least in part, on the skill of the person presenting the case. For all of these reasons, counsel's lack of skill usually will be more evident to those choosing to go to trial than to those pleading guilty. From that perspective, it is significant that close to 65% of the defendants in the federal docketing database went to trial, either before a judge or jury, a rate over ten times greater than the rate at which represented federal felony defendants went to trial in 1998.[126] This evidence further supports the theory that at least some of those defendants chose self-representation because of concerns about the quality of counsel.

The defendants who invoke the right to self-representation and waive the right to counsel only to later accept representation when the judge appoints new counsel provide additional evidence of concerns about the quality of counsel.[127] In these cases, it is clear that the defendant is dissatisfied with counsel—he requests that the court appoint new counsel. The fact that the motion to proceed *pro se* follows the denial of the request for new counsel indicates that the denial of the request for new counsel leads to the self-representation. Finally, the fact that the defendant accepts new counsel (and waives the right to self-representation) demonstrates that the issue was not with lawyers generally but instead with the specific attorney appointed to represent the defendant.

There also is ample evidence that defendants have a basis for being concerned about counsel—the quality of court-appointed counsel is breathtakingly low in many jurisdictions. While most jurisdictions now provide a lawyer to indigent defendants, many do not provide truly *effective* counsel. In 1963, the Court held that a defendant has a constitutional right to the assistance of counsel, and the state has the obligation to provide counsel to indigent defendants.[128] But what constitutes assistance? The Court has held that the state must provide more than just a person with a law degree–at the very least, the defendant is entitled to the *effective assistance* of counsel.[129] At the same time, the Court has set the constitutional standard for effective assistance of counsel very low, or, to state it more accurately, it has set the standard for proving *in*effective assistance of

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126 *See supra* at XX.

127 *See supra* at XX.

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

129 *See* Strickland v. Washington, 466 U.S. 668 (1984) (noting that defendant is entitled to the effective assistance of counsel, not just the presence of counsel).

counsel very high.[130] Thus, a lawyer who slept during portions of the trial was not *per se* ineffective,[131] and a lawyer who drank heavily throughout trial and was arrested for driving under the influence during jury selection was not *per se* ineffective.[132] Nor does inexperience qualify as ineffectiveness. The Court has held that attorneys with little to no trial experience still can provide constitutionally sufficient assistance of counsel even in serious felony or death penalty cases.[133]

Given the overwhelming number of cases in which the state and federal government must provide counsel and given the expense of appointing counsel in all of those cases, most jurisdictions have struggled to provide counsel that meets even that very minimal constitutional standard. The vast majority of defendants in both state and federal courts are indigent and represented by court-appointed counsel: In 1990-2000, court-appointed counsel represented 80% of state felony defendants at case termination in the 75 largest urban counties.[134] Similarly, in

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130 In order to establish a Sixth Amendment violation, a defendant must establish either (1) that there was an actual or constructive deprivation of counsel or (2) that counsel's representation fell below an objective standard of reasonableness and that counsel's errors resulted in prejudice. *Id.* Because proving prejudice under the second prong is so difficult, defendants ordinarily try to cast ineffective assistance claims as constructive denials of the right to counsel so that they do not have to prove prejudice.

131 *See* United States v. Petersen, 777 F.2d 482, 484 (9th Cir. 1985) (concluding that representation by an attorney who slept through "a substantial portion of the trial" was not *per se* denial of counsel).

132 *See* People v. Garrison, 765 P.2d 419, 441 (Cal. 1989) (finding attorney who drank heavily everyday, was arrested during jury selection for driving under the influence with a blood alcohol level of .27 and who died of alcoholism shortly after trial was not per se deficient and that a "review of the facts indicate that [attorney] did a fine job in the case."); Fowler v. Parratt, 682 F2d 746, 750 (8th Cir. 1982) (holding that attorney disbarred because of alcoholism and blackouts while representing clients was not ineffective because attorney "testified that his alcoholism did not affect his representation of [the client]"). *See also* Burnett v. Collins, 982 F. 2d 922, 930 (5th Cir. 1993).

133 *See* United States v. Cronic, 466 U.S. 648 (1984) (holding that fact that defense attorney was inexperienced in criminal matters and case was complex was not sufficient to establish ineffective assistance absent showing of actual ineffectiveness). *See also* Stephen B. Bright, *Counsel of the Poor: The Death Sentence Not For the Worst Crime But For the Worst Lawyer,* 103 YALE L.J. 1835 (1994) (discussing the life and death implications of the low standard for effective assistance of counsel in death penalty cases).

134 Harlow, *supra* note 124, at 1. In 2002, a little over one million adults were convicted of felonies in state courts. *See* Jodi M. Brown & Patrick Langan, *Bureau of Justice Statistics Bulletin: Felony Sentences in the United States*, 2002, U.S. DEP'T. OF JUST. BUREAU OF JUST. STAT. (2004). http://www.ojp.usdoj.gov/bjs (follow "Publications" hyperlink; then follow "Felony Sentences in the United States, 2002" hyperlink). Leaving aside that this figure does not account for defendants whose cases were dismissed or who were acquitted, states had to appoint counsel for at least 800,000 felony defendants in that one year alone.

1998, court-appointed counsel represented 66% of federal felony defendants at case termination.[135] The sheer volume of defendants requiring appointed counsel has overwhelmed many jurisdictions that lack systems and resources to ensure adequate representation.

The deficiencies in the quality of court-appointed counsel result both from a lack of adequate funding and from problems in the structure used to provide counsel to indigent defendants. The challenge of public defender systems has been, and continues to be, extremely limited resources. Attorneys are saddled with crushing caseloads, and are unable adequately to represent their clients because of the sheer volume of cases for which they are responsible.[136] Indeed, in some jurisdictions, individual attorney case loads of several hundred serious felony defendants per year are standard.[137] In New Orleans, a court declared that because of high caseloads and inadequate resources, the New Orleans Indigent Defender Program was unable to provide constitutionally effective assistance of counsel.[138] Moreover, because public defender positions generally pay well below the salaries of other attorneys, many public defenders come straight from law school and have no legal experience.

In jurisdictions where private lawyers are appointed on a case-by-case basis to represent indigent defendants and are compensated for the representation, funding problems also lead to inadequate representation. Attorneys usually are compensated at an hourly rate well below that commanded by most attorneys. The result has been that those who accept appointment tend to be attorneys who lack the experience to develop their own practices and instead rely on the court-appointed cases. To cure that problem, some counties have required that all attorneys practicing in the jurisdiction accept a certain number of court-appointed

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135 Harlow, *supra* note 124, at 1.

136 *See*, *e.g.*, Charles J. Ogletree, *Toward a More Effective Right to Assistance of Counsel: An Essay on the New Public Defender for the 21st Century*, 58 LAW & CONTEMP. PROBS. 81, 85-86 (arguing that lack of institutional support, including "unconscionable caseloads," has led to burnout of public defenders and ineffective assistance of counsel). A select few public defender offices, like the District of Columbia's Public Defender Service, have caps on the number of cases each public defender can handle, and any cases beyond that cap are assigned to private attorneys. Such a system, however, is very rare. In the majority of jurisdictions, public defenders regularly maintain case loads of hundreds of cases.

137 *See, e.g.*, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice* 17-18, (2004), http://www.abanet.org/legalservices/sclaid/home.html (follow "A Report on the American Bar Association's Hearings on the Right to Counsel in Criminal Proceedings" hyperlink). ("'Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases.'") (quoting testimony of Jonathan Gradess, Executive Director, New York State Defenders Association (Albany, New York)).

138 *See* State v. Peart, 621 So.2d 780 (La. 1993).

cases. This, of course, compounds the problem of inexperienced attorneys being appointed to represent criminal defendants. In one county in Georgia, all practicing lawyers were required to accept court-appointed cases, including those lawyers who had absolutely no criminal experience whatsoever. An attorney who has spent his entire career drafting wills, although he may be a very good estate lawyer, probably knows very little about representing an indigent defendant charged with murder and, if required to represent that defendant for court-appointed fees, may well demonstrate that lack of experience.[139]

Further compounding the problem, in jurisdictions where compensation for court-appointed cases is high enough to make appointments attractive (or profitable) to lawyers, the nature of the appointment process may create incentives for court-appointed attorneys to curry favor with judges. In jurisdictions where appointment comes at the discretion of individual judges, attorneys serve at the pleasure of judges and understand that future appointments–and the potential fiscal health of their practice–may depend on a quick and easy resolution of the case.[140] Such a system gives lawyers an incentive to urge clients to plead guilty rather than going to trial regardless of the strength of the case.

Inadequate representation also has resulted from the use of contract systems.[141] In such a system, a jurisdiction awards a contract to a lawyer or group of lawyers to provide representation for all indigent defendants for a specified period of time. There are different types of contracts, but most typically, contracts are awarded on a flat-fee basis: Attorneys awarded a contract are given one flat fee for handling all of the indigent defense cases prosecuted in that year, regardless of the number of cases, the method of disposition of those cases, or the complexity of the cases. This system obviously creates enormous incentives for those awarded the contract to ensure that they spend as little time on each case as possible–or, to put it another way, to ensure that as many of their clients as possible plead guilty. The result in many jurisdictions is a policy of "meet 'em and plead 'em."[142] In hearings before the ABA Standing Committee on Legal Aid

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139 *Gideon's Broken Promise*, *supra* note 137, at 15-16.

140 In jurisdictions that have public defender offices, private attorneys are appointed for those indigent defendants that the public defender office cannot represent because of conflicts. In at least some of those public defender jurisdictions, the public defender office will handle the process of ensuring that private counsel is appointed if needed. In those jurisdictions, individual judges are less likely to control the appointment process.

141 *See* Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense, Part I, THE SPANGENBERG GROUP 34-40 (2002) http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc,.

142 *Gideon's Broken Promise*, *supra* note 137. In one county in Georgia, for instance, a lawyer had represented over 400 indigent defendants and had never taken a case to trial. See Bill Rankin, *Indigent Defense Rates F*, ATLANTA J. CONST., Dec. 12, 2002, at A1.

and Indigent Defense, witnesses recounted numerous stories of defendants entering guilty pleas immediately after their first meetings with their attorneys: One witness reported that "a study of all felony cases over a five-year period in rural Quitman County, Mississippi revealed that 42% of the indigent defense cases were resolved by guilty plea on the day of arraignment, which was the first day the part-time contract defender met the client."[143] The lack of any investigation or effort to determine the merits of these cases and the concomitant pressure on the client to accept a guilty plea has led many indigent defendants to believe that court-appointed attorneys do not serve their interests. And in spite of the very real concerns about the quality of representation provided by contract attorneys, a contract system still is in place in many jurisdictions.[144]

The problem of inadequate indigent representation is not confined to state courts–the same problems of underfunded and overworked attorneys exist in federal courts.[145] Indeed, the problem of excessively high case loads at the federal level may be exacerbated by the fact that federal cases generally are more complicated to litigate and lawyers are required to expend more resources and time in order properly to represent federal defendants. [146]

The optimism of the Supreme Court in *Martinez* notwithstanding, it is apparent that the criminal justice system does not assure "the availability of *competent* counsel for every indigent defendant."[147] Because the evidence suggests that at least some of the defendants who choose to proceed *pro se* do so

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143 *Gideon's Broken Promise*, *supra* note 137, at 16.

144 Further compounding the problem, contracts often are awarded to the lowest bidders or the only attorneys willing to take the job and appointments often are made to the newest attorneys or those least experienced in criminal defense. *See Status of Indigent Defense in Georgia: A Study for the Chief Justice's Commission on Indigent Defense, Part I,* THE SPANGENBERG GROUP 34-40 (2002), http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc (detailing several instances of contracts awarded without bid, including awards by the judge asking around for who "would be willing to do the work," or to the "youngest attorney in the county, because no one else wanted them," and examples of the poor quality of representation, as the contract attorney who assumed his clients were guilty). *See also* Bright, *supra* note 133, at 1845-47 (detailing instances of attorney inexperience in capital cases).

145 Richard Klein, Symposium, *Gideon–A Generation Later: The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1438 (1999).

146 Most federal district courts maintain some form of public defenders office, rather than entrusting all indigent representation to private court-appointed attorneys. Most jurisdictions, however, still use attorneys appointed under the Criminal Justice Act, 18 U.S.C. § 3006, for cases in which the public defender's office has a conflict or is unable to represent the defendant. Because the reimbursement rates for attorneys appointed under the Criminal Justice Act (commonly known as CJA attorneys) continues to be relatively low, the same concerns regarding case loads of public defenders also often hold true for CJA attorneys.

147 528 U.S. at 158 (emphasis added).

because of legitimate concerns about the quality of representation being provided to them, it follows that the right to self-representation in practice protects a valuable interest of the defendant–the interest of the defendant in retaining some control in order to assure fairness in the process.

The right to self-representation serves one other autonomy interest—the defendant's interest in presenting his own defense rather than having it presented by an agent of the state.[148] As discussed supra at XX, at least some of the defendants in the federal docketing database opted for self-representation before any counsel had represented them, suggesting that they did not want any lawyer (regardless of the quality of that lawyer) to speak for them. The data suggest that at least some of these defendants may have had ideological reasons for representing themselves.[149] In particular, defendants in the federal docketing database were much more likely to be charged with certain offenses that lend themselves to an ideological defense than federal felony defendants overall. For instance, as set forth in Table 3 below, when looking at the most serious charges of the cases included in the federal docketing sheet database, the *pro se* defendants in the docketing database were *thirteen times* more likely to be charged with tax offenses as their most serious charge than federal felony defendants overall. A full 9% of the *pro se* defendants in the federal docketing database were charged with tax-related offenses as their most serious charges.[150] In the federal system overall, by contrast, in fiscal year 2002, only .7% of the defendants were charged with tax law violations as their most serious charge.[151] Even a cursory look at the docket sheets in those cases indicates that in at least some of those cases, defendants raised ideological defenses, most notably that the tax code was unconstitutional or illegitimate.

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[148] Justice Scalia stated the point powerfully: "I have no doubt that the Framers of our Constitution, who were suspicious enough of governmental power–including judicial power–that they insisted upon a citizen's right to be judged by an independent jury of private citizens, would not have found acceptable the compulsory assignment of counsel *by the government* to plead a criminal defendant's case." Martinez v. California, 528 U.S. 152, 165 (2000) (Scalia, J., concurring).

[149] *See* Mossman & Dunseith, *supra* note 47 at 408-419 (identifying ideological considerations as a reason that *pro se* defendants choose self-representation).

[150] That figure includes four defendants whose lead charge was conspiracy. Because the target of the alleged conspiracy in those cases was tax fraud, I included those in the tax category. I did not, however, include cases in which there was a substantively different lead charge (such as drug trafficking or fraud) and tax evasion also was charged.

[151] *Bureau of Justice Statistics: Compendium of Federal Justice Statistics, 2000* at 55, U.S. DEP'T. OF JUST. BUREAU OF JUST. STAT. (2004), http://www.ojp.usdoj.gov/bjs (follow "Publications" hyperlink; then follow "Compendium of Federal Justice Statistics, 2002" hyperlink).

Table 3: Most Serious Lead Charge

	Pro Se Cases[152]	Represented Felony Defendants FY 2002[153]
Assaults	2.3% (4/177)	.5%
Drug Offenses	15.8% (28/177)	41.7%
Escape	1.7% (3/177)	.7%
Fraudulent Property Offenses	31.6% (56/177)	17.5%
Other Property Offenses	1.1% (2/177)	3.5%
Immigration Offenses	6.2% (11/177)	17.1%
Public Order-Racketeering & Extortion	8.5% (15/177)	1.3%
Public Order-Non-Violent Sex Offenses	1.7% (3/177)	.8%
Public Order-Failure to Appear	.6% (1/177)	--
Public Order-Perjury, Contempt, & Intimidation	1.7% (3/177)	.5%
Public Order-Tax Offenses	9.0% (16/177)	.7%
Public Order-Other Non-Regulatory	1.1% (2/177)	.4%
Public Order-Other Regulatory	1.1% (2/177)	.8%
Threats on the President	1.1% (2/177)	.04%
Robbery	4.5% (8/177)	2.3%
Weapons	11.3% (20/177)	9.3%

As another example, two out of the 177 *pro se* cases in the federal docketing database (roughly 1%) charged the defendants with threats on the President. Although the sample is relatively small, this still represents a rate twenty-five times higher than the .04% of federal defendants charged with threats on the President in 2000.[154] Again, threats on the President is a charge that may well lead a defendant to assert an ideological or political defense.[155]

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[152] Twelve of the cases included in the federal docketing database included more than one *pro se* defendant (the number of *pro se* co-defendants in those cases ranged from two to ten). In order to prevent multiple co-defendants in the same case from skewing the data on the type of case, for purposes of Table 3, each entry represents only one *case*, rather than counting each *defendant* separately. Therefore, there are only 177 entries included in this Table.

[153] The data in this column reflects the most serious lead charges for defendants in criminal cases terminated in fiscal year 2002. *See* Compendium of Federal Justice Statistics, 2002 at 58. I eliminated some categories of charges because none of the *pro* se cases involved those charges, and the percentages therefore do not total 100%.

[154] *Id*.

[155] Both drug offenses and immigration offenses were underrepresented among *pro se* defendants, and both fraud and extortion offenses were overrepresented, but no category of offenses was as disproportionate as tax offenses and threats on the President.

In cases in which a defendant wants to raise an ideological defense, counsel may present (at least in the defendant's view) an obstacle. For instance, some tax protesters believe that it is unconstitutional for the United States to collect income tax and to require residents to file tax returns. Those defendants may want to assert the unconstitutionality of the Internal Revenue Code as a defense.[156] A lawyer appointed to represent that defendant, however, may well inform the client that the Internal Revenue Code repeatedly has been held constitutional and that this is not a valid defense. Even if the defendant knows that he will not succeed at trial, he may still want to raise the defense to make the political point that he believes the prosecution to be illegitimate. The defendant may well doubt that counsel will zealously present the defense (particularly given counsel's assertion that the position has no merit). Lacking faith in counsel's representation, the defendant may well choose self-representation. Thus, for defendants choosing to proceed *pro se* for ideological reasons, the right to self-representation protects similar autonomy interests of the defendant.

The court-appointed status of counsel exacerbates the problem for defendants seeking to raise ideological defenses. Indeed, this conflict of interest is inherent in *Gideon*'s holding that the state must provide representation for indigent defendants.[157] Although the mechanisms for funding indigent defense systems vary from state to state,[158] and although counsel in some jurisdictions are more insulated from the appointing body, the fact remains that the same state that is prosecuting the defendant ultimately pays for, and arguably in that way controls, the defendant's lawyer. For defendants who want to raise an ideological defense, concerns about the state-appointed nature of counsel may well motivate a decision to forego representation altogether.

The divide between indigent defendants and court-appointed counsel recently has deepened because many defendants, particularly in the federal system, become government witnesses in order to mitigate their sentences.[159] Court-appointed attorneys often are perceived as a part of the system of government informants, and defendants sometimes believe that court-appointed attorneys are

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156 *See*, *e.g.*, Cheek v. United States, 498 U.S. 192 (1991). Cheek was an American Airlines pilot who was charged with tax fraud for failing to pay income taxes over the course of ten years. He had been a member of an organization that believed that the Internal Revenue Code was unconstitutional and violated the Sixteenth Amendment to the Constitution. At trial, he claimed both that the code was unconstitutional and that he did not "willfully" fail to pay taxes because he in fact believed that the money he had received was not income. Cheek represented himself at trial and was convicted.

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

158 *See supra* at XX.

159 *See*, *e.g.*, Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645 (2004).

simply pawns of the system. And in fact, that perception to a certain extent is true. Criminal defense attorneys representing government witnesses have an interest in seeing that the state obtains a conviction in any case in which their client is cooperating.[160] A system in which criminal defense attorneys become agents of the state seeking to prosecute others blurs the line between prosecutors and defense attorneys and may cloud the judgment of the defense attorney in a way that is unacceptable to the defendant.[161]

In short, the concerns that appear to motivate at least some defendants to invoke the right to self-representation–concerns about the quality of court-appointed representation and concerns about the role of state-appointed attorneys–both are legitimate. Although ideally the state should be providing competent counsel to every indigent defendant, that simply is not happening. And even where the quality of counsel is adequate, there are legitimate reasons for a defendant to be concerned about the nature of the attorneys role in the system. Thus, the reasons initially identified in Faretta for recognizing a right to self-representation still exist today, and in fact are causing defendants to proceed *pro se*.

III. Preventing Abuse of the Right to Self-Representation

In short, the existing empirical data suggest that insofar as *Faretta* was seeking to protect the rights of criminal defendants, it was rightly decided. The data also, however, point to several areas in which the system could be improved. First, the data suggest that at least some defendants are being forced to represent themselves, rather than making a free choice to do so. For that reason, there needs to be further study to ensure that those who are representing themselves at the very least have been offered counsel. Second, although the majority of those choosing to proceed *pro se* in felony cases are not mentally ill, at least some of them appear to be. Given that fact, trial courts should have some mechanism in place to ensure that those defendants who are mentally ill but competent in fact are knowingly and intelligently waiving their right to counsel. And to the extent that the tools are not currently there for the judiciary to prevent the evisceration of the fair trial rights of mentally ill defendants, legislatures need to act on this front.

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160 *Id*.

161 For instance, if a defense attorney represents one defendant who is cooperating in an ongoing investigation with a certain police officer, is that attorney then precluded from representing another defendant who was arrested by that same police officer as a part of a completely separate investigation? There are no clear answers to that question, but it is an ongoing problem, particularly in the federal system where so many defendants do enter into plea agreements requiring cooperation with the government.

Finally, the role of standby counsel to assist defendants needs more in-depth study. Unfortunately, the data simply do not exist to determine whether *pro se* defendants are being appointed standby counsel, but to the extent that such counsel is being appointed, clearer standards and more defined roles will ensure the defendant's right to a fair trial is protected.

A. Self Selection and the Argument Against Coerced Choice

Given that *pro se* felony defendants in state court appear to have better outcomes than represented defendants, the looming question is not whether *Faretta* was rightly decided but instead whether perhaps *Gideon v. Wainwright* was wrongly decided. Handed down in 1963, *Gideon* held that criminal defendants have a constitutional Sixth Amendment right to the assistance of counsel, and it is the obligation of the state to provide counsel if a defendant cannot afford one.[162] At least part of the reasoning in *Gideon* centered on the importance of lawyers to the process. Without a lawyer, the Court reasoned, a defendant would be deprived of an effective defense.[163] If *pro se* defendants do just as well without counsel, does it follow that *Gideon* overrated the importance of counsel? I think not.

The primary reason that *pro se* felony defendants do not appear to have had disastrous results is that so few felony defendants choose to represent themselves.[164] Overall, less than one-half of one percent (between .3-.5%) of felony defendants in the state and federal databases represented themselves at case termination.[165] Those who choose to represent themselves therefore are a

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[162] Gideon v. Wainwright, 372 U.S. 335 (1963).

[163] *Id.*

[164] There is one other explanation worth mentioning. The success rate for *pro se* defendants may be a product of the fact that the standard for complete success (*i.e.* complete acquittal or dismissal) is so low for felony criminal defendants as a whole that *pro se* defendants can easily meet that mark. In other words, so many represented defendants plead guilty, and of the few that go to trial, so few are acquitted on all charges that it perhaps is not surprising that *pro se* defendants appear to have relatively similar complete success rates (or better rates in the case of state *pro se* defendants) than represented defendants. Because the complete success rate is so low, the more important measure of success in a criminal case may be the degree of success that a defendant obtains throughout the course of the plea negotiation process and at sentencing. If represented defendants do significantly better at sentencing (*i.e.* receive more lenient sentences) then perhaps *pro se* defendants are harmed by their decision to proceed without counsel. Unfortunately, the data on this point is unclear.

[165] Based on the available data, it appears that only between .3%-.5% of defendants charged with felonies in either state or federal courts represent themselves at the time of case termination. The database containing data on defendants charged in federal court includes information on the type of counsel at the time of case termination. Reporting rates for type of counsel vary from

self-selected group who have chosen to represent themselves for a reason–presumably because they believe that it will serve their interest to do so. That this small, self-selected group who choose self-representation has met with good results does not mean that *all* felony defendants, including those who reject self-representation, would fare as well if forced to navigate the criminal justice system without the aid of counsel. Thus, the right to counsel remains as important as when the Court decided *Gideon*.

The empirical data, however, demonstrate one disturbing fact. It provides evidence that *pro se* defendants in misdemeanor cases may not be voluntarily choosing to represent themselves, and instead are representing themselves because counsel is not being provided. Defendants charged with misdemeanors are overwhelmingly more likely to represent themselves in federal court than felony defendants.[166] While the vast majority of defendants in federal court are charged with at least one felony (82-87% of the total number of defendants charged in federal court) virtually all of the *pro se* defendants in the federal court database were not charged with any felony.[167] Approximately 30% of defendants charged with misdemeanors in federal court represented themselves at case termination, while only between .3-.5% of felony defendants in federal court represented themselves. Thus, criminal defendants charged with misdemeanors (excluding those charged with petty offenses) were *100 times* more likely to waive their constitutional right to counsel than those charged with felonies.

Most of the misdemeanor defendants probably had a right to court-appointed counsel. Defendants have a constitutional right to counsel in any criminal prosecution, "whether classified as petty, misdemeanor, or felony . . . that actually leads to imprisonment even for a brief period."[168] Moreover, a suspended sentence that may "end up in the actual deprivation of a person's liberty" may not

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jurisdiction to jurisdiction, but overall, the type of counsel at case termination was reported in approximately 61% of all cases and in approximately 60% of cases in which the defendant was charged with a felony. In no year did the percentage of felony defendants representing themselves exceed .5%.

[166] The state court database unfortunately does not provide any information on misdemeanor cases, so the misdemeanor data is limited to federal court. If defendants are representing themselves at such extraordinarily high rates in federal court, however, it is likely that the same phenomenon is occurring in state courts. Moreover, there is a great deal of anecdotal evidence that misdemeanor defendants are not being provided with counsel. *See Gideon's Broken Promise*, *supra* note 137, at 23-24 (noting the widespread practice of failing to inform state court misdemeanor defendants of their right to counsel).

[167] From 1998-2003, between 96-98% of the *pro se* cases in the federal court database did not involve a felony.

[168] Argersinger v. Hamlin, 407 U.S.25, 33-37 (1972).

be imposed unless the defendant is afforded counsel.[169] Thus, while the federal authorities are not required to appoint counsel for defendants charged with offenses for which imprisonment is a *potential* penalty, they are required to appoint counsel before the court can sentence the defendant either to imprisonment or to a suspended sentence.[170] In essence, then, other than those criminal cases in which the only sentence imposed is a fine or a term of probation enforceable only through a contempt proceeding, the government must appoint counsel to all indigent defendants, but it nonetheless appears that the majority was not represented.

One explanation for the high rate of self-representation at the misdemeanor level may be the method of determining indigency. There are no federal standards by which federal courts determine whether a defendant is sufficiently indigent to require the appointment of counsel. Instead, in most jurisdictions, the finding that a defendant is indigent is made on an *ad hoc* basis by a magistrate judge.[171] Because retaining counsel for a misdemeanor case generally is significantly cheaper than retaining counsel for a felony case, it would make sense for the magistrate judges to factor in the cost of hiring a lawyer when determining whether the defendant qualifies for the appointment of counsel. Moreover, in determining qualification for appointment of counsel, the magistrate looks only at whether the defendant can afford any counsel, not whether he can afford a good attorney. Thus, misdemeanor defendants who would have qualified for the appointment of counsel had they been charged with felonies but who do not qualify for misdemeanor appointment of counsel may conclude that they lack sufficient resources to retain a good lawyer. Because they likely are at the margins of being able to afford an attorney in any event, those defendants may well choose to represent themselves rather than using all of their disposable income to retain an attorney, particularly an attorney they view as mediocre.[172]

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169 See Alabama v. Shelton, 535 U.S. 654 (2002).

170 *Id.* Unless a probationary sentence stands alone, enforced only by contempt rather than by the imposition of any imprisonment justified by the original conviction, such a sentence cannot be imposed upon a defendant who was not afforded the right to counsel. *Id*. at 672-74.

171 S*ee* Rangita de Silva-de Alwis, *Determination of Eligibility for Public Defense,* THE SPANGENBERG GROUP (May 2002) (presenting the ABA standard and those of 17 states and finding that even those jurisdictions with standards give discretion to the court or the public defender office to allow exceptions), http://www.abanet.org/legalservices/downloads /sclaid/indigentdefense/determinationofeligibility.pdf; *see also Internal Operating Policy 02-05: Determining Indigence*, GEORGIA PUBLIC DEFENDER STANDARDS COUNCIL (May 2005) (updating the Georgia standard, effective Sept. 9, 2005), http://www.gpdsc.com/cpdsystem-policies-02-05.pdf.

172 *See* Wright & Logan, *supra* note 65.

The bottom line is that some difference between the rates of self-representation among misdemeanor and felony defendants makes sense. Some misdemeanor defendants are not entitled to the appointment of counsel because they received only fines. Other misdemeanor defendants may represent themselves because they are not deemed sufficiently indigent to entitle them to appointment of counsel. It is difficult to believe, however, that these factors explain why misdemeanor defendants represent themselves at a rate over 100 times that of felony defendants. It appears, then, that at least some of these defendants–and perhaps many of them–are not being afforded the right to counsel.

Because the right to counsel is constitutionally guaranteed, before a defendant can proceed *pro se*, the Constitution requires a knowing and voluntary waiver of that right.[173] A defendant invoking the right to self-representation must "knowingly and intelligently" waive the right to counsel.[174] Setting the "knowing and intelligent" waiver standard is more difficult than it might first appear: If the court sets the standard too high, it eviscerates the right to self-representation, while if it sets it too low, it eviscerates the right to counsel.[175] Rather than articulating a bright-line standard, the Supreme Court simply has instructed that the waiver of counsel must be both knowing and voluntary. At a minimum, this means that the defendant must be informed that he has a right to counsel. The extent to which the court must assure that the defendant understands that right, however, varies widely depending on the jurisdiction, with some jurisdictions requiring that certain questions be asked of defendants and others requiring only

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[173] Just as invoking the right to self-representation requires waiver of the right to counsel, conversely invoking the right to counsel requires waiver of the right to self-representation. Although the waiver of the right to counsel must be knowing and voluntary, however, most courts have held that there is no constitutional requirement that the waiver of the right to self-representation be either knowing or voluntary. Thus, a defendant waives his right to self-representation simply by not invoking it.

Some jurisdictions also instruct the defendant of the right to self-representation when informing him of his other rights, including the right to assistance of counsel, the right to remain silent, and the right to a jury trial. *See, e.g.*, 1 BENCH BOOK FOR TEXAS TRIAL JUDGES, §§ 1.01.01 (1978) (instructing judges in situations where the defendant appears without counsel to inform the defendant that (1) he has the constitutional right to be represented; (2) if he cannot afford representation, the court will appoint counsel; and (3) he is not required to have counsel, but it is wise to do so.)

[174] Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938)).

[175] In *Faretta*, for instance, the Court concluded that the lack of legal training or expertise could not serve as the basis for determining that a defendant did not have the capacity to knowingly and intelligently waive his right to counsel. *Faretta,* 422 U.S. at 835-36.

that the court conduct a colloquy to ensure that the defendant understands that he has a right to counsel.[176]

There is evidence that even in jurisdictions in which a specified colloquy is required in order to ensure that the waiver of counsel is knowing and voluntary, judges sometimes ignore governing rules. For instance, in at least some jurisdictions in the federal court system, before determining that the defendant has knowingly and intelligently waived the right to counsel, judges are required to ask the defendant fifteen questions.[177] They then must deliver an admonition along the following lines:

> I must advise you that in my opinion a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.[178]

Even in federal district courts where such a colloquy is required, however, a record that it occurred appears on the docket sheet only rarely. If such colloquies are not being consistently conducted in felony cases in the federal system, it is unlikely that they are being conducted in state court and in misdemeanor cases.[179]

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[176] *Compare* U.S. v. Peppers, 302 F.3d 120 (3rd Cir. 2002) (adopting the colloquy in the Benchbook for Federal District Court Judges); U.S. v. McDowell, 814 F.2d 245 (6th Cir. 1987) (same); People v. Stanley, 56 P.3d 1241 (Colo. Ct. App. 2002) (citing questions in the Colorado Trial Judge's Benchbook as the standard); State v. Anderson, 638 N.W.2d 301 (Wis. 2002) (stating that failure to follow colloquy in Wisconsin Judicial Benchbook invalidates waiver); State v. Miller, 738 A.2d 1142 (Conn. App. Ct. 1999) (holding that trial court failure to follow procedure in Practice Book § 44-3 requires grant of new trial); *with* U.S. v. Best, 426 F.3d 937, 943 (7th Cir. 2006) (not requiring colloquy from Benchbook for Federal District Court Judges, but finding it "a sound approach"); U.S. v. Jones, 421 F.3d 359, 364 (5th Cir. 2005) (approving "warnings much less thorough" than those in the Benchbook); U.S. v. Hayes, 231 F.3d 1132, 1138 (9th Cir. 2000) (stating that there "is no required formula" for colloquy); State vs. Markuson, 75 P.3d 298 (Mont. 2003) (same); Coughlin v. State, 842 So.2d 30 (Ala. Crim. App. 2002) (same); Smith v. Maldonado, 711 P.2d 15 (N.M. 1985) (same).

[177] *See* 1 BENCH BOOK FOR U.S. DISTRICT JUDGES, §§ 1.02-2 to 1.02-5 (3rd ed. 1986) (listing 15 questions that district court should ask defendant in order to "make clear on the record that defendant is fully aware of the hazards and disadvantages of self-representation); United States v. McDowell, 814 F.2d 245 (6th Cir. 1987) (adopting the benchbook questions as standard for the waiver of counsel).

[178] *Id.*

[179] The failure to conduct such a colloquy is doubly harmful in misdemeanor cases because it is not necessarily self-evident to misdemeanor defendants when and under what circumstances they are entitled to the appointment of counsel, so many defendants charged with misdemeanors may not recognize that they in fact have a right to appointment of counsel.

Moreover, there is strong anecdotal evidence that many state courts conduct no inquiry before concluding that the defendant has waived the right to counsel, particularly in misdemeanor cases.[180]

To the extent that waiver of counsel is not knowing and voluntary, a defendant's right to counsel has been violated. To the extent, then, that misdemeanor defendants are proceeding *pro se* without being informed of their right to counsel, the imposition of any sentence other than a fine or probation unenforceable except through a contempt proceeding is unconstitutional**.** One potential solution is to require that a defense attorney be present at the hearing when the waiver of counsel takes place. A defense attorney at least can explain to the defendant that she has a constitutional right to the assistance of counsel. In addition, because most misdemeanor cases generally are handled with relative dispatch, it should not impose much of a burden to appoint a lawyer to represent the defendant at hearings on whether the right to counsel will be waived.[181] Such a system would ensure that any waiver of counsel in fact is knowing and voluntary.

B. Ensuring that the Waiver of Counsel is Knowing and Voluntary with Mentally Ill Defendants

As discussed above*,* not all, or even most, defendants who choose to represent themselves are mentally ill.[182] Nonetheless, *pro se* felony defendants are more likely to show indications of mental illness than their represented counterparts.[183] Because of that fact, it is important that courts have the necessary tools to address situations in which they believe that the defendant is competent but because of mental illness may not be knowingly and voluntarily waiving the right to counsel. And because of the current state of the law, legislative action may be required in order to provide trial court judges with the appropriate tools to ensure that the waiver of counsel by a mentally ill defendant is knowing and voluntary.

In 1993, the Supreme Court held that the standard for determining competence to waive counsel is identical to the standard for determining competence to stand

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[180] *See Gideon's Broken Promise*, *supra* note 137, at 23-24 (noting the widespread practice of failing to inform state court misdemeanor defendants of their right to counsel).

[181] This solution has the added benefit of reducing the incentive of judges to encourage defendants to proceed *pro se*. To the extent that financial considerations, namely the cost of appointing an attorney, motivate judges to obtain waivers of counsel, the requirement that counsel be appointed at least for the waiver of counsel hearing removes at least some of that incentive.

[182] *See supra* at XX.

[183] *Id*.

trial.[184] Responding to the concern that mentally ill defendants might not have the necessary skills to represent themselves, the Court held that the proper focus of inquiry was *not* whether the defendant was competent to represent himself but rather whether the defendant was competent to make the decision to waive counsel.[185] And, according to the Court, if the defendant is competent to stand trial, he also is competent to make the decision to waive counsel. As previously discussed, the standard for competency to stand trial is very low. Indeed, even seriously mentally ill defendants can be found competent to stand trial.[186]

The Court also emphasized, however, that the waiver of counsel still must be knowing and voluntary. That is, not only must a defendant have the *capacity* to knowingly and voluntarily waive his right to counsel (the competency inquiry), he also must *in fact* "understand the significance and consequences of a particular decision" and that decision must be uncoerced.[187] Thus, for defendants who are mentally ill, it may well be that the colloquy to determine whether the defendant has knowingly and voluntarily waived his right to counsel must take account of the defendant's mental illness.[188]

Unfortunately, after the Court's decision in *Godinez*, there appears to be some confusion regarding whether the trial court may consider the state of the defendant's mental health when determining whether the relinquishment of the right was knowing and voluntary.[189] As a result, legislative action to clarify that courts may consider mental illness in determining whether the waiver of the right to counsel is knowing and voluntary may be necessary. Such action would protect the due process rights of those mentally ill defendants who seek to represent themselves.

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184 Godinez v. Moran, 509 U.S. 389 (1993).

185 *Id* at 399-400.

186 For instance, Colin Ferguson, who appeared to have paranoid delusions, was found competent to represent himself. *See* Bardwell & Arrigo, *supra* note 4.

187 *Id*. at 401.

188 *See, e.g.*, *People v. Lego*, 660 N.E. 2d 971 (IL 1996) (holding that the trial court should have considered the defendant's mental illness in determining whether the defendant knowingly and voluntarily waived the right to counsel).

189 *Id.* One of the difficulties for courts attempting to interpret the Court's holding in *Godinez* is the concern that if a state sets the standard for waiver of counsel too high, it might be infringing on the defendant's right to self-representation. In *Godinez*, however, the Court specifically noted that although the Due Process Clause does not require a higher standard of competence to waive counsel than to stand trial, "States are free to adopt competency standards that are more elaborate than the *Dusky* formulation." Godinez v. Moran, 509 U.S. 390, 402 (1993). Thus, it appears that it would not violate a defendant's right to self-representation for a state to require a higher standard of competence for the decision to waive counsel, but that point is not entirely clear from the Court's opinion.

C. The Role of Standby or Advisory Counsel

The Court in *Faretta* specifically noted that the trial judge could "—even over objection by the accused–appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary."[190] Advisory counsel can play a crucial role in ensuring that the defendant receives a fair trial.[191] Particularly with incarcerated *pro se* defendants, there are many logistical problems with mounting a defense, ranging from an inability to conduct any investigation and to speak to witnesses, to very practical problems of often being denied sufficient paper and pens to file motions. Even mail is limited from many institutions, and an incarcerated *pro se* defendant needs assistance navigating these pre-trial challenges. Advisory counsel also can provide practical help during the trial itself. For instance, even if the defendant does not have a complete grasp of the rules of evidence, he will be much more likely to lodge appropriate objections if standby counsel is available to prompt him to do so. In the overwhelming majority of cases included in the docketing database, the defendant was afforded advisory counsel.[192] Indeed, both of the defendants acquitted of all charges in that database had standby counsel assisting them.[193]

To date, the determination whether to appoint standby counsel has been entrusted to the judge, and despite the fact that most of the *pro se* federal felony defendants were appointed standby counsel, it is unlikely that the appointment of advisory counsel is the norm, particularly in misdemeanor cases. As discussed *supra* at XX, misdemeanor defendants are overwhelmingly more likely to represent themselves than felony defendants, and it appears that in those cases, the reason counsel is not appointed may be because of cost considerations. No money is saved, however, if standby counsel is appointed, and it therefore seems unlikely that even a majority of *pro se* misdemeanor defendants are being appointed advisory counsel. Because the appointment of standby counsel appears critical to the success of *pro se* representation, more data are needed regarding the extent to which standby counsel is appointed to *pro se* defendants, and the effect, of any, of that appointment. To the extent that advisory counsel proves helpful to

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190 Faretta v. California, 422 U.S. 806, 834 n. 46 (1975).

191 *See, e.g.,* Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties under* Faretta, 42 BRANDEIS L.J. 329 (2004) (listing the trial court's additional responsibilities to a *pro se* defendant if standby counsel is not appointed).

192 Standby counsel was appointed for 88% (182/208) of the defendants in the federal docketing database.

193 In the interest of full disclosure, I served as standby counsel to one of those defendants.

pro se defendants, ways of requiring the appointment of standby counsel should be explored.[194]

One final point regarding standby counsel. There are few, if any, standards regarding the role of standby counsel.[195] Instead, individual attorneys are left to carve out their own roles, with some playing very passive roles and others taking an active role in the defense. To the extent that standby counsel can have a positive impact on the outcome of a *pro se* defendant's case, some guidelines regarding the role of standby counsel would be helpful and appropriate.[196]

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[194] *See* Williams, *supra* note 50, at 810-811 (arguing that standby counsel should be mandatory).

[195] *See* Poulin, *supra* note 8, at 678-79. (arguing that the role of standby counsel should be "strengthened and more clearly delineated" and that there should be standard for standby counsel so that those appointed in that capacity "have a better sense of their obligations.").

[196] *Id*.

CONCLUSION

The data in this Article help establish that "in general, the right to represent oneself furthers . . . the Constitution's basic guarantee of fairness."[197] The select few felony defendants who choose self-representation do not appear to suffer significant adverse outcomes from that decision, and the right therefore does not appear to infringe defendants' due process fair trial rights. Of perhaps even more significance, it appears that defendants choose to represent themselves not because they suffer from mental illness but instead because they are dissatisfied with counsel. On the mental illness point, the data are clear. While there are some defendants who choose to represent themselves because of mental illness, the vast majority of *pro se* defendants exhibit no signs of mental illness. To the extent that there are issues of mental illness, those should be addressed through the waiver of counsel standard. The fact that some mentally ill defendants choose to represent themselves should not be the basis for questioning the legitimacy of a right that protects all defendants. The right to self-representation in practice protects the interest of defendants in presenting their cases as effectively as possible. Indeed, for indigent defendants who have been appointed unskilled or inept counsel, and for defendants seeking to assert ideological defenses, the right to self-representation stands as the bulwark protecting the defendant from an unfair trial. In short, the data expose the fallacy of the prevailing view of *pro* se felony defendants and demonstrate that the right to self-representation in fact serves a vital role in protecting the rights of criminal defendants.

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197 *See* Martinez v. California, 528 U.S. at 164 (Breyer, J., concurring).