NORTH CAROLINA LAW REVIEW

Volume 85 | Number 2 Article 2

1-1-2007

Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant

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

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Why would a criminal defendant waive the right to counsel and proceed pro se? Conventional wisdom assumes that there is no good reason for a defendant to choose self-representation, and those who make that choice are therefore either mentally ill or foolish. Courtroom proceedings in cases of high-profile pro se defendants like Colin Ferguson and, more recently, Zacarias Moussaoui and John Muhammad, have only increased the dominance of this prevailing view. Even the Supreme Court has assumed that the right of self-representation in practice hurts, rather than helps, criminal defendants. Until now, however, no empirical study has examined the phenomenon of self-representation.

This Article presents the results of the first study of pro se felony defendants. The data undermine both the assumption that most felony pro se defendants are ill-served by the decision to self-represent and the theory that most pro se defendants suffer from mental illness. Somewhat surprisingly, the data indicate that pro se felony defendants in state courts are convicted at rates equivalent to or lower than the conviction rates of represented felony defendants, and the vast majority of pro se felony defendants—nearly 80%—did not display outward signs of mental illness.

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The data also suggest an alternative explanation for the pro se phenomenon. The small, self-selected group of felony defendants who choose to represent themselves may make that choice because of legitimate concerns about court-appointed counsel. Without the right to represent themselves, those defendants would be in the untenable position of being represented by inadequate counsel with no alternative. In short, the data in this Article expose the fallacy of the prevailing view of pro se felony defendants and demonstrate that the right of self-representation serves a vital role in protecting the rights of criminal defendants. Finally, because the right is peculiarly subject to abuse, this Article suggests several modifications to the existing structure to protect the constitutional rights of defendants seeking to invoke the right of self-representation.

> "[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]

INTRODUCTION

Thirty years ago, the Supreme Court recognized a constitutional right of self-representation in criminal cases.[2] Since that time, both academics and the popular media have been fascinated by, and almost uniformly critical of, pro se defendants.[3] Dr. Jack Kevorkian, Colin Ferguson, Congressman James Traficant, Zacarias Moussaoui, and, most recently, John Muhammad, all tried their hands at self-representation with seemingly disastrous (and highly publicized) consequences.[4] Colin Ferguson, for example, rambled incoherently

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1. Martinez v. Court of Appeals, 528 U.S. 152, 164 (2000) (Breyer, J., concurring).

2. *See* Faretta v. California, 422 U.S. 806, 819 (1975) (holding that defendants have a Sixth Amendment right to represent themselves in criminal prosecutions).

3. *See, e.g.*, Tanya Schevitz, *In Self-Defense—Literally Some Fools Ignore Lincoln's Maxim and Represent Themselves in Court*, S.F. EXAMINER, Feb. 20, 1995, at A4, *available at* 1995 WLNR 9519; Robin Topping, *The Pitfalls of Self-Representation*, NEWSDAY, Feb. 1, 1995, at A29, *available at* 1995 WLNR 500322. Even when *Faretta* was decided, there were those who doubted the wisdom of recognizing a right of self-representation. *See Faretta*, 422 U.S. at 852 (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.").

4. 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. *See* 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 was convicted on all counts and sentenced to eight years incarceration. This trial was Traficant's second at which he represented himself. In 1983, Traficant was indicted on bribery charges and chose to represent himself. He was acquitted at that trial. *See* Robert E. Pierre & Juliet

about a vast conspiracy during his opening statement, asserting to the jury that the only reason there were ninety-three counts on the indictment was because the year was 1993.[5] The media frenzies 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.[6]

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 foolish or mentally ill? The importance of this empirical question has taken on increased significance in recent years because the Supreme Court, troubled by the possibility that pro se defendants are ill-served by their decisions to represent themselves, has called into question the wisdom of continuing to recognize a constitutional right of self-representation.[7] According to the Court,

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Eilperin, *Traficant Is Found Guilty: Ohio Congressman Could Face House Sanctions*, WASH. POST, Apr. 12, 2002, at A1; *Ex-Rep. Traficant Sentenced to 8 Years*, WASH. POST, July 31, 2002, at A2. Zacarias Moussaoui, known as the twentieth hijacker, was charged with conspiracy for the September 11 attacks on the World Trade Center and the Pentagon. Moussaoui represented himself for seventeen months, but prior to his trial, the judge ordered that Moussaoui be represented by counsel because of Moussaoui's repeated violations of her rulings. *See* Philip Shenon, *Judge Bars 9/11 Suspect from Being Own Lawyer*, N.Y. TIMES, Nov. 15, 2003, at A8. Moussaoui ultimately pleaded guilty and was sentenced to life in prison without parole after the death penalty phase of the trial. *See* Jerry Markon & Timothy Dwyer, *Jurors Reject Death Penalty for Moussaoui*, WASH. POST, May 4, 2006, at A1. 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; Josh White, *Defiant Muhammad Sentenced to Death for Sniper Slaying*, WASH. POST, Mar. 10, 2004, at A1. After his trial in Virginia, he was tried on six murder counts in Maryland. He represented himself at that trial, and was convicted and sentenced to six life sentences. *See* Eric Rich & Ernesto Londoño, *Md. Sniper Suspect Quickly Convicted: Muhammad Found Guilty in 6 Deaths*, WASH. POST, May 31, 2006, at A1; Ernesto Londoño & Eric Rich, *Sniper Given Six Life Terms: Victims' Relatives Tell of Their Pain*, WASH. POST, June 2, 2006, at B1.

5. MARK C. BARDWELL & BRUCE A. ARRIGO, CRIMINAL COMPETENCY ON TRIAL: THE CASE OF COLIN FERGUSON 302 (2002). 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 case of stereotype victimization of a black man. A subsequent conspiracy to destroy him. Nothing more." *Id.*

6. *See, e.g.*, John F. Decker, *The Sixth Amendment Right To Shoot Oneself in the Foot: An Assessment of the Guarantee of Self-Representation Twenty Years After* Faretta, 6 SETON HALL CONST. L.J. 483, 487 (1996) (concluding that many defendants who represent themselves are foolish or "so totally out of touch with reality that they believe they can do it all themselves").

7. *See* Martinez v. Court of Appeals, 528 U.S. 152, 156 (2000).

the reasons for originally recognizing a right of 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,"[8] and experience with the right of self-representation has demonstrated " 'that a pro se defense is usually a bad defense.' "[9] In similar fashion, many 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.[10]

This Article presents the results of an empirical study that calls into question both the assumption that felony criminal defendants are

8. *Id.* at 158.

9. *Id.* at 161 (quoting Decker, *supra* note 6, at 598).

10. 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 A. 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, 33–34 (2000) (arguing that the competency standard needs to be changed in light of several cases, including the Colin Ferguson case); Decker, *supra* note 6, 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, 165 (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 of self representation *in practice* undermines the fairness of the criminal process."); *see also* Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 120–21 (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 stating that the Court in *Faretta* overcame these "deeply ingrained objection[s]" attending self-representation (quoting Faretta v. California, 422 U.S. 806, 840 (1975) (Burger, C.J., dissenting))); 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 and arguing that 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.' "); Christopher Johnson, *The Law's Hard Choice: Self-Inflicted Injustice or Lawyer-Inflicted Indignity*, 93 KY. L.J. 39, 41, 61 (2004–05) (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' " (quoting Falkner v. State, 462 So. 2d 1040, 1042 (Ala. Crim. App. 1984))).

ill-served by proceeding pro se and the notion that no legitimate reasons can underlie the decision to engage in self-representation.[11] First, the data undermine the notion that defendants who choose to proceed pro se in felony cases necessarily suffer negative consequences from that decision. Although pro se defendants make choices that are different from those made by their represented counterparts (for instance, a higher percentage of pro se felony defendants choose to go to trial than the percentage of those represented by counsel[12]), pro se defendants do not fare significantly worse in terms of outcomes than do their represented counterparts.[13] Indeed, at the state court level, felony defendants representing themselves at the time their cases were terminated appear to have achieved higher felony acquittal rates than their represented counterparts in that they were less likely to have been convicted of felonies.

Second, the vast majority of felony pro se defendants in federal court do not exhibit overt signs of mental illness. Of the over two hundred felony pro se defendants in federal court studied in this Article, competency evaluations were ordered in just over 20% of the cases.[14] This figure is telling because in most cases in which a defendant manifests any sign of mental illness, a federal district court judge will order a competency evaluation.[15] 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.

Far from establishing that pro se defendants represent themselves because of mental illness, the data instead suggest that felony defendants choose to represent themselves because of

11. There are three databases that form the basis for this study. Each is discussed more fully in Part II. *See infra* Part II.A. The two preexisting 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.

12. *See infra* Part II.B.

13. This does not mean that counsel are not necessary or helpful to most defendants, but instead suggests that the very small percentage of felony defendants who choose to represent themselves may have legitimate and valid reasons to do so.

14. This figure comes from a database I compiled of felony defendants in federal court who represented themselves at the time of case disposition. *See infra* Parts II.A.1, II.C.1.

15. *See* Bruce J. Winick, *Restructuring Competency To Stand Trial*, 32 UCLA L. Rev. 921, 924 (1985) ("Virtually every criminal defendant who appears to be mentally ill at any time within the criminal trial process is examined for competency.").

legitimate concerns about, or dissatisfaction with, appointed counsel. Nearly half of the pro se federal felony defendants in the Federal Docketing Database[16] asked the court to appoint new counsel prior to invoking the right of self-representation.[17] 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. Defendants with court-appointed counsel were more likely to choose to represent themselves pro se than were federal felony defendants as a whole. In addition, the pro se defendants went to trial at significantly higher rates than their represented counterparts.[18] Because deficiencies in the quality of counsel may be more apparent in the lead-up to trial than during the course of plea negotiations (particularly since negotiating a plea usually requires less consultation with a client than preparing for trial), the problems of overworked or substandard counsel will be more apparent to defendants going to trial than to those taking pleas.[19] The correlation between self-representation and increased trial rates therefore inferentially supports the theory that concerns about the quality of counsel may drive some defendants to represent themselves. There is a substantial body of evidence demonstrating that these concerns about the quality of court-appointed counsel are legitimate. States are struggling to provide even marginally adequate court-appointed counsel to indigent defendants,[20] 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.

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 some of the

16. The Federal Docketing Database is described below in Part II.A.1.

17. In addition, there are a number of cases in which federal felony criminal defendants expressed dissatisfaction with counsel and invoked the right of self-representation, only to withdraw the request to proceed pro se when they were appointed new counsel. *See infra* Part II.C.2. Those defendants were not included in the database.

18. *See infra* text accompanying notes 113–14. Felony defendants in that database went to trial at a rate of over fifteen times the rate of represented defendants.

19. Such problems include both the unwillingness to try the case despite the defendant's desire to go to trial, and the inability or unwillingness to adequately prepare for and try the case.

20. *See infra* notes 169–92 and accompanying text.

defendants may have chosen self-representation in order to present those ideological defenses.

In short, the right of 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 of self-representation protects the defendant's *personal* right to defend in the way the defendant believes most advantageous.[21]

Despite the importance of the right of self-representation, the data also demonstrate that recognizing this right can lead to violations of the defendants' constitutional rights, and several modifications of the existing legal structure therefore are needed. First, jurisdictions need to ensure that pro se defendants know of their right to counsel and voluntarily waive that right. In jurisdictions where the sheer number of indigent defendants has overwhelmed the system, the court has an incentive (particularly in less serious cases) to conclude that defendants have waived the right to counsel. To the extent that defendants have not knowingly and voluntarily waived the right to counsel, however, the government has violated their constitutional rights. The data suggest a risk that such involuntary or unknowing waivers may be occurring in misdemeanor cases, and jurisdictions therefore may need to adopt a standard practice or protocol to ensure that courts conduct valid waivers in all pro se cases.

Second, although the overwhelming majority of felony pro se defendants have not exhibited signs of mental illness, the existence of the right of self-representation poses a risk that at least some mentally ill defendants will choose to represent themselves to their detriment. Accordingly, trial judges need to take special care to ensure that defendants who exhibit signs of mental illness understand that they have a right to counsel and voluntarily relinquish that right. The extent to which a trial judge can take account of the defendant's mental illness in making this constitutional determination that the defendant has knowingly and intelligently waived the right to counsel has become somewhat unclear because the Supreme Court has held that the standard for competence to waive counsel is the same as the standard for competence to stand trial.[22] Once a court has determined that a defendant is competent to stand trial (a very low

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

22. *See* Godinez v. Moran, 509 U.S. 389, 401–02 (1993).

standard for competence), that defendant also has the capacity to waive the right to counsel unless a legislature enacts a different standard.[23] Legislative action therefore may be needed 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, because standby or advisory counsel can play a vital role in protecting the fair trial rights of pro se defendants, some mechanism should be implemented to ensure that courts appoint standby counsel as a matter of course.[24] Although little data exist regarding the extent to which courts appoint standby or advisory counsel, courts should take action to guarantee that pro se defendants receive that assistance.

This Article contains three Parts. Part I explains the original justification for recognizing a right of self-representation and the Court's recent critique of the right. It also highlights the empirical issues that appear critical to the Court's disapproval of the right. Part II sets forth data that suggest answers to those empirical questions. Specifically, it presents data that undermine the assumptions that (1) pro se felony defendants necessarily do worse because of their decisions to self-represent and (2) the vast majority of pro se felony defendants are mentally ill. It also includes data suggesting reasons these defendants might have chosen to represent themselves. Despite data indicating that there may be legitimate reasons for the right, the potential for abuse still remains. Accordingly, Part III sets forth three recommendations to help ensure that the right of 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. These three refinements to the existing structure—protocols to ensure knowing and voluntary waiver of the right to counsel, clarification that a defendant's mental illness can be considered in determining whether he has knowingly

23. *Id.*

24. Currently, little guidance exists regarding the appropriate role for standby or advisory counsel to play. *See* 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, 703–05 (2000). For instance, it is not clear whether ethical obligations such as the obligation to serve as a zealous advocate apply to standby counsel. *See id.* at 676 ("An appointment as standby counsel casts an attorney into an uncomfortable twilight zone of the law. The attorney may be unsure of her duties and the extent of her obligation. She functions in a context where the usual professional and ethical guides to attorney conduct appear not to fit, and she is constrained from assuming the normal role of an attorney."). More research and scholarship on this issue would help those appointed in a standby role to serve the pro se defendant more effectively.

and voluntarily waived the right to counsel, and mechanisms to assure appointment of standby counsel—will ensure that the right of self-representation, which protects valuable rights of the defendant, does not infringe other constitutional rights.

I. FRAMING THE ISSUE: THE DEBATE OVER THE CONSTITUTIONAL RIGHT OF SELF-REPRESENTATION

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

Anthony Faretta thought his court-appointed public defender was too "loaded down with . . . a heavy case load" to represent him adequately, so he requested permission to represent himself.[25] The trial judge initially granted Faretta's request, but later reversed course, concluding that Faretta had not knowingly and intelligently waived his right to counsel and that he did not have a constitutional right to represent himself.[26] The court appointed the same public 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.[27] At trial, Faretta was convicted, and the court sentenced him to imprisonment.[28]

Repudiating the trial court's rejection of a constitutional right of 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.[29] 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

25. *Faretta*, 422 U.S. at 807.

26. *Id.* at 808–10. At the colloquy preceding the ruling that Faretta had not knowingly and intelligently waived his right to counsel, the trial court judge asked Faretta a series of questions about peremptory and cause challenges of jurors. *Id.* Based upon Faretta's responses and his demeanor, the trial court concluded that Faretta should not be permitted to represent himself. *Id.* 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 9 n.3.

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

28. *Faretta*, 422 U.S. at 811.

29. *Id.* at 819. 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, 906 (1974) (mem.) (appointing counsel on Faretta's motion).

own unskilled efforts."[30] Nonetheless, the Court held that just as the Sixth Amendment guarantees a right to counsel, so also it guarantees a right of self-representation.[31] The Court acknowledged that the reasoning underlying the Sixth Amendment right to counsel as articulated in *Gideon v. Wainwright*[32]—the importance of counsel in adversarial proceedings—conflicted somewhat with a right of self-representation.[33] 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 of self-representation could be respected.[34]

The Court's conclusion that the Sixth Amendment guarantees 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.[35] Thirty-six state constitutions conferred a right of self-representation.[36] Moreover, the right of self-representation in federal courts has been protected by statute since the inception of this country.[37] The Court observed, "We confront here a nearly universal conviction, on the part of our people as well as our courts, that forcing a lawyer upon an unwilling defendant is contrary to his basic right to defend himself if he truly wants to do so."[38]

Second, the nature and source of the Sixth Amendment supported the conclusion that it protects a right of self-representation.[39] The Court reasoned that the right to defend oneself is granted to the accused because "it is he who suffers the consequences if the defense fails."[40] 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

30. *Faretta*, 422 U.S. at 834.
31. *Id.* at 819.
32. 372 U.S. 335 (1963). In *Gideon*, the Court held that indigent defendants have a constitutional right to the appointment of counsel. *Id.* at 344–45. The Court later clarified that this right extends to any criminal case in which imprisonment is imposed. Argersinger v. Hamlin, 407 U.S. 25, 33–37 (1972).
33. *Faretta*, 422 U.S. at 832–33.
34. *Id.* at 835 (quoting Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)).
35. *Id.* at 812–13.
36. *Id.* at 813.
37. *Id.* at 812–13.
38. *Id.* at 817.
39. *Id.* at 818.
40. *Id.* at 820.

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."[41] The English common law tradition, well-established at the time of the Sixth Amendment's ratification, also permitted self-representation.[42] Given the "centuries of consistent history" supporting a right of self-representation, the Court concluded that "there is no evidence that ... the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel."[43]

Finally, the Court emphasized that failing to recognize a right of self-representation would infringe personal autonomy: "[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."[44] To the Court, requiring a defendant to accept state-selected representation would undermine any trace 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 harm that might result from allowing criminal defendants to represent themselves.[45]

B. *Challenges to the Constitutional Right of 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 concluded that whatever might be said about the value of personal autonomy, the right of self-representation has harmed criminal defendants in the real world.[46] This belief

41. *Id.*

42. *Id.* at 823. According to the Court, the only tribunal in British history to have "forc[ed] counsel upon an unwilling defendant in a criminal proceeding" was the Star Chamber, an institution that existed in the late sixteenth and early seventeenth centuries and that "for centuries symbolized disregard of basic individual rights." *Id.* at 821.

43. *Id.* at 832.

44. *Id.* at 833–34.

45. *Id.* at 832–33 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

46. The right of self-representation in felony cases does not have a particularly wide fan base. Prosecutors and judges in felony cases may be concerned that pro se defendants will cause chaos and make a mockery of the system of justice. The criminal defense community also has reason to be critical of the right of self-representation. *See, e.g.*, Sabelli & Leyton, *supra* note 10, at 186–88 (noting that the right of self-representation can "inject a destructive element of gamesmanship" into the attorney's relationship with a

reflects two sets of concerns about the right of self-representation, both of which rely on empirical assumptions. First, there is a strong sense that the right of self-representation as a matter of practice undermines the defendant's constitutional due process right to a fair trial.[47] In other words, unfairly skewed processes—pitting legally trained prosecutors against nonlawyer defendants—produce unfairly skewed results for defendants unwise enough to choose to represent themselves at trial.[48] 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.[49]

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mentally ill client). Some criminal defense attorneys are concerned that those invoking the right of self-representation are simply hurting themselves. *Id.* at 165. 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 in felony cases.

47. *See* U.S. CONST. amend. V, XIV.

48. *See, e.g.*, Arrigo & Bardwell, *supra* note 10, 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." (citations omitted)); Decker, *supra* note 6, at 598 (concluding that defendants who represent themselves are foolish); *see also* Johnson, *supra* note 10, at 41, 61 (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' " (quoting Falkner v. State, 462 So. 2d 1040, 1042 (Ala. Crim. App. 1984))).

49. *See, e.g.*, Decker, *supra* note 6, at 485–87 ("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."); Sabelli & Leyton, *supra* note 10, at 164 (questioning the wisdom of the right of self-representation because of a concern that mentally ill defendants "abuse . . . the right of self representation in order to block presentation of mental health evidence"); *see also* Toone, *supra* note 10, 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").

In *Martinez v. Court of Appeals*,[50] the Court drew on these concerns in intimating that *Faretta* had been wrongly decided.[51] The holding of *Martinez*—that there is no right of self-representation on appeal[52]—was unremarkable. Because the *Faretta* Court found the right of self-representation in the Sixth Amendment, and because the Sixth Amendment guarantees *trial* rights, not *appeal* rights,[53] it was not surprising that the Court concluded that the Constitution creates no right of 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.[54] 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."[55] Thus, said the Court, although *Faretta* was accurate in observing that there is a long history of recognizing a right of self-representation in this country, that history becomes less compelling in view of the Court's decision to require that the government make competent counsel available to all defendants.[56] 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."[57]

The Court also questioned the wisdom of recognizing a right of self-representation, expressing concern that the right undermines the defendant's due process right to a fair trial. The Court noted that historically the "right" of 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."[58] 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. . . .

50. 528 U.S. 152 (2000).
51. *Id.* at 154.
52. *Id.*
53. *Id.* at 159–60.
54. *Id.* at 156–58.
55. *Id.* at 156–57.
56. *See id.* at 158 (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).
57. *Id.* at 158.
58. *Id.* at 157.

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.' "[59]

The Court's reasoning implies that the continued recognition of a constitutional right of self-representation should depend on an empirical analysis of the costs and benefits of recognizing the right.[60] Because, in the Court's view, the cost to defendants of recognizing a right of self-representation outweighed any actual benefits defendants gained from the right, it doubted the wisdom of *Faretta*. But while empirical considerations ostensibly informed the Court's reasoning, the Court made its sweeping pronouncement about the effect of the right of self-representation without citation to any empirical evidence.[61]

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 were not readily available.[62] As Justice Breyer recognized in his concurrence in *Martinez*, there was "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."[63] Although thirty years have passed since the Court decided *Faretta*, and although during that time there has been an explosion in the categories of information that are kept in the criminal system, very little has been done to compile empirical

59. *Id.* at 161 (quoting Decker, *supra* note 6, at 598).

60. Some scholars have noted that the Court has used empirical data to decide issues of constitutional criminal procedure in the past. *See* Tracy L. Meares & Bernard E. Harcourt, *Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure*, 90 J. CRIM. L. & CRIMINOLOGY 733, 739–40 (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).

61. The Court has made similar "pseudo-empirical statements" without empirical evidence in other cases. *See* Meares & Harcourt, *supra* note 60, at 739 ("[C]onstitutional criminal procedure decisions are often marred by spotty or inconsistent application of balancing tests and by pseudo-empirical statements . . . .").

62. The only study on pro se criminal defendants at the time *Martinez* was decided was a monograph authored by psychologists. *See* Douglas Mossman & Neal W. Dunseith, Jr., *"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). Before the publication of this Article, there was no empirical study of pro se criminal defendants in the legal literature.

63. *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.

data on criminal defendants who represent themselves in court.[64] Most of the literature that addresses the subject of pro se representation offers no empirical information, even about such critical questions as how many defendants represent themselves and how self-representation affects outcomes of cases.[65]

Indeed, 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.[66] Beginning with the 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.[67] The same sort of reasoning, rooted in unsubstantiated assumptions, marks other scholarly work in this field.[68] This Article seeks to respond to that persistent view.

II. THE RESULTS OF THE EMPIRICAL STUDY

A. *The Data*

1. The Three Databases

To determine whether the commonly held assumptions are accurate, this Article analyzes three primary sources of data. The first database (the "Federal Court Database") is a preexisting compilation of data collected by the Administrative Office of the

64. *See* Mossman & Dunseith, *supra* note 62, at 408 (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 compiled on groups of persons who represent themselves" and none of those conducts an exhaustive survey of pro se criminal defendants).

65. Although one article attempted to estimate the number of pro se defendants each year, the estimate relied on opinion instead of empirical evidence. *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 the data presented in this Article, approximately 0.3% to 0.5% of felony criminal defendants represent themselves. *See infra* Part II.B. In 1996, 1,041,809 criminal defendants were convicted of felonies in federal and state courts. *See* JODI M. BROWN & PATRICK LANGAN, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FELONY SENTENCES IN THE UNITED STATES, 1996, at 1 (1999), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fsus96.pdf. Thus, somewhere between 3,000 and 5,200 felony defendants represented themselves in that year.

66. *See Martinez*, 528 U.S. at 161 (quoting Decker, *supra* note 6, at 598).

67. *See* Decker, *supra* note 6, at 485, 487.

68. *See supra* note 10 (listing articles concluding that the overwhelming majority of defendants who represent themselves either are mentally ill or have no legitimate reason for self-representation).

United States Courts.[69] The Federal Court Database contains a line of coded data for each defendant in each case terminated in federal court each year. It includes approximately 175 fields of 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.[70] 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.[71] This Article uses data for the federal government's fiscal years 1998–2003.[72]

The second database (the "State Court Database") also is a preexisting database.[73] It contains data for a sample of cases

69. Bureau of Justice Statistics, U.S. Dep't of Justice, Federal Justice Statistics Resource Center, http://fjsrc.urban.org/download/dtsheet.cfm (data used in this Article are available under the row heading "AOUSC Defendants in criminal cases terminated" and the "SAFs Name" column heading for each of the years 1998–2003 under the individual file names adj98out, adj99out, adj00out, adj01out, adj02out and adj03out) [hereinafter Federal Court Database]. The data come from information provided by the clerk's office in each federal jurisdiction to the Administrative Office of the United States Courts. The Bureau of Justice Statistics maintains the database. Each line of data contains a snapshot of each case that was terminated in a particular fiscal year, and the data are separated by fiscal year.

70. All personal information about individual defendants is deleted from the file. Thus, the data in the file are strictly case-related and do not include information about factors such as sex, race, and age.

71. As an example of the way in which the database works, the 236th character position contains information on type of counsel. A value of "1" in the 236th position indicates a nonpublic 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 236th 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 236th position. "Represented defendants" includes all defendants with a value of "1," "2," or "6" in the 236th position.

72. Information also is available for fiscal years 1994–1997, but this study is limited to 1998–2003 because the data for the previous years were relatively similar.

73. NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, STATE COURT PROCESSING STATISTICS, 1990–2000: FELONY DEFENDANTS IN LARGE URBAN COUNTIES (STUDY NO. 2038) (on file with the North Carolina Law Review) [hereinafter State Court Database]. This database was originally downloaded from the website of the National Archive of Criminal Justice Data, http://www.icpsr.umich.edu/NACJD/archive.html. Since the analysis for this Article was conducted, the cumulative database has been updated to include statistics for the year 2002. *See* NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, STATE COURT PROCESSING STATISTICS, 1990–2002: FELONY DEFENDANTS IN LARGE URBAN COUNTIES (STUDY NO. 2038), http://www.icpsr.umich.edu/NACJD/archive.html (search for "Felony Defendants in Large Urban Counties" in the title; then follow "Download" hyperlink; then follow "Log In Anonymously"

prosecuted in state court in forty of the seventy-five most populous urban counties. 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.[74] While no central database tracks criminal cases in the courts of all fifty states, 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 seventy-five most populous urban counties in the United States.[75] The sample then is weighted to represent all felony cases filed in the month of May in the seventy-five largest counties in the country, and the data are compiled into state court processing statistics.[76] This Article analyzes the datafile that aggregates all of the data collected over the course of the six even-numbered years from 1990–2000.[77]

The final database (the "Federal Docketing Database") contains data on pro se defendants collected specifically for this Article from federal court docket sheets.[78] 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.[79] The Federal

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hyperlink; then select "ASCII Data File + SAS Setup Files" and select "DS1: 1990–2002 Cumulative Data"; then follow "Add to Data Cart" hyperlink; then follow "Download Data Cart" hyperlink, open the file titled "02038-0001-Data.txt"). Note that this data is only accessible in the proper format with SAS software.

74. BROWN & LANGAN, *supra* note 65, at 2.

75. NAT'L ARCHIVE OF CRIMINAL JUSTICE DATA, STATE COURT PROCESSING STATISTICS, 1999–2000: FELONY DEFENDANTS IN LARGE URBAN COUNTIES (STUDY NO. 2038) CODEBOOK 4, http://www.icpsr.umich.edu/NACJD/archive.html (search for "Felony Defendants in Large Urban Counties" "in the title"; then follow "Download" hyperlink; then follow "Log In Anonymously" hyperlink; then select "ASCII Data File + SAS Setup Files" and select "DS1: 1990–2002 Cumulative Data"; then follow "Add to Data Cart" hyperlink; then follow "Download Data Cart" hyperlink, open the file titled "02038-0001-Codebook.txt") [hereinafter Codebook].

76. *Id.* Those seventy-five counties "account for more than a third of the U.S. population and approximately half of all reported crimes." *Id.*

77. Because the data represent only a small snapshot of the case flow on particular days in the month of May, and because the percentage of felony defendants representing themselves is so small (significantly less than 1% of the felony defendants), *see infra* Part II.B, there are data on relatively few pro se defendants for each individual year. Over the six even-numbered years included in this analysis, there are data for only 234 pro se felony defendants. *See infra* Part II.B.1.

78. Federal Docketing Database (on file with the North Carolina Law Review) (compiled by author).

79. 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 and cannot be

Docketing Database includes information on about 208 pro se defendants,[80] each of whom represented himself or herself at the time of case disposition.[81] For each defendant included in this database, data were coded for the following: the jurisdiction, the nature of the charges, the type of counsel at the time the defendant invoked the right of self-representation (retained counsel, appointed public defender, appointed panel attorney, or no representation), the point in the proceeding at which the defendant invoked his right of 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 of self-representation, and whether standby counsel was appointed.

2. Database Limitations

As discussed in the Introduction, this Article analyzes the data to determine whether they support the assumptions that: (1) the outcomes of cases in which felony defendants represent themselves are worse than the outcomes of represented felony defendants; (2) most felony pro se defendants exhibit signs of mental illness; and (3) there are no good reasons that might lead pro se defendants to represent themselves. This study necessarily is limited by the available data. Although those limitations, described below, prevent any definitive conclusions about either the reasons defendants choose to represent themselves or the precise impact of that self-representation, the available data are sufficient to cast serious doubt on the validity of the assumptions identified above.

The first major limitation is the sample size of the databases, and in particular the sample sizes of both the State Court Database and

searched by other terms. Westlaw recently began offering a docket sheet database that contains most of the recent PACER records. The Westlaw database can be searched for terms appearing in the docket sheet.

80. 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.

81. For purposes of the Federal Docketing Database, "case disposition" is defined as the stage of the case at which the guilt/innocence question is decided (i.e., verdict, plea, or dismissal). As discussed below, type of counsel was measured at the time of case disposition because it is a more critical stage of the case than case termination (the stage at which both the Federal Court Database and the State Court Database measure type of counsel). *See infra* text accompanying notes 89–90.

the Federal Docketing Database. The State Court Database contains information on roughly 20,000 defendants for each year of data.[82] The database reports both type of representation and outcome for only approximately half of those defendants,[83] and of those reporting type of counsel, less than 0.5% of the defendants reported as self-representing. In any given year, then, there was information on only about forty to fifty pro se defendants in the State Court Database. Because the sample size for each year was so small, this Article analyzes the dataset that aggregates the data from 1990–2000, which yields a larger sample size. Even with the data aggregated, however, the sample size of pro se defendants in the State Court Database remains too small to draw definitive conclusions about the success rates of pro se defendants. The limited sample size also prevents comparison of conviction rates of pro se defendants with conviction rates of represented defendants charged with similar offenses.

The Federal Docketing Database contains data on 208 pro se felony defendants collected from publicly available docket sheets. The size of this database was dictated in large part by the labor-intensive process of identifying defendants for inclusion. The database includes only cases in which the defendant represented himself at the time of trial, plea, or dismissal. Identifying those cases required sifting through and discarding hundreds of docket sheets for defendants who represented themselves for some portion of the case, but not at the dispositional stage of the case. In addition, searchable docket sheets are a relatively new service provided by Westlaw, so not all of the docket sheets were complete, and more docket sheets were being added throughout the data collection period. As with the State Court Database, the sample size of the Federal Docketing Database is too small to draw any firm conclusions about the causal relationship between trends that appear in the data on pro se defendants and defendants' decisions to self-represent. There are,

82. State Court Database, *supra* note 73. The State Court Database contains data on only a fraction of criminal cases brought in state courts, and that fraction is not necessarily representative of cases prosecuted in state courts generally. In particular, because the State Court Database contains only a sampling of cases from the seventy-five most populous counties, it does not include any information on cases prosecuted in more rural counties. Unfortunately, no other database more completely documents criminal cases brought in state courts. *See* Ronald F. Wright & Wayne A. Logan, *The Political Economy of Application Fees for Indigent Criminal Defense*, 47 WM. & MARY L. REV. 2045, 2080 (2006) (lamenting the lack of data on cases prosecuted in state courts nationwide).

83. *See infra* notes 87–89 and accompanying text (discussing the missing data in both the State Court Database and the Federal Court Database).

however, sufficient data at least to suggest possible reasons defendants choose to represent themselves.

The second major data limitation relates to missing data in the two preexisting databases (the Federal Court Database and the State Court Database). In particular: (1) no data exist from which to assess the sentencing exposure of the defendants; (2) no data are available from which the strength of evidence in particular cases can be measured; (3) no data exist on competency evaluations; and (4) the data on type of counsel at case termination are incomplete. Each of these is discussed in turn below.

Comparing the sentences received upon conviction of pro se defendants with the sentences of their represented counterparts would provide one measure of the relative success rates of pro se felony defendants as compared with represented defendants.[84] Unfortunately, data do not exist to make such a comparison, and this Article therefore does not include sentencing information. With respect to the State Court Database, although there are some data collected on variables that might affect defendants' sentences, including the nature of the charges and the criminal history of the defendants, the sample size is too small to allow analysis of these factors. In addition, each state has a different sentencing scheme, and any sentencing comparison therefore would have to account for state-to-state variations, which would further reduce sample size for purposes of comparison. With respect to the Federal Court Database, although the overwhelming majority of cases were subject to the United States Sentencing Guidelines, the database does not include data on the criminal histories of the defendants. The lack of that information, which is a key determinant of the sentence received by the defendant under the Sentencing Guidelines, renders sentencing data in the Federal Court Database relatively meaningless.

Comparing conviction rates of pro se defendants with conviction rates of represented defendants also provides a measure of pro se defendants' relative success rates. Because both the method of disposition (dismissal, guilty plea, or trial) and the outcome are provided in the State Court Database and in the Federal Court Database, reporting this data is relatively straightforward. The data, however, cannot establish any causal connection between the pro se

84. The majority of felony defendants in both state and federal court are convicted, either by way of guilty plea or at trial. If there were data establishing that pro se defendants receive sentences that are roughly comparable to the sentences received by similarly situated represented defendants, that data would support the argument that pro se defendants are not ill-served by the decision to proceed pro se.

status of the defendant and a particular outcome because there are no data to control for the strength of the evidence against the defendant. In other words, one can conclude that a pro se defendant's favorable outcome is causally linked with his pro se status only if he would have received a less favorable outcome but for his pro se status. The databases do not, however, record any data from which one can assess the strength of the case against the defendant. Even with this limitation, however, the data provide some descriptive indication of the success rates of pro se defendants.

Data regarding signs of mental illness also are missing in the State Court Database and the Federal Court Database. The Federal Docketing Database includes information regarding whether a judge ordered the defendant to undergo an examination to determine competence to stand trial, which provides a rough measure of the percentage of pro se federal felony defendants who exhibited signs of mental illness or bizarre behavior.[85] Because neither the State Court Database nor the Federal Court Database collects this data, however, there are no corresponding data on the rate at which represented defendants are required to undergo competency evaluations.[86]

Finally, data on type of representation in both the State Court Database and the Federal Court Database are missing for approximately half of the defendants.[87] Although data related to other variables are missing as well, a much greater percentage of the data on type of representation is missing. Because this study essentially examines only about 50% of the cases included in the database, the results may be somewhat skewed.[88] It appears, however, that the results of the defendants reported as represented by counsel essentially mirror the published results of defendants in the state and federal systems overall, suggesting that the data are not

85. *See infra* notes 123–36 and accompanying text.

86. One study estimates the rate at which competency evaluations are ordered, but it appears to be a relatively rough estimate. *See infra* note 135 and accompanying text.

87. In the Federal Court Database, data were included on only 191,395 out of the total reported 469,540 cases. Data on type of counsel or outcome were missing for 135,323 cases, an additional 96,927 cases were eliminated because they duplicated information for defendants already included, and 45,895 cases were eliminated because the defendants were only charged with misdemeanors. The State Court Database did not contain any duplicates, but the reporting rate for type of counsel and outcome were much lower than in the Federal Court Database, so data from only about half of the cases are included in this study.

88. In the portions of this study that report the results of represented defendants, the only data used were associated with those defendants who reported that they were represented by counsel.

skewed in any way that would affect the analysis in this Article.[89] This Article therefore proceeds on the assumption that the cases for which the database provides data on type of representation and outcome are representative of federal cases generally.

The stage in the proceedings at which the State Court Database and the Federal Court Database record type of counsel creates another limitation on the analysis in this Article. Both databases record the type of counsel at case termination, defined as sentencing in the event of a conviction, dismissal, or acquittal at trial. The data do not, however, provide any indication of the length of time the defendant represented himself. Thus, a defendant who invoked the right of self-representation only for sentencing (after being represented during plea or trial) would appear in the database as an unrepresented defendant, but a defendant who represented himself through a guilty verdict but then requested counsel for sentencing would appear to be represented. 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 these databases may be slightly inflated. Unfortunately, the databases do not contain any information that reveals whether defendants reported as self-represented in fact were pro se for any meaningful period of time in their cases.[90]

One final note about the Federal Docketing Database—the database created specifically for this Article—merits mention. As discussed above, the availability of searchable docket sheets on Westlaw is a relatively recent phenomenon, but there is no way to ensure that the cases included within the database are representative of cases in which federal felony defendants represent themselves at case disposition. Several different search terms were used to get as

89. *Compare* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, at 55 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs02.pdf [hereinafter COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002] (establishing that in 2002, 92% of all federal felony defendants were convicted, 96% of convicted defendants pled guilty, and only 4% of all defendants exercised their right to a trial), *with infra* notes 108–10 and accompanying text (establishing that 95% of all represented federal court defendants were convicted of some charge, 97% of convicted defendants pled guilty, and only 4% of all these defendants exercised their right to trial).

90. To control for this problem with respect to the Federal Docketing Database, data were collected only for defendants who were pro se at the time of case disposition, defined as guilty plea, trial verdict, or dismissal.

many cases as possible, but those search terms may create some selection bias.[91]

In short, the data certainly are not perfectly tailored to determine whether pro se defendants are ill-served by their decisions to proceed pro se, nor can they definitively answer why a defendant might choose to represent himself. Nonetheless, they certainly are sufficient to call into question the prevailing assumptions about pro se defendants and to suggest alternative, legitimate reasons that the right of self-representation serves important interests of the defendant.

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

> "[I]t is not inconceivable that in some rare instances, the defendant might in fact present his case more effectively by conducting his own defense."[92]

The primary argument against the right of self-representation rests on concerns of fairness to the defendant.[93] From this perspective, the right of 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.[94] As the Court bluntly put it in *Martinez*, "Our experience has

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91. To give an example, I ran the following search in the District Court Docketing Database in Westlaw: (ctp) criminal and (Faretta). This search pulled up all of the cases in which the docket sheet referred to a "Faretta hearing" or the defendant's invocation of his "Faretta rights." Many courts, however, do not use the word "Faretta," instead using either the term "self-representation" or "pro se" or citing to particular Faretta case law in their jurisdiction. I used a number of searches with these other terms to try to get as many cases as possible, but it is at least possible that I did not capture cases from a particular jurisdiction that uses another term to refer to pro se defendants.

92. Faretta v. California, 422 U.S. 806, 834 (1975).

93. *See* 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 10, at 39, 41 (weighing the respect owed to an individual defendant's "fundamental dignity interest" with society's commitment to justice through the adversary process).

94. There is a tendency to equate a pro se defendant's bad outcome, i.e., conviction, with the denial of a fair trial. As the Court recognized in *Faretta*, however, the two concepts are not necessarily equivalent. *Faretta*, 422 U.S. at 833. 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.

taught us that 'a pro se defense is usually a bad defense, particularly when compared to a defense provided by an experienced criminal defense attorney.' "[95] The data, however, do not support the assessment that the decision to proceed pro se necessarily has negative consequences. Although pro se defendants make different choices than their represented counterparts, they are not necessarily ill-served by those decisions.

As an initial matter, very few felony defendants actually choose to represent themselves. In both the Federal Court Database and the State Court Database, the rate of self-representation was roughly 0.3% to 0.5%. The select few felony defendants reported as pro se in the State Court Database appear to have achieved a higher felony acquittal rate 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 conviction (including guilty pleas and convictions at trial) was not significantly higher for pro se defendants than for represented defendants.[96]

1. Outcomes for Pro Se Felony Defendants in State Court

The outcomes for pro se defendants in the State Court Database were at least as good as, and perhaps even better than, the outcomes for their represented counterparts. A total of 234 defendants were

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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 the one he would have received had he been represented necessarily means that the pro se defendant was denied due process. Nonetheless, the fact that there are data establishing that at least some pro se defendants do as well as or better than their represented counterparts undercuts the argument that pro se defendants necessarily are denied due process.

95. Martinez v. Court of Appeals, 528 U.S. 152, 161 (2000) (quoting Decker, *supra* note 6, at 598).

96. 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 62. In that study, the authors read popular news accounts of fifty-four criminal cases involving forty-nine pro se defendants and compiled information regarding the mental health status of those defendants and the outcomes of the cases. Mossman & Dunseith, *supra* note 62, at 409–10. According to their study, of the fifty-four cases, defendants in thirty-eight cases went to trial before a jury. *Id.* at 412. Of those, four were acquitted. *Id.* Out of the fifty-four cases included within the sample, the acquittal rate of the pro se defendants was 11% (four acquittals out of the total thirty-eight cases that went to trial). *Id.* 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.

pro se at case termination.[97] Approximately 50% of those defendants were not convicted of any charge. Of the 50% who were convicted, just over 50% (or 26% of the total number of pro se defendants) were convicted of felonies.[98] 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, 85% were convicted of felonies. Thus, 26% of the pro se defendants ended up with felony convictions, while 63% of their represented counterparts were convicted of felonies.[99]

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% (5202/ 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 higher rates than represented defendants.[100] A total of

97. State Court Database, *supra* note 73.

98. All of the defendants in this database were charged with felonies. A conviction of only a misdemeanor (rather than a felony) indicates either that the defendant pleaded guilty to a misdemeanor and the felony charge was dismissed or that the defendant went to trial and was acquitted on all felony charges.

99. As discussed above, I recognize that the 234 cases in which defendants represented themselves may differ from the cases of represented defendants in other significant ways. *Supra* notes 84–85 and accompanying text. 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. Alternatively, defendants may choose self-representation in cases that are less serious, and thus prosecutors might be more willing to offer misdemeanor pleas in those cases. Unfortunately, there is no way to use the existing data to assess the strength of the evidence against defendants or to ensure comparison of cases with similar merit. Although conclusions as to causation are impossible, the point remains that pro se felony defendants in state court, for whatever reason, are not being convicted at rates higher than those of their represented counterparts.

100. Type of counsel in this database is measured at the time of case termination, and the trial rates of pro se defendants may be inflated as a result. *See supra* text accompanying notes 89–90.

42% of the pro se defendants pleaded guilty, while 71% of represented defendants pleaded guilty. The trial rates of pro se defendants were roughly double those of represented defendants: approximately 10% of the pro se defendants went to trial,[101] 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 ninety-eight pro se defendants who entered guilty pleas, only 53% pleaded guilty to felonies, while the remaining 47% pleaded guilty to misdemeanors.[102] For the represented defendants who pleaded guilty, 84% pleaded guilty to felonies, while the remaining 16% pleaded guilty to misdemeanors.[103] Thus, the pro se defendants were much more likely to have garnered misdemeanor plea deals than the represented defendants.

The pro se defendants who went to trial also appear to have enjoyed success. 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. However, a much lower percentage of the pro se defendants who went to trial were convicted of felonies than the percentage of represented defendants convicted of felonies at trial. A total of twenty-three pro se defendants went to trial, with eighteen convicted and five acquitted, which means that 22% of the pro se defendants choosing to go to trial were acquitted on all charges. Similarly, of the 2,501 represented defendants who went to trial, 78% were convicted, while 22% were acquitted on all charges.

Although the trial acquittal rates were similar, pro se defendants who went to trial were much less likely to be convicted of felonies than their represented counterparts. Only 56% of the pro se defendants convicted at trial were convicted of felonies, while the remaining defendants were convicted only of misdemeanors.[104] By

101. Twenty-three out of the 234 pro se defendants, or 9.8%, went to trial. This percentage does not equal the total of the percentages in Table 1 because of rounding in the Table.

102. State Court Database, *supra* note 73. A defendant who has pleaded guilty to both a felony and a misdemeanor would be included within the category of defendants who pleaded guilty to felonies. The misdemeanor plea category therefore includes only defendants whose most serious offense of conviction was a misdemeanor.

103. *Id.* Of the 33,070 represented defendants who pleaded guilty, 27,868 pleaded guilty to a felony, while 5,202 pleaded guilty only to misdemeanors.

104. *Id.* As discussed above, the sample size of pro se defendants who went to trial is too small to draw any conclusions beyond an observation that the data certainly do not support an argument that pro se defendants are harmed by the decision to self-represent. *See supra* notes 82–83 and accompanying text.

contrast, 90% of the represented defendants who were convicted at trial were convicted of felonies.

The overall acquittal rate of pro se defendants expressed as the percentage of pro se defendants acquitted out of the total number of pro se defendants (rather than as a percentage of defendants going to trial) also was higher than the overall acquittal rate of represented defendants. A total of 2% of the pro se defendants were acquitted, while only about 1% of the represented defendants were acquitted.

Pro se defendants also garnered a higher percentage of dismissals and deferred adjudications than did their represented counterparts. Cases against roughly 37% of the pro se defendants were dismissed. Another 11% received diversion or deferred adjudications.[105] By contrast, the represented defendants had just over half the dismissal rate and less than half the rate of deferred adjudications: the dismissal rate was 20%, and the diversion rate was 4%. The discrepancy in dismissal rates may be explained, at least in part, 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 insufficient proof to convict the defendant on a particular element and he will therefore dismiss the charge. In at least some of those instances, the dismissal may occur prior even to appointment 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 have not done anything to represent themselves, it may not be entirely accurate to categorize them as pro se.

Even recognizing the limitations of the databases, while the data do not prove that pro se felony defendants in state court achieve *better* results than represented defendants, they certainly undermine the assumption that decisions to engage in self-representation necessarily lead to bad outcomes.[106]

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105. State Court Database, *supra* note 73. 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. *See, e.g.*, GA. CODE ANN. § 16-13-2 (2003) (setting forth requirements for diversion program in drug cases); OHIO REV. CODE ANN. § 2935.36 (LexisNexis 2004) (providing requirements for pretrial diversion).

106. As discussed below, this is not to suggest that counsel is not necessary. *See infra* notes 209–14 and accompanying text. 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.

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 those of 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.[107]

Felony defendants in the Federal Court Database who were reported as pro se at case termination pleaded guilty less often than did their represented counterparts and were almost twice as likely to go to trial.[108] As set forth in Table 2, from 1998 to 2003, 91% of the federal felony defendants who reported having counsel pleaded guilty. By contrast, pro se defendants in this database pleaded guilty in approximately 80% of cases.[109] 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. A little over 9% of the pro se defendants went to trial. By contrast, less than 4% of the represented felony defendants went to trial.[110]

107. The Federal Court Database is a preexisting database of all defendants prosecuted in federal court. *See supra* notes 69–72 and accompanying text. The Federal Docketing Database contains information collected from the federal court docket sheets of 208 felony defendants who were representing themselves at the time of case disposition. *See supra* notes 78–81 and accompanying text.

108. Federal Court Database, *supra* note 69. The Federal Court Database, like the State Court Database, measures type of counsel at the time of case termination.

109. 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 above, the dismissal statistics in pro se cases may be somewhat overstated. *See supra* Part II.B.1. Even excluding the dismissals, however, defendants reported as pro se at case termination were more likely to go to trial than represented defendants.

110. Federal Court Database, *supra* note 69. 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 defendants and defendants who were pro se at case termination still is significant.

Table 2: Method of Disposition and Outcome in the Federal Court Database

	No Trial		Trial		Total
	Guilty Plea	Dismissed	Convicted	Acquitted	
Represented	174,352 (91%)	9,099 (5%)	6,153 (3%)	1,169 (1%)	190,773
Self/Waived	500 (80%)	65 (10%)	53 (9%)	4 (1%)	622

In terms of acquittal rates at trial, over the six-year period between 1998 and 2003, fifty-seven pro se defendants in the Federal Court Database went to trial, and four of them were acquitted, yielding a trial acquittal rate of 7%. Over that same six-year period, 7,322 of the represented defendants went to trial, with 1,169 acquitted, for a trial acquittal rate of 16%. The acquittal rate for represented defendants therefore was over twice as high as that for unrepresented defendants.[111]

Measured a different way, however, pro se federal felony defendants were just as likely to be acquitted as their represented counterparts. Because the 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, it might make more sense to express the pro se acquittal rate 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.* Using this method, the acquittal rate for pro se defendants is virtually identical to the acquittal rate for represented defendants. Four pro se felony defendants were acquitted out of a total of 622 pro se defendants, for a 0.64% overall acquittal rate. By way of comparison, 1,169 represented felony defendants were acquitted at trial out of 190,773 total represented felony defendants, yielding a 0.61% 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.[112]

111. *Id.* Over that six-year period, represented defendants had a higher acquittal rate at bench trials than at jury trials. Because only one unrepresented defendant chose a bench trial, however, there are no statistics for comparison in the bench trial category.

112. 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. United States v. Booker, 543 U.S. 220, 233–34 (2005) (noting that the "Guidelines as written . . . are mandatory and binding on all judges"). The Guidelines do not provide for the significant sentence variation that

Pro se felony defendants in the Federal Court Database, like their state court counterparts, also 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, all of the defendants represented themselves at the time of case *disposition*, rather than at the time of case termination.[113] This group of pro se defendants was overwhelmingly more likely to go to trial than either pro se defendants in the Federal Court Database or represented defendants in the Federal Court Database. Indeed, of the 208 pro se defendants included within this database, 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%, well over fifteen times the trial rate of represented federal felony defendants in the Federal Court Database.

Two of the pro se defendants in the Federal Docketing Database were acquitted of all charges, resulting in a trial success rate of 1.5%, a figure that is significantly lower than the 16% acquittal rate of the represented defendants. 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 were as successful as the represented defendants, with an overall acquittal rate of 0.96%, compared to the 0.61% overall acquittal rate of the represented defendants.[114]

In addition, the dismissal rates of the pro se defendants in the Federal Docketing Database were roughly equivalent to the dismissal rates of represented defendants, with cases against eleven of the pro

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many state sentencing systems offer. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2005) (limiting the extent to which a court can reduce a defendant's sentence based upon his guilty plea). 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.

113. Case disposition is defined as dismissal, verdict at trial, or plea.

114. *See* Federal Docketing Database, *supra* note 78 (showing that two out of 208 pro se defendants were acquitted); Federal Court Database, *supra* note 69 (showing that 1,169 out of the 190,773 represented defendants were acquitted).

In addition to the outright acquittals of pro se defendants in the Federal Docketing Database, a number of the other pro se defendants were acquitted on all but one of the charges against them or on the vast majority of charges. Three other defendants obtained mistrials.

se defendants (approximately 5%) being dismissed.[115] Because the overall complete success rate (counting both complete acquittals and dismissals) of represented defendants in federal court is so low—roughly 5.4%—the complete success rate of the pro se defendants in the Federal Docketing Database (approximately 6.3%) still roughly approximates that of the represented defendants. 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 that pro se defendants cannot receive constitutionally fair trials.

C. *Furthering the Constitution's "Basic Guarantee of Fairness":*[116] *The Benefits of Recognizing a Right of Self-Representation*

Having concluded that the right of self-representation is not necessarily inconsistent with the due process right to a fair trial, I now turn to the second major criticism of *Faretta*—that recognizing a right of self-representation does not benefit criminal defendants in any way because they choose to proceed pro se as a result of mental illness or for illegitimate reasons (such as the desire to disrupt the judicial proceedings) rather than for any rational reason.[117] This argument requires that at least one of the two following assumptions be true: (1) most defendants who choose to represent themselves do so

115. In contrast to the uncertainty surrounding dismissal rates in connection with the State Court Database and the Federal Court Database, *see supra* Part II.B, there is no question with regard to the Federal Docketing Database that the defendants were representing themselves at the time of the dismissals. In most of the cases that resulted in dismissal in the docketing database, the defendant was represented by counsel and then invoked his right of 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. *See* Federal Docketing Database, *supra* note 78.

116. Martinez v. Court of Appeals, 528 U.S. 152, 164 (2000) (Breyer, J., concurring).

117. *See, e.g.*, Decker, *supra* note 6, at 485–87 ("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."); Sabelli & Leyton, *supra* note 10, at 164 (questioning the wisdom of the right of self representation because of their concern that mentally ill defendants "abuse . . . the right of self representation in order to block presentation of mental health evidence").

because they are mentally ill, or (2) the reason articulated in *Faretta* for recognizing a right of 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 ascertain their reasons for choosing to proceed pro se.[118] Nonetheless, the data in the Federal Docketing Database provide 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, the data suggest that at least some 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-representation had asked the judge to appoint a new lawyer *before* they invoked the right to represent themselves.[119] 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.[120] Because there is ample evidence to establish that these are legitimate concerns on the part of defendants, the right of self-representation in practice appears to work to the benefit of defendants by protecting their right to control their defense in the face of inadequate or potentially conflicted counsel.

118. Interviews with pro se defendants alone likewise would not be sufficient because it is unlikely that mentally ill defendants would self-identify their own mental illness as a reason they proceeded pro se.

119. *Infra* note 140.

120. This Article focuses on the evidence supporting these reasons for invoking the right of self-representation in part because they mirror the Court's analysis in *Faretta* and in part because of 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 pro se clients. Their reasons for asserting the right of self-representation, as articulated by them in open court, included some of the reasons discussed in this Article.

1. The Lack of Signs of Mental Illness Among Those Representing Themselves

Faretta emphasized criminal defendants' autonomy as one basis for recognizing a right of self-representation.[121] Imbedded within this 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 a cloud of mental illness.[122] 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 of self-representation. There is, of course, no perfect way to measure whether a pro se criminal defendant is mentally ill, let alone whether mental illness affected the decision to proceed pro se.[123] 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.[124] By that standard, over 78% of the pro se defendants in the Federal Docketing Database did not exhibit signs of mental illness.[125]

A criminal defendant has a constitutional right not to be tried if he is not competent, primarily because a competent defendant is "fundamental to an adversary system of justice."[126] As a matter of

121. 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.").

122. 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. 389, 401–02 (1993) (holding that the standard for competence to waive counsel is the same as for competence to stand trial).

123. 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.

124. This Article uses 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 the standard for competency is so low that very few criminal defendants are found incompetent to stand trial. *See infra* note 129 and accompanying text. Using the order that a defendant undergo a competency evaluation as a proxy for signs of mental illness, however, may be overinclusive in that it may include defendants who are not really mentally ill.

125. *See* Federal Docketing Database, *supra* note 78. Mossman and Dunseith reached a similar conclusion. *See* Mossman & Dunseith, *supra* note 62, at 412–13. The authors charted the extent to which evidence of mental illness or disturbance was apparent from the media accounts. Mossman & Dunseith, *supra* note 62, at 409–10. Although the media coverage of thirteen of the pro se defendants (out of forty-nine) reported "statements or actions [that] appeared to be symptoms of a serious Axis I mental disorder or indicated possible incompetence to stand trial," the majority of the defendants did not exhibit such behavior. *Id.* at 412–13.

126. Drope v. Missouri, 420 U.S. 162, 172 (1975).

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 has] a rational as well as factual understanding of the proceedings against him."[127] 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."[128] Although it is relatively rare for a defendant to be found incompetent to stand trial,[129] competency evaluations in both the state and federal systems are done routinely upon any indication of mental illness.[130] Moreover, 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.[131] Consequently, 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.[132] 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* presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense."[133] Therefore, as a practical matter, if the defendant exhibits signs of bizarre behavior, one party (often the government) will move to have the defendant evaluated.

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127. Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam).

128. 18 U.S.C. § 4241(d) (2000).

129. *See* NORMAN G. POYTHRESS ET AL., ADJUDICATIVE COMPETENCE: THE MACARTHUR STUDIES 50 (2002) ("Referral for a competence evaluation infrequently results in a finding of incompetence—perhaps 10–30% of defendants referred for evaluation are regarded as incompetent by evaluators, and found to be so by the courts.").

130. *See* Winick, *supra* note 15, 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.").

131. *See, e.g.*, Hull v. Kyler, 190 F.3d 88, 105–06 (3d Cir. 1999) (noting that if there were signs of incompetence, the defendant's right to be tried only if he is competent would be violated by "the trial court's failure to grant a competency hearing or his counsel's failure to request one").

132. *Id.*; SEYMOUR L. HALLECK, THE MENTALLY DISORDERED OFFENDER 20–22 (1986) ("Prosecutors may ask for a competency examination to avoid having the conviction overruled on appeal.").

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

Given the low threshold at which judges in federal court order competency evaluations, and given the widely held 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 the Federal Docketing Database.[134] It is unclear exactly how many defendants receive competency evaluations nationwide, but one study estimates that 4% to 5% of felony defendants in 1994 received competency evaluations.[135] Although the rate of competency evaluations among the federal felony pro se defendants in the Federal Docketing Database appears to be 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.

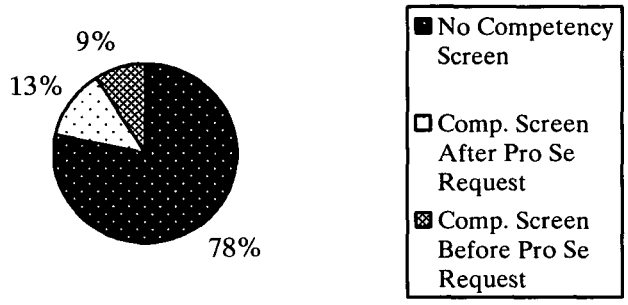
Moreover, not only did less than 22% of the pro se defendants receive competency evaluations, but as depicted in the chart below, in over half of the cases in which the defendant was ordered to undergo an evaluation, the evaluation was ordered *after* the defendant invoked his right of self-representation.[136]

134. Competency evaluations were ordered in forty-five 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. *See* Federal Docketing Database, *supra* note 78.

135. *See* POYTHRESS ET AL., *supra* note 129, at 50. The authors estimated that 50,000 defendants receive competency evaluations annually and that there are approximately 1.2 million felony indictments annually. *Id.* The authors therefore estimated that roughly 4% to 5% of felony defendants receive competency evaluations. *Id.*

136. Of the forty-five cases in which the court ordered a competency evaluation, the evaluation in twenty-six cases was not ordered until after the defendant invoked the right of self-representation. *See* Federal Docketing Database, *supra* note 78.

Chart 1: Competency Evaluations for Pro Se Defendants



Because of the long-held assumption that those who represent themselves are mentally ill, a defendant's decision to represent himself, 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 may be much more likely to order a competency evaluation when a defendant invokes his right of self-representation, even absent any other indicia of mental illness, than she would be for a defendant who proceeds with counsel. Counting only those defendants who had competency evaluations *prior* to invoking the right of self-representation, only 9% of the pro se defendants were ordered to undergo evaluations.[137] Although this figure still is higher than that of defendants in the federal system generally, it certainly undermines the notion that most defendants who represent themselves are mentally ill.[138] And while there perhaps are some mentally ill pro se defendants who simply were not ordered to undergo competency evaluations, 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.

137. *See* Federal Docketing Database, *supra* note 78.

138. As discussed in Part III.B, the fact that over 20% of the pro se defendants were ordered to undergo a competency evaluation 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 do not exhibit signs of mental illness, and they therefore are choosing to represent themselves for reasons unrelated to mental illness.

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

> "To force a lawyer on a defendant can only lead him to believe that the law contrives against him."[139]

Because the data suggest that the majority of felony defendants who choose self-representation have not exhibited signs of mental illness, there must be some other reason that defendants choose to proceed pro se. None of the databases contains information explicitly addressing other reasons pro se defendants choose self-representation, but the data in the Federal Docketing Database provide some clues. Inherent in a defendant's choice to represent himself 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 believe that any lawyer can represent his best interests. Not surprisingly, the data in the Federal Docketing Database suggest that many of the pro se defendants were dissatisfied with the quality of representation they received from counsel prior to invoking the right of self-representation. The data also provide evidence of the second proposition—that some defendants are representing themselves because they do not want any lawyer, and in particular any agent of the government, representing them.

a. Data Suggesting Dissatisfaction with Counsel

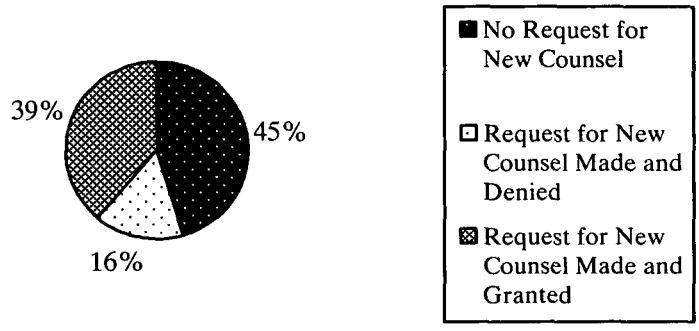
More than half of the pro se defendants in the Federal Docketing Database who had counsel at the initial stage of their cases made a request, *prior to* invoking their right of self-representation, that the judge appoint new counsel.[140] This statistic bears repeating: over one out of every two pro se defendants in the Federal Docketing Database who were represented by counsel had some experience with counsel that caused them to ask the court to remove that attorney and appoint a different attorney. Although there are no data on the overall rate at which federal felony defendants request new counsel, the fact that nearly half of the pro se defendants expressed

139. Faretta v. California, 422 U.S. 806, 834 (1975).

140. Twenty-two of the defendants in this database invoked the right of 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 of self-representation. *See* Federal Docketing Database, *supra* note 78.

dissatisfaction with counsel before they chose to represent themselves is significant.[141]

Chart 2: Requests for New Counsel by Pro Se Defendants[142]



Moreover, in 29% of the cases in which defendants requested new counsel (or for roughly 16% of the pro se defendants who had counsel at some point[143]), the request was denied.[144] 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.[145]

141. *See* Federal Docketing Database, *supra* note 78. Unlike the Federal Docketing Database, 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. Based upon my anecdotal experience as an assistant federal public defender and working in the federal court system, this rate is higher than the overall rate of requests for new counsel in federal court.

142. This Chart includes only defendants who were represented at some point in the proceeding. *See supra* note 140.

143. The pro se defendants who had counsel at some point are the 186 defendants identified in footnote 140.

144. The decision whether to appoint new counsel upon request of the defendant is committed to the discretion of the district court. *See infra* note 152.

145. For that 16% of the pro se defendants, it appears relatively clear that the defendants were unhappy with court-appointed counsel when they decided to proceed pro se. For the remaining 84% of defendants who invoked the right to proceed pro se at a point in the case when they were represented by counsel whom they had not previously sought to have removed from the case, it is more difficult to measure the level of satisfaction with counsel. In particular, the fact that a particular defendant did not file a motion for appointment of new counsel does not necessarily mean that the defendant was happy with the quality of representation, but instead may be explained by a lack of information on the part of the defendant. Similarly, the fact that 39% of the defendants had succeeded on a motion for new counsel does not necessarily indicate satisfaction with

Further evidence of dissatisfaction with counsel as a reason for self-representation emerges from the fact that at least some defendants apparently invoke the right of self-representation but then later agree to be represented (and to waive the right of 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 some of these cases, entries in 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 of 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 of self-representation.[146] The defendant waives his right of self-representation, receives new counsel, and the case continues along the normal track of cases. In other cases, the defendant invokes the right of self-representation, and then at the hearing to determine whether the defendant wishes to waive the right to counsel, the judge agrees to appoint new counsel for the defendant. The defendant then waives the right of self-representation, and the case continues with the defendant represented by counsel. None of these defendants are included in the Federal Docketing Database because they have counsel at the time of case disposition, but in the searches that led to the creation of this database, this pattern in which the invocation of

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the new counsel but instead may suggest a belief by the defendant that another motion for the appointment of new counsel would not result in the appointment of a more qualified attorney. Indeed, there are indications in the docket sheets that some judges, upon granting a motion for appointment of new counsel, will admonish the defendant that she will not entertain any further such motions.

146. Judges in felony cases often will try to dissuade defendants from representing themselves because there are strong institutional 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, *see supra* note 18, and for reasons of efficiency, most trial judges prefer guilty pleas to trials. Second, a 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 on the defendant's right to a fair trial before the jury? These difficulties may lead judges to encourage the use of counsel in felony cases.

the right of self-representation led to the appointment of new counsel occurred with some frequency.[147] In these cases, the data suggest that dissatisfaction with counsel caused the defendant's decision to represent himself, 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 of self-representation at their first appearance in court, before counsel was appointed or entered an appearance.[148] Because 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.[149]

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 either dissatisfaction with, or distrust of, lawyers. The question is whether there is any legitimate basis for that dissatisfaction.[150] In other words, is any constitutional interest served by guaranteeing these defendants a right of self-representation? Existing evidence on the quality of indigent representation demonstrates that the concerns of pro se defendants are legitimate and that the right of self-representation therefore protects a valuable constitutional interest of the defendant.

147. 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 of self-representation only to waive the right once new counsel was appointed in one of the patterns described above. *See, e.g.*, Docket, United States v. Santacruz, No. 1:04CR00254 (N.D. Ga. filed May 5, 2004) (setting forth, in docket entries 207, 213, 215, and 218, defendant Renato Jiminez's efforts for new counsel); Docket, United States v. Denny, No. 4:03CR00024 (D. Mont. filed Feb. 21, 2003) (setting forth the pattern in entries eleven and twenty-three); Docket, United States v. Johnson, No. 6:02CR00088 (M.D. Fla. filed Aug. 7, 2002) (setting forth in entries 163, 166, and 171 the order for new counsel for Dammron Mitchell).

148. *See supra* note 140.

149. For the defendants who requested and received new counsel, *see supra* note 145, this same explanation may hold true.

150. If there is not a *legitimate* reason for representing oneself, it is possible that *Faretta* does not protect any interest of the defendant.

The first interest protected by the right of self-representation could be termed the right of self-preservation. The data suggest that at least some pro se defendants act out of self-preservation. This need for a right of self-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*).[151] A simple example demonstrates the point.

Suppose 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, 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.

151. Arguing that even criminal defendants with legal training 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 6, at 488 (footnote omitted). This argument misses the point that indigent defendants cannot afford the type of attorney that F. Lee Bailey could afford.

The judge refuses to do so.[152] 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 he can represent himself at trial. While the defendant may doubt his own ability to present the case to a jury, at the very 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 constitutional right of 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 the defendant's behalf, and failed to argue the defendant's theory of defense in the closing to the jury.[153]

Three pieces of data suggest that at least some defendants who choose to represent themselves may do so because of these types of concerns about court-appointed counsel. First, pro se defendants in the Federal Docketing Database were more likely to qualify for court-appointed counsel than federal defendants overall. Second, pro se defendants are more likely to go to trial than represented defendants. Finally, there are a number of defendants who invoked the right of self-representation only to later waive that right when the trial court appointed new counsel. As discussed below, each of these pieces of data tends to support the argument that some pro se defendants invoke the right of self-representation because of dissatisfaction with the quality of court-appointed counsel.

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

152. An indigent defendant has no right to counsel of his choice. *See* United States v. Iles, 906 F.2d 1122, 1130 (6th Cir. 1990) ("An indigent defendant has no right to have a particular attorney represent him."); *see also* Morris v. Slappy, 461 U.S. 1, 14 (1983) ("[W]e reject the claim that the Sixth Amendment guarantees a 'meaningful relationship' between an accused and his counsel."). The trial court therefore has almost complete discretion regarding whether to grant a request for new counsel.

153. The right of 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 of self-representation. The key point, however, is that it is the right of self-representation that gives the defendant some leverage in this situation. As discussed *supra* at notes 145–47 and accompanying text, this pattern appears to be occurring in federal court.

felony criminal defendants.[154] 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 of self-representation, roughly 87% were represented by court-appointed counsel, either a public defender or other Criminal Justice Act appointed counsel.[155] 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 court-appointed counsel.

The trial rates of pro se defendants also support an inference that dissatisfaction with the quality of representation leads to the decision to self-represent. Concerns about the quality of counsel are most acute for defendants who go to trial because the inadequacies of counsel become most 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. The stakes of pleas and trials also are different. In a plea negotiation, 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 skill, or lack thereof, 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 pro se defendants in the Federal Docketing Database went to trial, either before a judge or jury, a rate over fifteen times greater than the rate at which represented federal felony defendants went to trial.[156] This evidence further supports the theory that at least some of those defendants chose self-representation because of concerns about the quality of counsel.

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154. CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/dccc.pdf.

155. Twenty-two of the defendants (roughly 11%) represented themselves from the initial proceeding and never had counsel, *see supra* note 140, so it is not clear whether they would have been represented by appointed counsel. Out of the 186 remaining defendants, seventy-one had appointed public defenders, ninety-one had court-appointed counsel other than public defenders, and twenty-four retained their own attorneys. *See* Federal Docketing Database, *supra* note 78.

156. *See supra* text accompanying notes 113–14.

The defendants who invoke the right of self-representation and waive the right to counsel only to accept representation when the judge appoints new counsel provide additional evidence of concerns about the quality of counsel.[157] In these cases, it is clear that the defendant is dissatisfied with counsel—he has requested 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 may have led to the self-representation. Finally, the fact that the defendant accepts new counsel (waiving the right of 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.[158] While all jurisdictions are constitutionally required to provide a lawyer to indigent defendants, many do not provide *good* counsel.[159] In 1963, the Supreme 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.[160] Two decades later, the Court held that the defendant is entitled not just to the assistance of counsel but to the *effective* assistance of counsel.[161] But what constitutes "effective" assistance? 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 counsel very high.[162] Thus, a lawyer who sleeps during portions of the trial is not per se ineffective unless he sleeps through substantial portions of the trial,[163] and a lawyer who drinks heavily throughout trial and is arrested for driving under the influence during jury

157. *See supra* notes 146–47 and accompanying text.

158. *See infra* notes 160–92 and accompanying text.

159. *See infra* notes 170–90 and accompanying text.

160. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

161. *See* Strickland v. Washington, 466 U.S. 668, 685 (1984) (noting that the defendant is entitled to the effective assistance of counsel, not just the presence of counsel).

162. To establish a Sixth Amendment violation, a defendant must establish either (1) that there was an actual or constructive deprivation of counsel, *id.* at 692, or (2) that counsel's representation fell below an objective standard of reasonableness and that counsel's errors resulted in prejudice, *id.* at 693.

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

selection is not per se ineffective.[164] 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.[165]

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. Most defendants in both state and federal courts are indigent and represented by court-appointed counsel. In 1996, court-appointed counsel represented 82% of state felony defendants at case termination in the seventy-five largest urban counties.[166] Similarly, in 1998, court-appointed counsel represented 66% of federal felony defendants at case termination.[167] The sheer volume of defendants requiring appointed counsel has overwhelmed many jurisdictions that lack systems and resources to ensure adequate representation.[168]

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164. *See* People v. Garrison, 765 P.2d 419, 440–41 (Cal. 1989) (finding that an attorney who drank heavily every day, was arrested the day of jury selection for driving under the influence with a blood alcohol level of 0.27%, and died of alcoholism shortly after trial was not per se deficient and that a "review of the facts indicate [sic] that [the attorney] did a fine job in this case"); *see also* Burnett v. Collins, 982 F.2d 922, 930 (5th Cir. 1993) (concluding that the client's failure to show that the attorney's alcohol use during trial affected his representation defeated his claim for ineffective counsel); Fowler v. Parratt, 682 F.2d 746, 750 (8th Cir. 1982) (holding that an attorney disbarred because of alcoholism and blackouts while representing clients was not ineffective because the attorney "testified that his alcoholism did not affect his representation of [the client]").

165. *See* United States v. Cronic, 466 U.S. 648, 665–66 (1984) (holding that even though the defense attorney was inexperienced in criminal matters and the case was complex, these facts were not sufficient to establish ineffective assistance absent a showing of actual ineffectiveness); *see also* Stephen B. Bright, *Counsel for 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).

166. HARLOW, *supra* note 154, at 1. In 2002, a little over one million adults were convicted of felonies in state courts. *See* JODI M. BROWN & PATRICK LANGAN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: FELONY SENTENCES IN THE UNITED STATES, 2002, at 1 (2004), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fssc02.pdf. 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.

167. HARLOW, *supra* note 154, at 1.

168. *See infra* notes 170–90 and accompanying text; *see also* E.E. Edwards, *Getting Around* Gideon*: The Illusion of Effective Assistance of Counsel*, CHAMPION, Jan.–Feb. 2004, at 4, 4 (arguing that many indigent defense systems are chronically underfunded, including Oregon, which ran out of money for public defense in 2003 and was forced to shut down on Fridays for three months).

The deficiencies in the quality of court-appointed counsel result both from a lack of sufficient funding and from problems in the structure used to provide counsel to indigent defendants.[169] Public defender systems often work with extremely limited resources. Attorneys are saddled with crushing caseloads and are unable to represent their clients adequately because of the sheer volume of cases for which they are responsible.[170] Indeed, in some jurisdictions, individual attorney caseloads of several hundred serious felony defendants per year are standard.[171] In New Orleans, a court declared that because of high caseloads and inadequate resources, the local indigent defender program was unable to provide constitutionally effective assistance of counsel.[172] Moreover, because public defender positions generally pay well below the salaries of other attorneys,[173] many public defenders come straight from law school and either have no legal experience or lack the skills to represent clients effectively.[174]

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 may also lead to inadequate representation. Court-appointed attorneys usually are compensated

169. Although inadequate funding and bad structuring of indigent defense systems can and often do appear simultaneously, they also can operate independently of each other. For instance, even if a state provides adequate funding for indigent defense, structural problems still may prevent the provision of adequate representation, and a system that is perfectly structured may nonetheless experience problems if it is not adequately funded.

170. *See, e.g.*, Charles J. Ogletree, Jr., *An Essay on the New Public Defender for the 21st Century*, LAW & CONTEMP. PROBS., Winter 1995, 81, 85–86 (arguing that lack of institutional support, including "unconscionable caseload[s]," 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, cap the number of cases each public defender can handle. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1286–87 (1993). Such a system, however, is very rare. In many jurisdictions, public defenders regularly juggle hundreds of cases.

171. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 17–18 (2004), *available at* http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf [hereinafter *GIDEON*'S BROKEN PROMISE] (" '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 Jonathan Gradess, Executive Director, New York State Defenders Association)).

172. *See* State v. Peart, 621 So. 2d 780, 790 (La. 1993).

173. *See* CAROL J. DEFRANCES, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: STATE-FUNDED INDIGENT DEFENSE SERVICES, 1999, at 5 (2001), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/sfids99.pdf (noting that "minimum salaries for entry-level assistant public defenders ranged from $29,000 to $45,000 among the States reporting this information").

174. *GIDEON*'S BROKEN PROMISE, *supra* note 171, at 16–17.

at an hourly rate well below that commanded by most attorneys, and the total fee may be capped.[175] The result has been that those who accept appointment have an incentive, and may be obligated by financial considerations, to take on more cases than they can effectively manage.[176] To cure that problem, some counties in Georgia used to require that all attorneys practicing in the jurisdiction accept a certain number of court-appointed cases.[177] This practice, however, does little to solve the underlying problem. Requiring all lawyers in a jurisdiction to accept a certain number of court-appointed cases means that lawyers are forced to adjudicate outside of their practice areas. In one county in Georgia, for example, all practicing lawyers were required to accept court-appointed cases, including those lawyers who had absolutely no criminal experience whatsoever.[178] An attorney who has spent her entire career drafting wills may be a very good estate lawyer, but she 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.[179]

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.[180] Such a system

175. *See* Bruce A. Green, *Criminal Neglect: Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1178–79 (2003) (citing panel attorney fees in Chatham County, Georgia, as sixty dollars per hour for work in court and forty-five dollars per hour for work outside of court); *GIDEON'S* BROKEN PROMISE, *supra* note 171, at 9–10.

176. *See* Green, *supra* note 175, at 1179.

177. *GIDEON'S* BROKEN PROMISE, *supra* note 171, at 16–17.

178. *Id.*

179. *Id.* at 15–16.

180. *Id.* at 20–21; Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2480 (2004) ("Judges and clerks put pressure on defense counsel (especially public defenders) to be pliable in [plea] bargaining. Repeat defense counsel often must yield to this pressure in order to avoid judicial reprisals against clients and perhaps to continue to receive court appointments."). 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. *See* DEFRANCES, *supra* note 173, at 9. 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. *Id.* at 7

gives lawyers an incentive to urge clients to plead guilty rather than to go to trial, regardless of the strength of the case.

Inadequate representation also has resulted from the use of contract systems.[181] 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.[182] There are different types of contracts, but in a flat-fee system, 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.[183] 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."[184] In hearings before the ABA Standing Committee on Legal Aid and Indigent Defense, witnesses from several states provided accounts demonstrating that indigent defendants often entered guilty pleas almost immediately after their first meetings with attorneys.[185] 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."[186] 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 could lead indigent defendants legitimately 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,[187] a contract system

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tbl.8. In those jurisdictions, individual judges are less likely to control the appointment process.

181. *See* SPANGENBERG GROUP, STATUS OF INDIGENT DEFENSE IN GEORGIA: A STUDY FOR THE CHIEF JUSTICE'S COMMISSION ON INDIGENT DEFENSE, PART I, at 37–43 (2002), http://www.georgiacourts.org/aoc/press/idc/idchearings/spangenberg.doc.

182. *See* DEFRANCES, *supra* note 173, at 3 (describing public defender, private appointment, and contract methods of providing indigent defense).

183. *GIDEON'S* BROKEN PROMISE, *supra* note 171, at 12.

184. *Id.* at 16. 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 A16.

185. *GIDEON'S* BROKEN PROMISE, *supra* note 171, at 16.

186. *Id.*

187. Contracts often are awarded to the lowest bidders or to the only attorneys willing to take the job. Thus, appointments often are made either to the newest attorneys or to

still is in place in many jurisdictions.[188] Thus, even if pro se defendants in state court enjoy higher success rates due to the fact that the evidence against them is weaker than the evidence against represented defendants,[189] there still exists a legitimate reason for recognizing the right of self-representation.

The problem of inadequate indigent representation is not confined to state courts—the same problems of underfunded and overworked attorneys exist in federal courts.[190] Indeed, the problem of excessively high caseloads 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 to properly represent federal defendants.[191]

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."[192] Because the evidence suggests that at least some of the defendants who choose to proceed pro se do so because of legitimate concerns about the quality of representation provided to them, it follows that the right of self-representation in practice protects a

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attorneys with the least competence. *See* SPANGENBERG GROUP, *supra* note 181, at 37–43 (detailing several instances of contracts awarded without bid, including contracts awarded either 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"); *see also* Bright, *supra* note 165, at 1845–47 (detailing instances of attorney inexperience in capital cases).

188. *See* CAROL V. DEFRANCES & MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN: INDIGENT DEFENSE SERVICES IN LARGE COUNTIES, 1999, at 3 (2000), http://www.ojp.usdoj.gov/bjs/pub/pdf/idslc99.pdf (noting that in 1999, approximately 40% of the nation's largest 100 counties used contract attorneys).

189. *See supra* note 99.

190. *See* Richard Klein, *The Constitutionalization of* Ineffective *Assistance of Counsel*, 58 MD. L. REV. 1433, 1438 (1999).

191. Most federal district courts maintain some form of public defender's office, rather than entrusting all indigent representation to private court-appointed attorneys. *See* HARLOW, *supra* note 154, at 2 (noting that at the end of 1998, seventy-four out of the ninety-four United States district courts used public or community defender organizations). Most jurisdictions, however, still use attorneys appointed under the Criminal Justice Act, 18 U.S.C. § 3006 (2000), for cases in which the public defender's office has a conflict or is unable to represent the defendant. *See* HARLOW, *supra* note 154, at 2 (noting that "[a]t the end of 1998[,] all 94 U.S. district courts used" panel attorneys). Because the reimbursement rates for attorneys appointed under the Criminal Justice Act (the "CJA attorneys") continue to be relatively low, the same concerns regarding caseloads of public defenders also often hold true for CJA attorneys. *See* BUREAU OF NAT'L AFFAIRS, REPORT OF THE COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (1993), *reprinted in* 52 CRIM. L. REP. 2265, 2284–85 (1993) (concluding that hourly rates and case maximums for panel attorneys have led to fears of extreme financial hardship).

192. Martinez v. Court of Appeals, 528 U.S. 152, 158 (2000) (emphasis added).

valuable interest of the defendant—the interest in retaining some control in order to assure fairness in the process.

The right of 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.[193] As noted in Part II.C.2.a, at least some of the defendants in the Federal Docketing Database opted for self-representation before any counsel had represented them,[194] 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.[195] 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.[196] For instance, as set forth in Table 3, the pro se defendants in the Federal 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.[197] In the federal system overall, by contrast, in fiscal year 2002, only 0.7% of the defendants were charged with tax law violations as their most serious charge.[198]

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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193. 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.

Id. at 173 (Scalia, J., concurring).

194. *See supra* note 140.

195. *See also* Mossman & Dunseith, *supra* note 62, at 408–19 (identifying ideological considerations as a reason that pro se defendants choose self-representation and offering Dr. Jack Kevorkian as an example).

196. The sample size is too small to draw any definitive conclusions about the nature of the charges against the pro se defendants in the Federal Docketing Database. Despite the lack of statistical significance, these figures remain worth reporting because they suggest one potential reason defendants may choose to pursue self-representation.

197. That figure includes four defendants whose lead charge was conspiracy and in which the target of the alleged conspiracy was tax fraud.

198. COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, *supra* note 89, at 58.

Table 3: Most Serious Lead Charge

	Pro Se Cases[199]	Represented Felony Defendants FY 2002[200]
Assaults	2.3%	0.5%
Drug Offenses	15.8%	41.7%
Escape	1.7%	0.7%
Fraudulent Property Offenses	31.6%	17.5%
Other Property Offenses	1.1%	3.5%
Immigration Offenses	6.2%	17.1%
Public Order: Racketeering & Extortion	8.5%	1.3%
Public Order: Nonviolent Sex Offenses	1.7%	0.8%
Public Order: Failure to Appear	0.6%	—
Public Order: Perjury, Contempt, & Intimidation	1.7%	0.5%
Public Order: Tax Offenses	9.0%	0.7%
Public Order: Other Nonregulatory	1.1%	0.4%
Public Order: Other Regulatory	1.1%	0.8%
Threats on the President	1.1%	0.04%
Robbery	4.5%	2.3%
Weapons	11.3%	9.3%

As another example, defendants in two out of the 177 pro se cases in the Federal Docketing Database (roughly 1%) were charged with threats against the President. Although the sample is extremely small, this still represents a rate twenty-five times higher than the 0.04% of federal defendants charged with threats against the President in 2002.[201] Again, threats against the President is a charge that may well lead a defendant to assert an ideological or political defense.[202]

199. Twelve of the cases included in the Federal Docketing Database included more than one pro se defendant (the number of pro se codefendants in those cases ranged from two to ten). In order to prevent multiple codefendants 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.

200. The data in this column reflect the most serious lead charges for defendants in criminal cases terminated in fiscal year 2002. *See* COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2002, *supra* note 89, 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%.

201. *Id.*

202. 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 against 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.[203] 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 might 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 of self-representation protects 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.[204] Although the mechanisms for funding indigent defense systems vary from state to state,[205] 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 motivate a decision to forgo 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

203. *See, e.g.*, Cheek v. United States, 498 U.S. 192, 196 (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. *Id.* at 194. He had attended meetings of an organization that believed that the Internal Revenue Code was unconstitutional and violated the Sixteenth Amendment to the Constitution. *Id.* at 195–96. 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. *Id.* at 196. Cheek represented himself at trial and was convicted. *Id.* at 198.

204. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963).

205. *See supra* notes 168–88 and accompanying text.

mitigate their sentences.[206] Court-appointed attorneys often are perceived as a part of the system of government informants, and defendants may believe that court-appointed attorneys are simply pawns of the system. And in fact, that perception is, to a certain extent, true. Criminal defense attorneys representing government cooperators have an interest in supporting the prosecutor who controls their clients' futures.[207] 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.[208]

In short, legitimate concerns about the quality of court-appointed representation and the role of state-appointed attorneys may motivate some defendants to invoke the right of self-representation. Although ideally the state should be providing competent counsel to every indigent defendant, this 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 attorney's role in the system. Thus, the reasons initially identified in *Faretta* for recognizing a right of self-representation still exist today, and in fact may be causing defendants to proceed pro se.

III. PREVENTING ABUSE OF THE RIGHT OF SELF-REPRESENTATION

As the foregoing discussion reveals, 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

206. *See, e.g.*, Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 663–68 (2004).

207. Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 619–20 (1999).

208. A defendant may be concerned that a court-appointed lawyer who also represents defendants cooperating with the government will not serve as a zealous advocate. That concern is exacerbated by ethical considerations that may confront the defense attorney in that situation. 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 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 enter into plea agreements requiring cooperation with the government.

are representing themselves 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 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 do not currently exist for the judiciary to prevent the evisceration of the fair trial rights of mentally ill defendants, legislatures need to act on this front. Finally, the role of standby counsel to assist defendants needs more in-depth study. Unfortunately, the data simply do not exist to determine whether courts routinely appoint standby counsel for pro se defendants, but to the extent that such counsel is being appointed, clearer standards and more defined roles would ensure that 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 remaining question may be not whether *Faretta* was rightly decided but instead whether perhaps *Gideon v. Wainwright*[209] was wrongly decided. Handed down in 1963, *Gideon* held that criminal defendants have a constitutional right to the assistance of counsel, and it is the obligation of the state to provide counsel if a defendant cannot afford one.[210] At least part of the reasoning in *Gideon* centered on the importance of lawyers to the process.[211] Without a lawyer, the Court reasoned, a defendant would be deprived of an effective defense.[212] 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, and those that do may be the best qualified to do so.[213] Overall, less than one-half of 1% (between 0.3% and

209. 372 U.S. 335 (1963).
210. *Id.* at 344–45.
211. *Id.* at 344.
212. *See id.*
213. *See infra* note 214 and accompanying text. 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

0.5%) of felony defendants in the state and federal databases represented themselves at case termination.[214] Those who choose to represent themselves therefore are a 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 adequate 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, reveal one disturbing fact. Defendants charged with misdemeanors are overwhelmingly more likely to represent themselves in federal court than felony defendants.[215] That fact suggests 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.[216] While the vast majority of defendants in federal court are charged with at least one felony (in each of the years from 1998 to 2003, 82% to 87% of the total number of defendants

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to have relatively similar complete success rates (or better rates in the case of state pro se defendants) as do 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, data on this point are not available. *See supra* Part II.A.2.

214. Based on the available data, it appears that only between 0.3% and 0.5% of defendants charged with felonies in either state or federal courts represent themselves at the time of case termination. *See* Federal Court Database, *supra* note 69; State Court Database, *supra* note 73. The database containing data on defendants charged in federal court includes information on the type of counsel at the time of case termination. Federal Court Database, *supra* note 69. Reporting rates for type of counsel vary from 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. *Id.* In no year did the percentage of felony defendants representing themselves exceed 0.5%. *Id.*

215. 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 171, at 23–25 (noting the widespread practice of failing to inform state court misdemeanor defendants of their right to counsel).

216. *See id.*

charged in federal court were charged with a felony), virtually all of the pro se defendants in the Federal Court Database were not charged with any felony.[217] Over 60% of defendants charged with misdemeanors in federal court represented themselves at case termination, while only between 0.3% and 0.5% of felony defendants in federal court represented themselves. Thus, criminal defendants charged with misdemeanors 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 "that actually leads to imprisonment even for a brief period,"[218] regardless of "whether [the crime is] classified as petty, misdemeanor, or felony."[219] Moreover, "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant" is afforded counsel.[220] Thus, while the government is not required to appoint counsel for defendants charged with offenses for which imprisonment is a *potential* penalty, it *is* required to appoint counsel before the defendant can be sentenced either to imprisonment or to a suspended sentence.[221] 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. Nonetheless, it appears that the majority of misdemeanor defendants were 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

217. From 1998 to 2003, between 96% and 98% of the pro se cases in the Federal Court Database did not involve a felony. *See* Federal Court Database, *supra* note 69.

218. Argersinger v. Hamlin, 407 U.S. 25, 33 (1972).

219. *Id.* at 37.

220. *See* Alabama v. Shelton, 535 U.S. 654, 658 (2002) (quoting *Argersinger*, 407 U.S. at 40).

221. *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. The Court also concluded that if a state structures its probation revocation proceedings such that the defendant has a right to relitigate his guilt or innocence at a trial de novo with counsel before the court can revoke probation, defendants can be sentenced to probation enforceable by imprisonment without giving rise to a right to counsel. *Id.* at 667–68. The Court expressed skepticism, however, that states would avail themselves of this option. *Id.* at 671 n.12.

appointment of counsel. Instead, in most jurisdictions, the finding that a defendant is indigent is made on an ad hoc basis.[222] Because retaining counsel for a misdemeanor case generally is significantly cheaper than retaining counsel for a felony case, it would make sense for courts to factor in the cost of hiring a lawyer when determining whether a defendant qualifies for the appointment of counsel. Moreover, in determining qualification for appointment of counsel, judges look 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.[223]

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 receive 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 some other factor—potentially a denial of the right to counsel—may be causing this discrepancy. The Constitution requires a knowing and voluntary waiver of the right to counsel before a defendant can proceed pro se.[224] A defendant

222. *See* RANGITA DE SILVA-DE ALWIS, SPANGENBERG GROUP, DETERMINATION OF ELIGIBILITY FOR PUBLIC DEFENSE (2002), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/determinationofeligibility.pdf (presenting the ABA standard and those of seventeen states and finding that even those jurisdictions with standards give discretion to the court or the public defender office to allow exceptions).

223. *See* Wright & Logan, *supra* note 82, at 2063.

224. Godinez v. Moran, 509 U.S. 389, 400 (1993). Just as invoking the right of self-representation requires waiver of the right to counsel, conversely invoking the right to counsel requires waiver of the right of self-representation. Although the waiver of the right to counsel must be knowing and voluntary, most courts have held that there is no constitutional requirement that the waiver of the right of self-representation be either knowing or voluntary. *See* United States v. Smith, 780 F.2d 810, 811 (9th Cir. 1986) (per curiam) (holding that the constitutional right of self-representation is waived if it is not timely and unequivocally asserted); United States v. Weisz, 718 F.2d 413, 426 (D.C. Cir.

invoking the right of self-representation must "knowingly and intelligently" waive the right to counsel.[225] Setting the "knowing and intelligent" waiver standard is more difficult than it might first appear. If the Court sets the standard too high, it infringes the right of self-representation, while if it sets it too low, it eviscerates the right to counsel.[226] Rather than articulating a bright-line standard, the Supreme Court simply has instructed that the waiver of counsel must be both knowing and voluntary.[227] At a minimum, this means that the defendant must be informed that he has a right to counsel.[228] The extent to which a 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 that the court conduct a colloquy to ensure that the defendant understands that he has a right to counsel.[229]

1983) ("[T]he right of self-representation is waived unless defendants articulately and unmistakably demand to proceed *pro se*."); United States v. Jones, 514 F.2d 1331, 1334 (D.C. Cir. 1975) (holding that absent an indication that the defendant wants to proceed pro se, the trial judge is under no obligation to inform the defendant of that right). Thus, a defendant waives his right of self-representation simply by not invoking it.

Despite the lack of a constitutional requirement that a defendant be informed of his right to self-represent, some jurisdictions inform the defendant of the right of 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.*, BENCHBOOK 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).

225. Faretta v. California, 422 U.S. 806, 835 (1975) (quoting Johnson v. Zerbst, 304 U.S. 458, 464–65 (1938)).

226. 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. *Id.* at 835–36.

227. *Godinez*, 509 U.S. at 400.

228. *Faretta*, 422 U.S. at 818–21.

229. *Compare* United States v. Peppers, 302 F.3d 120, 136 (3d Cir. 2002) (adopting the colloquy in FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES § 1.02 (4th ed., rev. 2000)); United States v. McDowell, 814 F.2d 245, 250 (6th Cir. 1987) (adopting the colloquy in BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, *supra*, § 1.02-2); People v. Stanley, 56 P.3d 1241, 1244 (Colo. App. 2002) (citing questions in the *Colorado Trial Judge's Benchbook* as the standard); State v. Miller, 738 A.2d 1142, 1144–45 (Conn. App. Ct. 1999) (holding that the trial court's failure to follow procedure in the *Connecticut Superior Court Rules of Practice* merits granting a new trial); State v. Klessig, 564 N.W.2d 716, 721–22 (Wis. 1997) (stating that failure to conduct colloquy invalidates waiver of counsel); *with* United States v. Best, 426 F.3d 937, 943 (7th Cir. 2005) (not requiring colloquy from the *Benchbook for U.S. District Court Judges*, but finding it "a sound approach"); United States v. Jones, 421 F.3d 359, 363–64 (5th Cir. 2005) (approving "warnings much less thorough" than those in the *Benchbook for U.S. District Court Judges*); United States v. Hayes, 231 F.3d 1132, 1138 (9th Cir. 2000) (stating that "[t]here is

There is evidence that even in jurisdictions in which a specified colloquy is required 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.[230] They then must deliver an admonition along the following lines:

> I must advise you that in my opinion you would be far better defended by a trained lawyer than you can be by yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I would strongly urge you not to try to represent yourself.[231]

Even in federal district courts where such a colloquy is required, however, a record that it occurred appears on the docket sheet only rarely.[232] 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.[233] 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.[234]

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no required formula" for colloquy); State v. Markuson, 75 P.3d 298, 300 (Mont. 2003) (explaining that specificity in colloquy is not required so long as the trial court "makes inquiry of the defendant to the extent it deems necessary" regarding waiver of counsel); Coughlin v. State, 842 So. 2d 30, 35 (Ala. Crim. App. 2002) (stating that although a colloquy is "preferable, it is not a per se denial of the right to counsel" if one is not on record); Smith v. Maldonado, 711 P.2d 15, 18 (N.M. 1985) (rejecting the adoption of a rule requiring colloquy to follow the *New Mexico Magistrate Benchbook*).

230. *See* BENCHBOOK FOR U.S. DISTRICT COURT JUDGES, *supra* note 229, § 1.02 (4th ed., rev. 2000) (listing fifteen questions that a district court judge should ask the 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, 250 (6th Cir. 1987) (adopting the *Benchbook* questions as the standard for the waiver of counsel).

231. *McDowell*, 814 F.2d at 251.

232. *See* Federal Docketing Database, *supra* note 78.

233. The failure to conduct such a colloquy is especially harmful in misdemeanor cases. In contrast to felony cases in which most defendants assume that they have the right to counsel, defendants charged with misdemeanors may not recognize that they have a right to appointment of counsel. Thus, if the court fails to inform a misdemeanor defendant of the right to counsel, that defendant may not know to ask for counsel.

234. *See GIDEON'S* BROKEN PROMISE, *supra* note 171, at 23–25 (noting the widespread practice of failing to inform state court misdemeanor defendants of their right to counsel).

To the extent that defendants are not knowingly and voluntarily waiving the right to counsel, their right to counsel has been violated. Thus if 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 he 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.[235] 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 in Part II.C.1, most federal felony defendants who choose to represent themselves are not mentally ill. Nonetheless, pro se felony defendants are more likely to show indications of mental illness than their represented counterparts.[236] 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. Given the current state of the law, legislative action may be required 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 trial.[237] Although it recognized that some 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

235. This solution has the added benefit of reducing the incentive of judges to encourage defendants to proceed pro se. Particularly in misdemeanor cases, judges may want defendants to proceed pro se because of financial considerations and because there is little likelihood of being reversed on appeal. To the extent that those financial considerations may 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.

236. *See supra* Part II.C.1.

237. Godinez v. Moran, 509 U.S. 389, 401–02 (1993).

himself but rather whether the defendant was competent to make the decision to waive counsel.[238] And, according to the Court, if the defendant is competent to stand trial, he also is competent to make the decision to waive counsel.[239] As previously discussed, the standard for competency to stand trial is very low.[240] Indeed, even seriously mentally ill defendants can be found competent to stand trial.[241]

The Court also emphasized, however, that the waiver of counsel still must be knowing and voluntary.[242] 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,"[243] and that decision must be "uncoerced."[244] 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.[245]

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.[246] As a result, legislative action may be necessary to clarify that courts may consider mental illness in determining whether the waiver of the right to counsel is knowing and voluntary. Such action would protect

238. *Id.* at 399–400.

239. *Id.* at 391.

240. *See supra* notes 126–33 and accompanying text.

241. For instance, Colin Ferguson, who appeared to have paranoid delusions, was found competent to stand trial and represent himself. *See* BARDWELL & ARRIGO, *supra* note 5, at 271–72.

242. *Godinez*, 509 U.S. at 400.

243. *Id.* at 401 n.12.

244. *Id.*

245. *See, e.g.*, People v. Lego, 660 N.E.2d 971, 979 (Ill. 1995) (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).

246. *See 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 of 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*, 509 U.S. at 402. Thus, it appears that it would not violate a defendant's right of 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.

the due process rights of those mentally ill defendants who seek to represent themselves.

C. *The Role of Standby or Advisory Counsel*

The Court in *Faretta* specifically noted that the state "even over objection by the accused [could] 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."[247] Advisory counsel can play a crucial role in ensuring that the defendant receives a fair trial.[248] Particularly with incarcerated pro se defendants, there are many logistical problems with mounting a defense, ranging from an inability to conduct an investigation and to speak to witnesses, to practical problems of being denied sufficient paper and pens to file motions.[249] Even mail is limited from many institutions,[250] and an incarcerated pro se defendant needs assistance navigating these pretrial challenges. Advisory counsel also can provide practical help during the trial itself. For instance, if a defendant does not have a complete grasp of the rules of evidence, he will be 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 Federal Docketing Database, the defendant was afforded advisory counsel.[251] Indeed, both of the defendants acquitted of all charges in that database had standby counsel assisting them.[252]

To date, the determination of whether to appoint standby counsel has been entrusted to the judge. Despite the fact that most of the pro se defendants in the Federal Docketing Database were appointed standby counsel, it is not at all clear that appointment of advisory counsel is the norm in misdemeanor cases or in state court. As discussed above, misdemeanor defendants are overwhelmingly

247. Faretta v. California, 422 U.S. 806, 835 n.46 (1975).

248. *See* Myron Moskovitz, *Advising the Pro Se Defendant: The Trial Court's Duties Under* Faretta, 42 BRANDEIS L.J. 329, 341–42 (2004) (listing the trial court's additional responsibilities to a pro se defendant if standby counsel is not appointed).

249. *See* Poulin, *supra* note 24, at 731–32 (arguing that incarcerated pro se defendants should have the right to effective assistance of standby counsel because of the logistical difficulties of self-representation while incarcerated).

250. *See, e.g.*, BUREAU OF PRISONS, MAIL MANAGEMENT MANUAL 5800.10, §§ 301–412, *available at* http://www.bop.gov/policy/progstat/5800_010.pdf (setting forth the procedures inmates must follow for mailing items out of the institution).

251. Standby counsel were appointed for 88% (182/208) of the defendants in the Federal Docketing Database. *See* Federal Docketing Database, *supra* note 78.

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

more likely to represent themselves than felony defendants,[253] and in those cases, the reason counsel is not appointed may be due to 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 are appointed to pro se defendants, and the effect, if any, of that appointment. To the extent that advisory counsel proves helpful to pro se defendants, ways of requiring the appointment of standby counsel should be explored.[254]

One final point regarding standby counsel. There are few, if any, standards regarding the role of standby counsel.[255] 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.[256]

CONCLUSION

The data in this Article begin the process of establishing that "in general, the right to represent oneself furthers . . . the Constitution's basic guarantee of fairness."[257] 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 representing themselves who have exhibited signs of mental illness, the vast majority of pro se defendants have not exhibited such signs. To the extent that there are issues of mental illness, those should be

253. *See supra* text accompanying notes 217–18.

254. *See* Williams, *supra* note 65, at 810–11 (arguing that standby counsel should be mandatory).

255. *See* Poulin, *supra* note 24, at 678–79 (arguing "that standby counsel's role should be strengthened and more clearly delineated" and that there should be standards for standby counsel so that those appointed in that capacity "have a better sense of their obligations").

256. *See id.*

257. *See* Martinez v. Court of Appeals, 528 U.S. 152, 164 (2000) (Breyer, J., concurring).

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 of 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 of self-representation stands as the bulwark protecting the defendant from an unfair trial. In short, the data undermine the prevailing view of pro se felony defendants and suggest instead that the right of self-representation in fact serves a vital role in protecting the rights of criminal defendants.