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

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Defending the right to
SELF-REPRESENTATION:
An empirical look at the pro se *felony defendant*

By Assistant Professor Erica J. Hashimoto

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Thirty years ago, the U.S. Supreme Court recognized that criminal defendants have a constitutional right to represent themselves. Since that time, both academics and the popular media have been fascinated by, and almost uniformly critical of, the decisions of *pro se* defendants to represent themselves.

Dr. Jack Kevorkian, Colin Ferguson, Congressman James Traficant, John Muhammad and, most recently, Zacarias Moussaoui all tried their hands at self-representation with seemingly disastrous (and highly publicized) consequences.

Colin Ferguson, for example, who was convicted of opening fire on the Long Island Railroad and murdering several people, represented himself throughout his trial and was sentenced to 200 years in prison. During his opening statement, he rambled incoherently about a vast conspiracy against him, asserting to the jury that the only reason there were 93 counts in the indictment was because the year was 1993.

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

Are these well-publicized *pro se* defendants representative of all *pro se* defendants? Or to put it another way, are *pro se* defendants necessarily either crazy or foolish? The answer is that we simply cannot know for sure without looking at empirical data.

In the past five years, the importance of this empirical question has taken on increased significance because the Supreme Court, troubled by the possibility that *pro se* defendants are ill-served by the decision to represent themselves, has called into question the wisdom of continuing to recognize a constitutional right to self-representation.

After conducting an empirical study of *pro se* felony defendants, I conclude that these defendants are not necessarily either ill-served by the decision to represent themselves or mentally ill. Instead, the data suggest that these defendants have legitimate - and constitutionally important - reasons for representing themselves.

The primary argument against the right to self-representation is based on fairness to the defendant. On this view, the right to self-representation undermines the defendant's due process right to a fair trial by giving him a constitutional right to do something that ultimately can only hurt him.

As the Supreme Court bluntly stated the point, "[o]ur experience has taught us that a *pro se* defense is usually a bad defense, particularly compared to a defense provided by an experienced criminal defense attorney."

The assessment that *pro se* representation in felony cases necessarily is a bad idea, however, is contradicted by the empirical data I collected. Although *pro se* defendants make different choices on the path to resolving their cases, they are not necessarily ill-served by those decisions.

Outcomes in state court

In state court, *pro se* defendants charged with felonies fared at least as well as, and arguably significantly better than, their represented counterparts.[1]

A total of 238 defendants in the sample of state court felony defendants (less than 0.5 percent of the total defendants in the database for whom the type of counsel was reported) were *pro se* at the time their cases were terminated, and outcomes were provided for 234 of them.

As set forth in Table 1, of the 234 *pro se* defendants for whom an outcome was provided, just under 50 percent of them were convicted of any charge (either at trial or by guilty plea). And of the 50 percent who were convicted of something, just over 50 percent (or 26 percent of the total number of *pro se* defendants for whom an outcome was reported) were convicted of felonies.

For represented state court defendants, by contrast, a total of 75 percent were convicted of some charge (either at trial or by guilty plea), and of those convicted, 85 percent were convicted of felonies.

Thus, only 26 percent of the *pro se* defendants ended up with felony convictions, while 63 percent of their represented counterparts were convicted of felonies.

Notably, although *pro se* defendants in the database were significantly more likely to go to trial than represented defendants, their acquittal rate on all charges at trial (5/23 or 22 percent) equaled that of the

Table 1: Outcomes for Defendants in State Court

	Guilty Plea to Felony	Guilty Plea to Misdemeanor	Trial: Acquitted on All Charges	Trial: Convicted of Misdemeanor	Trial: Convicted of Felony	Dismissals/ Deferred Adjudications
Pro Se Defendants	22% (52/234)	20% (46/234)	2% (5/234)	3% (8/234)	4% (10/234)	48% (113/234)
Represented Defendants	60% (27,868/46,699)	11% (5,202/46,699)	1% (542/46,699)	-- (192/46,699)	4% (1,767/46,699)	24% (11,128/46,699)

Note: Percentages may not add to 100 percent due to rounding.

Table 2: Method of Disposition in Federal Court Database

	Plea of Guilty	Jury Trial	Bench Trial	Dismissals	Statistical Dismissals
1998	*Pro se:* 75% Represented: 88%	*Pro se:* 12% Represented: 5%	*Pro se:* 0.5% Represented: 0.4%	*Pro se:* 10% Represented: 6%	*Pro se:* 2% Represented: 0.4%
1999	*Pro se:* 71% Represented: 89%	*Pro se:* 9% Represented: 5%	*Pro se:* 0% Represented: 0.3%	*Pro se:* 15% Represented: 6%	*Pro se:* 4% Represented: 0.4%
2000	*Pro se:* 86% Represented: 90%	*Pro se:* 7% Represented: 4%	*Pro se:* 0% Represented: 0.3%	*Pro se:* 7% Represented: 5%	*Pro se:* 0% Represented: 0.3%
2001	*Pro se:* 79% Represented: 90%	*Pro se:* 8% Represented: 4%	*Pro se:* 0% Represented: 0.3%	*Pro se:* 11% Represented: 5%	*Pro se:* 2% Represented: 0.3%
2002	*Pro se:* 79% Represented: 91%	*Pro se:* 11% Represented: 3%	*Pro se:* 0% Represented: 0.3%	*Pro se:* 10% Represented: 5%	*Pro se:* 0% Represented: 0.3%

Note: Percentages may not add to 100 percent due to rounding.

represented defendants (542/2,501 or 22 percent), and their 57 percent (13/23) partial success rate, defined as acquittal on all *felony* charges, substantially exceeded the 29 percent (734/2,501) partial success rate of the represented defendants.

Outcomes in federal court

Pro se felony defendants in federal court, like their state court counterparts, were much more likely to go to trial than represented defendants.[2] As set forth in Table 2, the *pro se* defendants went to trial (usually jury trial) at approximately double the rate at which represented federal felony defendants went to trial.

In terms of acquittal rates at trial, over the five-year period from 1998 to 2002, 65 unrepresented defendants in the database went to jury trial, and five of them were acquitted, yielding a trial acquittal rate of 7.69 percent (5/65). Over that same five-year period, 7,744 defendants identified as being represented by counsel went to trial, with 1,238 acquitted, for a trial acquittal rate of 15.99 percent (1,238/7,744). The acquittal rate for represented defendants therefore was over twice as high as that for unrepresented defendants.

Measured a different way, however, *pro se* federal felony defendants were just as likely to be acquitted as their represented counterparts.

Because the jury trial rate of unrepresented defendants was so much higher than that of represented defendants and because so many represented defendants are convicted by way of guilty plea, if the *pro se* acquittal rate is expressed as a percentage of the total number of *pro se* federal felony defendants, rather than as a percentage of *pro se* defendants going to trial, the acquittal rate for *pro se* defendants is virtually identical to the acquittal rate for represented defendants: five *pro se* felony defendants were acquitted out of a total of 664 unrepresented felony defendants, for a 0.75 percent overall acquittal rate.

By way of comparison, 1,495 represented felony defendants were acquitted either at bench or jury trials out of 190,647 total represented felony defendants, yielding a 0.78 percent 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.

Therefore, in both state and federal court, the empirical evidence undermines the assumption that *pro se* defendants necessarily are ill-served by the decision to self-represent.

Signs of mental illness in *pro se* defendants

Those criticizing the right to self-representation also assert that the overwhelming majority of defendants who choose to represent themselves are mentally ill and that the right to self-representation therefore represents only the recognition of delusional beliefs rather than informed and rational choices of the *pro se* defendants.

The data refute that assertion. In fact, the vast majority of *pro se* defendants do not appear to exhibit any overt signs of mental illness. Because a defendant cannot constitutionally be required to stand trial unless he is mentally competent, in virtually every case in which a defendant manifests any sign of mental illness, a federal district court judge will order a competency evaluation.

As set forth in Chart 1 (see next page), of the over 200 *pro se* felony defendants in federal court that I studied, evaluations to determine competency to stand trial were requested or ordered in only about 22 percent of the cases.[3] Moreover, not only did less than 22 percent of the *pro se* defendants receive competency evaluations but, as depicted, in well over half of the cases (26/45) in which the defendant was ordered to undergo an evaluation, the evaluation was ordered after the defendant invoked his right to self-representation.

Because of the long-held assumption that those who represent themselves are mentally ill, a defendant's decision to represent himself *pro se* even absent other indications of mental illness, may well give rise to a concern on the part of the court that the defendant is mentally ill. A trial court judge therefore is much more likely to order a competency evaluation when a defendant invokes his right to self-representation, even absent any other indicia of mental illness, than she would be for a defendant who does not choose to proceed *pro se*.

Counting only those defendants who had competency evaluations prior to the invocation of the right to self-representation, only 19/208 *pro se* defendants (9 percent) were ordered to undergo evaluations. While this

figure may be higher than the rate of competency evaluations for defendants in the federal system generally, it certainly undermines the notion that most defendants who represent themselves exhibit signs of mental illness.

Why self-represent?

Why do felony *pro se* criminal defendants choose to represent themselves if not because of mental illness? The evidence suggests that in many cases, the choice may result from concerns about or dissatisfaction with appointed counsel.

Most significantly, nearly half of the *pro se* federal felony defendants in the database I created asked the court to appoint new counsel prior to invoking the right to self-representation.

This dissatisfaction appears to come from two sources. First, the data suggest that some *pro se* defendants are concerned about the quality of court-appointed counsel.

Pro se defendants in the database I created were more likely to have court-appointed counsel than federal felony defendants as a whole.

There is a substantial body of evidence demonstrating that states are struggling to provide even marginally adequate court-appointed counsel for indigent defendants. 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 whom the judge has appointed.

Pro se defendants also went to trial at significantly higher rates than their represented counterparts.

Because deficiencies in the quality of counsel are more apparent in the lead-up to trial than during the course of plea negotiations (particularly since negotiating a plea requires less consultation with a client than preparing for trial), and because the stakes for the defendant at trial arguably are higher than the stakes in plea negotiations, it follows that overworked or substandard counsel will be of greater concern to defendants going to trial than to those taking pleas.

The trial rate of *pro se* defendants therefore inferentially supports the theory that concerns about the quality of counsel may drive some felony defendants to represent themselves.

The data suggest one other source of dissatisfaction with counsel - defendants' ideological considerations. As set forth in Table 3, *pro se* defendants in the database I created were 13 times more likely to be charged with tax offenses as their most serious charge than federal felony defendants overall.

Tax evasion often lends itself to an ideological defense - in particular the assertion that the federal government lacks the authority to require its citizens to pay taxes.

Many such defendants may well believe that government-appointed counsel cannot adequately present that defense and thus may choose to represent themselves.

Suggested improvements

To the extent that indigent defendants represent themselves either as a result of legitimate concerns about the quality of court-appointed counsel or because of ideological considerations, the right to self-representation protects the defendant's personal right to defend in the way the defendant believes most advantageous.

That having been said, the data also demonstrate that recognizing a right to self-representation creates opportunities for abuse by the state, and several modifications to the existing legal structure are therefore needed to protect the constitutional rights of defendants.

First, jurisdictions need to ensure that the waiver of counsel in fact is knowing and voluntary.

Particularly in jurisdictions where the sheer number of indigent defendants has overwhelmed the system, the court has an incentive to encourage or even compel defendants to represent themselves. But to the extent that defendants do not knowingly and voluntarily waive the right to counsel, their constitutional rights are violated.

The data strongly suggest that such involuntary or unknowing waivers may be occurring in misdemeanor cases, and some form of protection therefore needs to be adopted in order to ensure that all such waivers are both knowing and voluntary.

Second, because at least some of the defendants who choose to represent themselves do exhibit signs of mental illness, trial judges need mechanisms to ensure that those defendants are knowingly and voluntarily relinquishing the right to counsel.

The extent to which a trial judge can take account of the defendant's mental illness in making the constitutional determination is somewhat unclear because of the Supreme Court's most recent pronouncement in this area. Legislative action therefore may be needed in order to make clear that judges can and should consider the presence of mental illness in determining whether the defendant has knowingly and voluntarily waived the right to counsel.

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

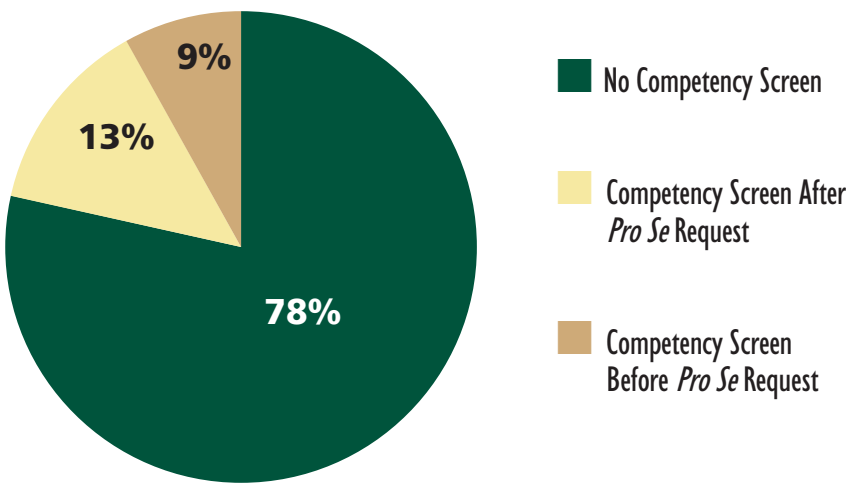
These three refinements to the existing structure will ensure that the right to self-representation does not infringe other constitutional rights.

Conclusion

The data establish that the right to self-representation furthers the Constitution's basic guarantee of fairness.

The select few felony defendants who

Chart 1: Competency Evaluations of *Pro Se* Felony Defendants in Federal Court



choose self-representation do not appear to suffer significant adverse outcomes from that decision, and the right therefore does not appear to infringe the 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 it is likely that at least some defendants choose to represent themselves because of mental illness, the vast majority of *pro se* defendants exhibit no signs of mental illness.

To the extent that there are issues of mental illness, those should be addressed through the waiver of counsel standard.

The fact that some mentally ill defendants choose to represent themselves should not be the basis for questioning the legitimacy of a right that protects all defendants.

The right to self-representation in practice protects the interest of defendants in presenting their cases as effectively as possible. Indeed, for indigent defendants who have been appointed unskilled or inept counsel and for defendants seeking to assert ideological defenses, the right to self-representation stands as the bulwark protecting the defendant from an unfair trial.

In short, the data expose the fallacy of the prevailing view of *pro se* felony defendants and demonstrate that the right to self-representation in fact serves a vital role in protecting the rights of criminal defendants. ■

End notes

1 Data on state court defendants come from the National Archive of Criminal Justice Data, State Court Processing Statistics, 1990-2000: Felony Defendants in Large Urban Counties. A complete description of the database and the methodology for collection of the data is available at http://www.icpsr.umich.edu/NACJD.

2 The federal court data come from the Federal Justice Statistics Resource Center, Defendants in Federal Criminal Cases Terminated in U.S. District Court, http://fjsrc.urban.org/index.cfm *(follow "Download" hyperlink; submit name and e-mail address; then follow "Standard Analysis Files" hyperlink).*

3 These figures come from a database I compiled comprised of information from the publicly available docket sheets of 208 pro se *felony defendants in federal court.*

Table 3: *Pro Se* Defendants' Most Serious Lead Charge in Federal Court

	Pro Se Cases*	Represented Felony Defendants FY 2002**
Assaults	2.3% (4/177)	0.5%
Drug Offenses	15.8% (28/177)	41.7%
Escape	1.7% (3/177)	0.7%
Fraudulent Property Offenses	31.6% (56/177)	17.5%
Other Property Offenses	1.1% (2/177)	3.5%
Immigration Offenses	6.2% (11/177)	17.1%
Public Order - Racketeering & Extortion	8.5% (15/177)	1.3%
Public Order - Non-Violent Sex Offenses	1.7% (3/177)	0.8%
Public Order - Failure to Appear	0.6% (1/177)	--
Public Order - Perjury, Contempt & Intimidation	1.7% (3/177)	0.5%
Public Order - Tax Offenses	9.0% (16/177)	0.7%
Public Order - Other Non-Regulatory	1.1% (2/177)	0.4%
Public Order - Other Regulatory	1.1% (2/177)	0.8%
Threats on the President	1.1% (2/177)	0.04%
Robbery	4.5% (8/177)	2.3%
Weapons	11.3% (20/177)	9.3%

* Twelve of the cases included in the federal docketing database included more than one *pro se* defendant (the number of *pro se* co-defendants in those cases ranged from two to 10). In order to prevent multiple co-defendants in the same case from skewing the data on the type of case, for the 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.

** 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 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 percent.