"Attitudinal" Decision Making in the Federal Courts: A Study of Constitutional Self-Representation Claims

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INTRODUCTION

Should law schools require a course in judicial biography? Should boards of bar examiners quiz applicants about the politics of the judges sitting in the jurisdictions to which they seek admission? If political scientists Jeffrey Segal and Harold Spaeth had their way, these practices and more might well become part of lawyers' basic training.[1] At least, that is the implication of their "attitudinal model," which they bill as scientific proof that the Supreme Court decides cases not on the basis of doctrine and the rules tested on bar exams, but instead on the basis of the individual Justices' political and ideological attitudes about the issues in litigation or the litigants before them or both.[2] Segal and Spaeth further assert that these attitudes are susceptible to principled discernment and measure, indexed by variables ranging from the political party of the appointing president to the nature of the Justice's pre-appointment professional experience. They gather and manipulate such data to form a model for "predicting" judicial decisions—that activity of predicting "and nothing more pretentious, being what [Oliver Wendell Holmes] mean[t] by the law."[3]

To be sure, Critical Legal Studies scholars, who have asserted that even the nature of a judge's lunch or night's sleep factors into the result in a particular case, would hardly blink at the canonization of attitudinal studies. Nor should experienced practitioners wince, for they have long sought to instill in young litigators the importance of researching the judge or panel to whom briefs are to be submitted. Indeed, the intangibles that Segal and Spaeth compile under the rubric "attitude" are not very different from what the law traditionally has called "judicial discretion."

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1. Judicial biography is hardly a nascent or neglected topic among legal scholars. An excellent collection of essays by scholars, including Richard A. Posner and Thomas C. Grey, as well as an outstanding bibliography, were recently gathered for a symposium at New York University. *See Symposium: National Conference on Judicial Biography*, 70 N.Y.U. L. REV. 485 (1995).

2. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993).

3. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

Even if judicial biography does not become a required subject, the success rate of Segal and Spaeth's model[4] makes it an important contribution to the study of judicial process. To date they have focused their model only on Supreme Court decisions; the resulting void serves as an invitation to additional work, to which this Article is a response.

This Article reports on the performance of a study based on and inspired by Segal and Spaeth's work. It examines the possible attitudinal bases of the entire corpus (over 100 cases) of federal district court decisions involving constitutional self-representation claims. As explained in greater detail below, this area of jurisprudence was selected for study because decisions often are dependent upon the exercise of judicial discretion—Segal and Spaeth's attitudinal factors. This study both elucidates the attitudinal methods of Segal and Spaeth and "proves" an exception to the attitudinal model hypothesized by Segal and Spaeth. That exception is the salience of doctrine in the decisions of lower federal court judges who, unlike Supreme Court Justices, adjudicate cognizant of appellate reviewability.

This Article first provides a brief elaboration of Segal and Spaeth's project and rebuts its principal critics.[5] Next, it reviews the relevant features of self-representation jurisprudence. Then it details the study performed on that body of cases, including explanations of the sample and methodology, and concludes with a discussion and analysis of the results.

I. SEGAL AND SPAETH'S ATTITUDINAL MODEL

Segal and Spaeth have advanced the attitudinal model as a principled basis for explaining the way judges decide cases and for predicting decisions in future cases. In their universe, the attitudinal model is in counterpoise to a collection of analytical principles they term the "legal

4. *See* SEGAL & SPAETH, *supra* note 2, at 208-60.

5. Segal and Spaeth describe and respond to their principal critics. *See id.* at 356-63. Bradley Canon articulates additional criticisms in his review of the book, 3 LAW & POL. BOOK REV. 98-100, Sept. 1993, *available in* the World Wide Web at gopher:\\nuinfo.nwu.edu\11\library\journal (Am. Pol. Sci. Ass'n), to which Timothy Hagle has replied in full. Timothy Hagle, *A Reply to Professor Canon's Review of Segal and Spaeth's The Supreme Court and the Attitudinal Model*, 3 LAW & POL. BOOK REV., Oct. 1993, *available in* the World Wide Web at gopher:\\nuinfo.nwu.edu\11\library\journal (Am. Pol. Sci. Ass'n). For a favorable review, see Melinda Gann Hall, 57 J. OF POL. 254 (1995) (book review).

model."[6] The legal model, for Segal and Spaeth, holds that legal rules and principles—what lawyers call doctrine—are what decide cases. The attitudinal model, by contrast, is built on assertions such as "Rehnquist votes the way he does because he is extremely conservative" and "Marshall voted the way he did because he is extremely liberal."[7] What has sparked controversy is that to each of these rather unremarkable assertions, Segal and Spaeth affix their signature coda: ". . . and for *no other reason*."[8]

Critics from the legal academy have generated some fairly passionate charges against Segal and Spaeth and their political science comrades. The critics fault Segal and Spaeth for not being clear about how much room the legal model officially allocates to the intangibles that easily appear to be non-doctrinal features of the decision maker's attitude. Scholars are left uncertain over which of their comments about judicial decision-making belong in what model. Ultimately, the critiques echo the debates occurring within the legal community itself about how judges reach their decisions and the latent tension between "macro" and "micro" justice that has long permeated the legal discourse.

The reference to Holmes is hardly a mere ploy to forge legitimacy in legal circles: Segal and Spaeth cite Holmes as authority for their enterprise. They position their task squarely within Holmes' infamous articulation of "what [he] mean[s] by the law," namely, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious."[9] More critically, they derive the title of their supposedly innovative, insurgent manifesto from the respected jurist's own words. Warning against the fallacy of assuming that reason and logic were the only bases of judicial decisions, Holmes explained that:

> [T]he logical method and form flatter that longing for certainty and for repose which is in every human mind. But . . . [b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, *often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding*. . . . You always can imply a condition in a contract. But why do you imply it? It is because of some belief . . . or, in short, *because of some attitude of yours upon a matter not capable of exact quantitative measurement* . . . .[10]

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6. SEGAL & SPAETH, *supra* note 2, at 33-52.
7. *Id.* at 65.
8. Segal and Spaeth acknowledge that their way of looking at legal decisions derives from the legal realists of the 1920s, such as Karl Llewellyn and Jerome Frank, *id.* at 65, but they go further by declaring the legal model to be meaningless. *Id.* at 62-64.
9. Holmes, *supra* note 3, at 461.
10. *Id.* at 466 (emphasis added).

That Holmes justifies formal attention to the attitude of the decision maker—be it the social, political, moral, ethical, or ideological values of the judge—cannot be denied. That Holmes fully supports the Segal and Spaeth project, however, is less certain. First, Segal and Spaeth dismiss the legal model in its entirety: They expressly call it "meaningless,"[11] which is an unpalatable affront to legal academics, most of whom spend a considerable part of their professional lives teaching legal doctrine in the law schools. Nor is their uncompromising position the necessary implication of Holmes' quoted admonition; for Holmes himself certainly devoted a great deal of his life to applying legal doctrine. Perhaps Segal and Spaeth, like Holmes, saw themselves as having no choice but to overstate, as if to compensate for a perceived shortcoming in the common wisdom.

Second, as social scientists and statisticians, Segal and Spaeth have taken the additional step of quantifying the attitudinal components of judicial decisions that Holmes believed were not capable of such exact measurement.[12] Through the lens of their statistical methods, the legal model cannot help but appear inadequate. Indeed, Segal and Spaeth expressly equate the legal model's supposed failings with their inability to document and measure it: The only acts that in their world count as proof that a model operates. Further, Segal and Spaeth assemble the many flagrant contradictions in Supreme Court judicial decision-making methodology that might make the Court look bad to laymen insistent on rigid consistency, juxtaposing instances of apparently absurd, result-oriented adherence to precedent[13] with equally agenda-driven departure from precedent.[14] Such examples are virtually irrefutable proof that

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11. SEGAL & SPAETH, *supra* note 2, at 62.

12. *See* Holmes, *supra* note 3, at 466.

13. For example, in Flood v. Kuhn, 407 U.S. 258, 282 (1972), Justice Blackmun upheld major league baseball's exemption from the antitrust statutes, conceding that "others might regard this as 'unrealistic, inconsistent, or illogical,'" but explaining that "the aberration is an established one . . . entitled to the benefit of *stare decisis*." *Id.* (citation omitted).

14. For example, in Payne v. Tennessee, 501 U.S. 808 (1991), Chief Justice Rehnquist expressly overturns earlier holdings in Booth v. Maryland, 482 U.S. 496 (1987) and South Carolina v. Gathers, 490 U.S. 805 (1989), when holding that the Eighth Amendment does not bar the admission of victim impact evidence during the penalty phase of a capital trial. In that decision, stare decisis is described as "the preferred course . . .'in most matters'. . . [but] *not an inexorable command*." *Payne*, 501 U.S. at 827-28 (emphasis added) (citations omitted).

doctrine alone does not decide, or enable one to predict the outcome of, individual cases (unless of course the concept of doctrine is so malleable and flexible that it approaches meaninglessness).

For this reason Segal and Spaeth's work has been subject to many criticisms,[15] but many of those accusations reflect a misunderstanding of their assertions and their entire project. Segal and Spaeth's claimed success rate makes their contribution to our understanding of how justice happens worth examining. Even if it goes too far, Segal and Spaeth's work is an important new beginning in the study of judicial decision making; it does not deserve the most bitter of the reproaches it has received.[16]

One might even argue that their announcement is not news at all. Over a century after Holmes, the Justices continue to acknowledge the nondoctrinal bases for their decisions. A poignant example is Justice Blackmun's opinion in a recent abortion decision, written in response to both the plurality opinion and the separate opinions of conservatives Rehnquist and Scalia:

> In one sense, the [plurality's] approach is worlds apart from that of THE CHIEF JUSTICE and JUSTICE SCALIA. And yet, in another sense, the distance between the two is short—the distance is but a single vote.
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> I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made.[17]

Notwithstanding that legal scholars would not employ the term "model" in the wooden way of strict social scientists, the comments of Holmes and Blackmun indicate that an attitudinal component is and has always been part of anything that might be delineated as a legal model, "model" being understood as a comprehensive schema for predicting judicial decisions. (By the same token, Segal and Spaeth ought to have extended the same latitude to law that they seek for themselves; they emphasize that it is a model they are expounding, which unlike a formula, is not compelled to be accurate 100 percent of the time).

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15. *See supra* note 5.

16. Nor should Segal and Spaeth's view be understood as reducing the value of the study of law and the use of legal doctrine in written and oral advocacy, which consumes a great deal of lawyers' and judges' professional time. They point out merely that there seems to be no principled way to predict results on the basis of doctrine alone—news that attorneys frequently share with clients.

17. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

What has been a trigger of heated reactions more subtle than Segal and Spaeth's assumptions that the legal rule is not based on doctrine is the perceived brazenness of their efforts to document that indeterminacy. They not only register their agreement with Blackmun's and Holmes' impressions, but also undertake to prove them statistically. Lawyers and judges, however, generally prefer to avoid attempts at pinning down the method of what they do and probably distrust formulaic efforts to predict judicial decisions as the unattainable goal of statistics-crazed social scientists. Segal and Spaeth put legal purists on the defensive by encroaching on sacred territory, lifting the shroud of mystery and respect supposedly encircling the judicial process. Notwithstanding that many candidly would acknowledge that the shroud is virtually transparent today, Segal and Spaeth's work, like Dorothy's venture into the Wizard's control room, seems, to many, too great an intrusion.

Segal and Spaeth are not the first analysts to have undertaken such sacrilegious inquiry. For example, H. W. Perry won scholarly acclaim for publishing interviews of several Supreme Court Justices and their clerks, anonymity preserved, to demonstrate the countless nondoctrinal bases for the Court's decisions on certiorari petitions.[18] Unlike Perry's work, however, Segal and Spaeth's is not principally an exposé, but instead an attempt to document, if possible, what lawyers already know when they refer to a judge as being a light sentencer, sympathetic to business, or unsympathetic to discrimination claims.

Still, the documentation itself troubles many because, at bottom, it incorporates assumptions that go to the core of unanswered questions about human nature. Most critically, the manner in which Segal and Spaeth proceed to measure attitudes ultimately relies on, or appears to prove, assertions about human nature that many may find objectionable. To illustrate, Segal and Spaeth's archetypal statement is that when a case comes before a particular judge, her decision is largely the result of her attitudes, such as political views or moral values. This statement implies either (1) that the judge consciously disregards or molds doctrine to suit her agenda, or (2) if the attitudinal influence is not conscious, that the judge's decision is the product of attitudes that themselves are the product of her lifetime of experiences, social background, and political affiliations, making the judge herself unconscious of whence her own

18. H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

attitudes derive and rendering her all but unable to prevent their influence. The first implication suggests corruption or abdication of the judicial obligation to impartiality, while the latter suggests an even more frightening notion—a version of the essentialist credo that human behavior is rigidly determined and that the rule of law is not so much indeterminate as it is predetermined, at least once the judicial appointment or case assignment occurs.

Lastly, Segal and Spaeth sorely test the American legal system's historic distrust of statistics. Courts have long remarked on their lack of probative value, reasoning that statistics are not proof in the individual case.[19] Vigorous debate on this issue occurs in any kind of discrimination case, where statistics of incidence prove overwhelming discriminatory impact, but are held not to be sufficient proof of internal discrimination in the particular case.[20] An objection to this view is that strong statistical correlations, when controlling for other factors, might well be a reasonable basis for inference, an activity in which the law engages all the time. For example, first-year law students are taught that the impossibility of ever taking a picture of the brain to produce the direct evidence of criminal intent creates an indispensable place for inference in criminal law. The difference, however, is that when mens rea is inferred, the inference is based on evidence particular to the individual defendant.

The law has long struggled with this tension between individual-case justice and bright-line predetermined rules. For example, in death penalty jurisprudence, this friction was the problem so troubling to Justice Douglas in *Furman v. Georgia*[21] and most articulately described

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19. *E.g.*, United States v. Banks, 36 M.J. 150, 176 n.6 (C.M.A. 1992) (Cox, J., dissenting). Judge Cox explains:

> Assume it can be shown that the only recurrent identifiers of child sexual abusers are red hair, blue eyes, and left-handedness. Assume also that, in 50% of the cases in which child abuse has actually occurred, the abuser bore these features. Assume further that 50% of all people having these three characteristics are actual child abusers, but that the other 50% are not. What does it prove if the accused has red hair, blue eyes, and is left-handed? Is the accused more likely or less likely to have abused a given child? Obviously we do not know, for the characteristics do not help us decide into which subset of red haired, blue eyed, left-handed people the accused [falls]. *Even if the abuse figures ran as high as 90%, they would still not shed any light on whether the accused was in the 90% group or the 10% group.*

Id. (emphasis added).

20. An extreme example is the Supreme Court's rejection of the statistical proof that black defendants were much more likely to receive the death penalty than whites, insisting that discriminatory intent in a particular imposition of the penalty be shown. McCleskey v. Kemp, 481 U.S. 279 (1987).

21. 408 U.S. 238, 256-57 (1972)(Douglas, J., concurring).

by Justice Blackmun in his last death penalty opinion.[22] They understood that the more individualized the process of death penalty sentencing is, the more arbitrary it becomes. On the other hand, an element of arbitrariness exists in bright-line, system-wide rules, for the need to simplify a complex area of the law with a bright-line rule will require some arbitrary determination of where the line is. The same conflict is manifest in the enactment of, and fierce resistance to, the Federal Sentencing Guidelines.[23]

In the end, fairness must be accepted as having dual but often competing constituents: The individual who wants custom, case-by-case adjudication, tailored to account for the idiosyncracies of his particular circumstances, and the system, which must treat similarly situated people alike if it is to earn the respect necessary for its authority. Segal and Spaeth could not help but provoke the ire of some faction of the legal academy since their work straddles this tension between "macro" and "micro" justice.

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22. Callins v. Collins, 510 U.S. 1141 (1994)(mem.). Justice Blackmun dissented from the denial of certiorari in this case, arguing that the death penalty cannot be administered in accordance with the constitutional requirements of consistency of application and individualized sentencing. *Id.* at 1129 (Blackmun, J., dissenting). Blackmun explained:

> To be fair, a capital sentencing scheme must treat each person convicted of a capital offense with that "degree of respect due the uniqueness of the individual." That means affording the sentencer the power and discretion to grant mercy in a particular case, and providing avenues for the consideration of any and all relevant mitigating evidence that would justify a sentence less than death. Reasonable consistency, on the other hand, requires that the death penalty be inflicted evenhandedly, in accordance with reason and objective standards . . . .

Id. (citations omitted).

23. The Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, sec. 217(a), 98 Stat. 1837, 3017-34 (codified as amended at 28 U.S.C. §§ 991-998 (1988)) established the United States Sentencing Commission to issue the sentencing guidelines, now compiled as UNITED STATES SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES MANUAL (1995). For a defense of the drafters' handling of the competing demands of the "charge offense" system (which blindly sentences strictly according to the offense as charged, without regard to aggravating or mitigating concerns) and the more subjective "real offense" approach, see Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 8-12 (1988). For an articulate criticism of the guidelines' removal of individualized sentencing, see, e.g., David Yellen, *Illusion, Illogic and Injustice: Real-Offense Sentencing and the Federal Sentencing Guidelines*, 78 MINN. L. REV. 403 (1993) and Charles J. Ogletree, Jr., *The Death of Discretion? Reflections on the Federal Sentencing Guidelines*, 101 HARV. L. REV. 1938 (1988).

Discerning Segal and Spaeth's position in this dialectic is essential for understanding their work. It can hardly be questioned that they are predominantly concerned with systemic fairness, macro-justice, and consistency across cases or across judges. From this viewpoint, the legal model's inadequacies are too much in the foreground. Despite Blackmun's description of the two kinds of fairness which any rule of justice ought to achieve,[24] the American legal model has tended to tip in favor of justice in the individual case at the expense of systemic fairness.

The preference for individual justice is reflected in the widespread and intense criticism of the injustice the sentencing guidelines caused (which seems greater than the displeasure with the injustice they sought to remedy), in the unavailability of a "selective prosecution" defense, in the relatively greater viscosity of substantive due process as opposed to equal protection as a guarantor of liberties, and in the deep-rooted American celebration of individualism. Forced to choose between the two, most Americans would pick the fuzzier rule that at least gave them an opportunity to argue their case over one that treated them with less-absolute individuality, but relatively the same as their cellmate. So the legal model Segal and Spaeth reject is the one that would listen to the "special circumstances" argument of a death penalty defendant, or would allow "downward departure" under the sentencing guidelines. Segal and Spaeth's rejection of that model reflects dispassionate and unmitigated preference for the needs of the system[25] and the view that accommodating the individual is a departure from principle. At the end of the day, Segal and Spaeth make no assertions about the fairness or correctness in an ontological, metaphysical, or absolute sense of the particular judicial decisions they study. As social scientists, their principal concern is with measurability; legal doctrine, however, like much of human activity, was not designed to accommodate statistical measurement concerns. Segal and Spaeth's work and the body of criticisms it engendered should be understood in this light.

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24. *See supra* note 22.

25. However, all efforts to protect the system naturally have an indirect benefit on those individuals that particular system affects.

II. APPLYING SEGAL AND SPAETH TO SELF-REPRESENTATION DECISIONS

A. Overview of the Project

Two aspects of Segal and Spaeth's work kindled the study which is the subject of this Article. First, they have subjected to their dispassionate measuring scales a strikingly wide range of facts about the human beings who become judges. Predictors of judicial decisions that they or fellow scholars have assessed include, among others, the political party of the appointing president (as a rough gauge of political attitude), schooling, geographic origin, rank among siblings, and previous work experience (and other psychological and social determinants that in turn influence a judge's vote in a particular case).[26]

This project examined a comparably eclectic though smaller group of factors. In place of Segal and Spaeth's term—"attitudinal"—this study adopted the more inclusive label "extra-legal model" (ELM) for that host of nondoctrinal factors that Segal and Spaeth and other political scientists formally have considered as the systematic basis for explaining and predicting judicial decisions.

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26. *See, e.g.*, Peter F. Nardulli et al., *Unraveling the Complexities of Decision Making in Face-to Face Groups: A Contextual Analysis of Plea-Bargained Sentences*, 78 AM. POL. SCI. REV. 912 (1984) (assessing interpersonal skills); James L. Gibson, *Personality and Elite Political Behavior: The Influence of Self Esteem on Judicial Decision Making*, 43 J. POL. 104 (1981); James L. Gibson, *Judges' Role Orientations, Attitudes, and Decisions: An Interactive Model*, 72 AM. POL. SCI. REV. 911 (1978) (study of Iowa state court trial judges focusing on how judges perceive themselves as individuals and as judicial officers); S. Sidney Ulmer, *Social Background as an Indicator to the Votes of Supreme Court Justices in Criminal Cases: 1947-1956 Terms*, 17 AM. J. POL. SCI. 622 (1973) [hereinafter Ulmer, *Social Background*] (considering nine different factors, and finding correlations between Justices' votes and their age at appointment, federal administrative experience and religious affiliation). *But see* James L. Payne & James A. Dyer, *Betting After the Race is Over: The Perils of Post Hoc Hypothesizing*, 19 AM. J. POL. SCI. 559 (1975) (criticizing Ulmer's method of obtaining data). Payne & Dyer's criticism was rebutted in S. Sidney Ulmer, H_0: *Post Hoc Con - Straw-Man Con = 0*, 19 AM. J. POL. SCI. 565 (1975). *See also* C. Neal Tate & Roger Handberg, *Time Binding and Theory Building in Personal Attribute Models of Supreme Court Voting Behavior, 1916-88*, 35 AM. J. POL. SCI. 460 (1991)(studying possible correlations between votes and, inter alia, urban/agrarian roots, order of birth among siblings, father's governmental experience, party of appointing president, and southernness); SEGAL & SPAETH, *supra* note 2, at 221-234, 241-255 (reviewing additional literature).

Second, Segal and Spaeth's focus on the Supreme Court invites further study of other courts. They theorize that their model probably would not predict lower federal court decisions because lower court judges, aware that they are subject to review by a superior court, presumably do not like to be reversed. Therefore those judges are more compliance-minded, or respectful of precedent, and are thus less likely to decide cases on grounds other than doctrine, such as policy preferences or other ELM factors.[27] Segal and Spaeth, however, do not empirically test their assertion about lower courts, and few others have focused on non-Supreme Court cases.[28]

This study aims to begin filling that void. Deriving from Segal and Spaeth's facially sensible observation, this project examines the extent to which factors other than doctrine influence the behavior of lower court judges. If Segal and Spaeth's generalization about lower court judges' compliance-mindedness holds, then it is reasonable to expect that federal district court judges would be relatively more compliance-minded than federal circuit court judges. The extremely small percentage of certiorari petitions the Supreme Court grants,[29] among other things, makes a circuit court decision much less likely to be reviewed than a district court decision, many of which are appealable as of right.[30]

In its most reductionist terms, Segal and Spaeth's model amounts to proof that Supreme Court Justices, like baseball umpires and others authorized to make crucial decisions, are human beings and not robots. Lower court judges are no less human beings than Supreme Court Justices. Therefore, notwithstanding Segal and Spaeth's expectation that lower court judges are respectful of legal doctrine, it is not unreasonable to expect to find some evidence of the role of attitudinal and ELM factors, especially in light of the strength of the evidence of the influence of ELM factors at the Supreme Court level.[31] If this study

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27. SEGAL & SPAETH, *supra* note 2, at 69-72. They do cite one study of appellate court decisions that reportedly shows "little overtly noncompliant behavior." *Id.* at 71-72, 72 n.153.

28. *E.g.*, Paul Brace & Melinda Gann Hall, *Neo-Institutionalism and Dissent in State Supreme Courts*, 52 J. POL. 54 (1990); Sheldon Goldman, *Voting Behavior on the U.S. Courts of Appeals Revisited*, 69 AM. POL. SCI. REV. 491 (1975). *See also* C.K. Rowland et al., *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: the Reagan Judges*, *in* AMERICAN COURT SYSTEMS 411 (Sheldon Goldman & Austin Sarat eds., 2d ed. 1989).

29. Although statistics vary, it is accepted that the Court grants review to no more than 10% of the paid petitions and 1% of the unpaid petitions. *See generally* SEGAL & SPAETH, *supra* note 2, at 165-206; PERRY, *supra* note 18.

30. *See, e.g.*, FED. R. APP. P. 4.

31. Segal and Spaeth claim a 74% accuracy rate in predicting Supreme Court decisions in search and seizure cases. SEGAL & SPAETH, *supra* note 2, at 230.

had been intended, however, as a direct test of the legal model—it is not,[32] but the converse hypothesis is inevitably implicated—then assuming arguendo the correctness of Segal and Spaeth's suggestions about lower court behavior, it would be reasonable to expect little correlation between various ELM factors and the decisions in particular cases.

The hypotheses selected for testing are derivative of the attitudinal model and of several other studies of ELM factors. Specifically examined were whether certain (1) social background and ideology factors, and (2) factual "cues"[33] show any significant correlation with the decisions of judges in a particular sample of cases. The chosen body of cases contained decisions of judges in a fairly unique position, namely, those in which a federal district court judge is asked to rule on a criminal defendant's petition for a writ of habeas corpus.[34] On the lowest rung in the federal judicial hierarchy, they earn the presumption of greatest compliance-mindedness. Habeas procedural requirements, however, place the district judge, while sitting as a trial judge in a court of original jurisdiction, into an appellate review posture. Specifically, because the habeas petitioner must have exhausted his appeals in the state system, the federal district judge's job is to review the correctness of state court decisions on constitutional issues in light of the already existing state trial record.

Further, assuming that any influence of ELM factors might be measured, it seemed most likely that such influence would be detectable in cases where the exercise of judicial discretion could reasonably be

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32. Again, the legal model does not lend itself to the kind of statistical measuring Segal and Spaeth employed and that is being roughly followed here.

33. Although the study of the relation between facts in the case and the decisions could be labeled "fact pattern analysis" like the kind employed by Segal and Spaeth in their study of search and seizure cases, SEGAL & SPAETH, *supra* note 2, at 208-221, what I examine, while technically "facts" in the cases, may more sensibly be understood as "cues" as that term was developed by Joseph Tanenhaus, et al. in *The Supreme Court's* Certiorari *Jurisdiction: Cue Theory, in* AMERICAN COURT SYSTEMS, *supra* note 28, at 158.

34. The habeas statute authorizes a defendant who claims he is being confined in violation of the United States Constitution to file a petition for a writ of habeas corpus in the federal district court in which his conviction was obtained or in which he is incarcerated. 28 U.S.C. § 2254 (1994). Courts have developed an important additional requirement, known as "exhaustion," which requires that in order to be heard in federal court a habeas petitioner must first have exhausted his appeals in state court and have raised in those appeals the same constitutional issue raised in the habeas petition.

anticipated. Cases involving an accused's constitutional right to self-representation were chosen. That right, first announced by the Supreme Court in 1975 in *Faretta v. California*,[35] is now among the bundle of constitutional claims a defendant may raise on habeas. The exercise of judicial discretion seems particularly invited, not because any prong of the doctrine expressly so provides, but instead because the doctrine, neutrally construed, would lead to results unpalatable to many: Among others, a defendant who was represented by counsel could seek to overturn his conviction on the ground that he was denied the right to represent himself, and a defendant who was permitted, at his request, to represent himself at trial might later argue that he was erroneously permitted to do so.[36] Either scenario would appear to test seriously one's loyalty to the constitutional guarantee.

A closer examination of the *Faretta* doctrine is essential to appreciate the issues in the cases studied.

B. Background on Faretta

On June 30, 1975, Justice Stewart issued the decision for a 6-3 majority of the United States Supreme Court in *Faretta*, announcing a new federal constitutional[37] right for defendants in state criminal trials. Under *Faretta*, the Sixth Amendment of the United States Constitution guarantees a defendant in state criminal proceedings the right to represent himself at trial—technically, the right to waive the Sixth Amendment's express guarantee of assistance of counsel. By any measure, *Faretta* makes a trial judge's job difficult: Not only must the judge see that the defendant receives the guaranteed right to counsel, but the judge must also ensure that, in the process, a lawyer is not unconstitutionally forced upon the defendant. Under *Faretta*, once a defendant articulates a desire to proceed pro se, the trial judge must conduct an inquiry to determine whether the defendant's request is genuine—not simply a ploy to delay the proceedings or to fabricate an issue for appeal—and whether the defendant is making a knowing and voluntary waiver[38] of the right to counsel.

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35. 422 U.S. 806 (1975).

36. *See* additional discussion *infra* text accompanying note 42.

37. At the time of the *Faretta* decision the constitutions of 36 states explicitly recognized the right to self-representation. *See Faretta*, 422 U.S. at 813-14, n.10 (cataloguing provisions). In the federal courts the right to self-representation has existed by statute since 1789. Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1654 (1875)).

38. *See* Johnson v. Zerbst, 304 U.S. 458 (1938) (articulating standard for assessing waivers of constitutional rights).

Under *Faretta*, the defendant's lack of legal training or the trial judge's belief that the defendant would likely fare better with an attorney are impermissible grounds for the judge's denial of a request to proceed pro se. *Faretta* explains that the right is about autonomy and self-determination, not mere procedure or the accuracy of the trial outcome—the values protected by many other constitutional rights of criminal litigants. In short, *Faretta* protects a defendant's right "to go to jail under his own banner if he so desires."[39] Understandably, however, many regard *Faretta* as constitutionalizing the right to be eccentric, stupid, idiosyncratic, or disruptive.[40]

Three additional aspects of *Faretta* jurisprudence make decisions involving *Faretta*-based claims particularly suitable for this kind of study. First, the Supreme Court has held that *Faretta* claims are not subject to harmless error analysis,[41] a view that probably reflects the fact that *Faretta* does not necessarily promote the accuracy of the trial—the defendant is arguably almost always better off with a competent attorney who knows pretrial procedures, the judicial system, and the mechanics of trial practice. Thus, if a reviewing court finds that a well-meaning trial judge forced counsel on a defendant because the judge believed doing so was in the defendant's best interest, under *Faretta* that conviction must be overturned.[42] The federal district court judge adjudicating a habeas petition cannot take the easy way out by finding a violation but nonetheless upholding the conviction in light of the overwhelming evidence of guilt.

Second, *Faretta* appears to open the door to abuse: All a defendant has to do is ask to represent himself, and he at least sets up a possible claim on appeal. *Faretta* holds that a defendant who does represent

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39. United States *ex. rel.* Maldonado v. Denno, 348 F.2d 12, 15 (2d Cir. 1965), *cert. denied*, 384 U.S. 1007 (1966).

40. The *Faretta* decision spawned a large body of scholarly discussion in the years immediately following its issuance. Many of these articles include incisive analyses of Justice Stewart's reasoning and perceptive appraisals of the doctrine in application. *See, e.g.*, Frank A. Kaufman, *The Right of Self-Representation and the Power of Jury Nullification*, 28 CASE W. RES. L. REV. 269 (1978)(discussing the impact of *Faretta* upon trial practice); Howard J. Schwab, *How Far Faretta: Creating Implied Constitutional Rights*, 6 SAN FERN. V. L. REV. 1 (1977).

41. *E.g.*, McKaskle v. Wiggins, 465 U.S. 165, 177 n.8 (1984); Johnstone v. Kelly, 808 F.2d 214, 218 (2d Cir. 1986), *cert. denied*, 482 U.S. 928 (1987). The "harmless error" doctrine originated in Chapman v. California, 368 U.S. 18 (1967).

42. *Johnstone*, 808 F.2d at 218 (cataloguing cases from other circuits).

himself may not thereafter be heard to complain that he was denied effective assistance of counsel. Nonetheless, many who have represented themselves after invoking *Faretta* have argued on appeal that their waiver was not knowing and voluntary and that, for one reason or another, they felt they had no choice but to represent themselves.[43] Again, knowing what is the correct thing to do when a criminal defendant invokes the right to represent himself seems very difficult for a state trial judge, who must seek to administer justice in the face of an increasingly heavy docket while simultaneously striving to shelter validly obtained convictions from needless appeal—the same event could now set up two arguments on appeal—and safeguarding the liberty that the Court in *Faretta* says the Constitution protects.[44] Since they are trial judges themselves, federal district judges adjudicating habeas petitions naturally would be sensitive to these challenges when reviewing the constitutionality of a state trial judge's response to *Faretta*'s dictates.

Third, the Supreme Court has not addressed the *Faretta* right since Stewart discovered it in 1975. This means that to know the *Faretta* decision is, for the most part, to know the *Faretta* doctrine. Although intermediate federal courts have added their interpretations to *Faretta* jurisprudence, *Faretta* remains unlike most of the other constitutional rights of the accused recognized by the Warren Court in that there is no significant doctrinal development or evolution subsequent to the initial decision (as there is, for example, in search and seizure, self-incrimination, and effective assistance of counsel law). In short, discerning the *Faretta* rule of law does not especially burden federal judges or their clerks. Therefore, when assessing the range of possible explanations for a particular judge's decision in each of the cases in this study, the likelihood that the deciding judge did not fully know or understand the law he was applying—the possibility that the deciding judge had not yet learned of a recent narrowing or expanding development in the law—can

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43. See discussion *infra* note 56.

44. Justice Blackmun's dissent in *Faretta* catalogues the many questions that make a trial judge's job difficult:

> Must every defendant be advised of his right to proceed *pro se*? If so, when must that notice be given? Since the right to assistance of counsel and the right to self-representation are mutually exclusive, how is the waiver of each right to be measured? If a defendant has elected to exercise his right to proceed *pro se*, does he still have a constitutional right to assistance of standby counsel? How soon in the criminal proceeding must a defendant decide between proceeding by counsel or *pro se*? Must he be allowed to switch in mid-trial? May a violation of the right to self-representation ever be harmless error? Must the trial court treat the *pro se* defendant differently than it would professional counsel?

Faretta v. California, 422 U.S. 806, 852 (1975).

be dismissed as negligible. In short, *Faretta* can be regarded as fairly consistent precedent, and a constant in this study.

The *Faretta* right also had a fairly definite date of birth—the right did not exist before the *Faretta* decision[45]—which facilitates this kind of study by creating a fixed time period and a finite number of cases to examine. Therefore "N," regardless of its absolute value, is exhaustive, not representative.

While *Faretta* is suitable or easy precedent for this study, it is "hard precedent" for the judges applying it, or at least somewhat more difficult than the precedent governing other constitutional protections afforded the accused. *Faretta* is hard precedent because, while it is seductive to uphold a constitutional right that has nothing to do with procedural accuracy but instead involves individual dignity, it nonetheless troubles even the most staunch supporters of that right to reverse a conviction because a defendant had the assistance of counsel, or because his apparent desire to represent himself was honored.[46] *Faretta* error does not seem to implicate the important policies underlying most of the accused's other constitutional procedural protections, such as misconduct on the part of the prosecution, or a compromise with the truth-seeking goals of the criminal trial process. *Faretta*-based claims, relative to claims involving other constitutional rights of the accused, would seem relatively more likely to lead to the exercise of discretion by reviewing courts, and relatively more fertile for testing the possible influence of ELM factors.

C. *The Tested Hypotheses*

The following hypotheses involving the possible influence of ELM factors were posited and are divided into Social Background/Ideology and Factual Cues:

Social Background/Ideology:

1. *Party of Appointing President.* Federal judges appointed by Republican presidents are as a group more conservative than

45. Only one state court held the *Faretta* doctrine to have retroactive application. People v. Holcomb, 235 N.W.2d 343 (Mich. 1975).

46. As discussed in greater detail *infra* part III.D.2.g., these are the two principal claims *Faretta* allows defendants to make.

federal judges appointed by Democratic Party presidents. Consequently they are more likely to uphold convictions by finding no constitutional violation.

2. *Prosecutorial Experience.* Notwithstanding the limited findings of the social background studies,[47] prosecutorial background might be relevant to a judge's attitude toward a *Faretta*-based claim. Specifically, judges who once prosecuted criminals would be more likely to uphold convictions, and find no constitutional violation on the habeas petition, for either of two reasons: (i) Because prosecutors are generally more conservative, law-enforcement minded, and respectful of convictions, or (ii) because prosecutors are aware of the tribulations of criminal trial practice and might look with disfavor on *Faretta*-based claims, viewing them as mere antics.
3. *Military Experience.* Similarly, judges with military experience would be more conservative and thus more likely to uphold convictions, or to be greater disciplinarians who are less tolerant of the pranks *Faretta* might allow in the courtroom.

Factual Cues in the Cases:

4. *Counsel on Petition.* Drawing on either (i) a basic premise of the right to counsel, which is that a criminal defendant is better off with representation, or (ii) the finding that the Supreme Court is more likely to grant review to paid than to unpaid petitions,[48] which suggests, among other things, that unpaid or pro se equals frivolous, it can be posited that a habeas petition is more likely to be granted when filed and briefed by counsel than by the prisoner appearing pro se.
5. *Seriousness of Crime.* The more serious the crime for which the defendant was convicted, the more likely the federal district judge would rule that there was no constitutional violation.
6. *Posture of Claim.* The posture of the *Faretta* claim may affect the outcome. Recall that a defendant could claim either (i) that he sought to represent himself but the trial judge denied his request, forcing him to go to trial with an attorney, or (ii) that he in fact did represent himself but was forced to do so, or otherwise invalidly waived counsel. It is fair to hypothesize that trial judges will be more sympathetic to the former claim than to the

47. *See, e.g.*, Ulmer, *Social Background*, *supra* note 26; Tate & Handberg, *supra* note 26.
48. *See* SEGAL & SPAETH, *supra* note 2, at 199.

latter, since the latter more likely seems contrived for appeal purposes. Specifically, a defendant making the latter claim appears to have gotten exactly what he asked for, so his claim of improper waiver would seem to smack of insincerity.

7. *Mental Status.* Because of the requirement that waivers of counsel be made knowingly and voluntarily, it seems likely that cases where the defendant's legal sanity or competency to stand trial is at issue should be decided differently than other cases.[49] Specifically, where the defendant did represent himself, we should expect a court to be more likely to find a constitutional violation when mental status was at issue than when it was not; similarly, where the defendant was denied the right to represent himself, a court should be less likely find a constitutional violation when his mental status was at issue than when it was not, on the theory that a mentally incompetent person should not be allowed to represent himself.
8. *Standby Counsel.* In many cases where a court permits a defendant to represent himself, it also appoints an attorney to act as standby or advisory counsel should the defendant require some assistance. *Faretta* permits but does not require this practice.[50] This factor will only exist in cases where the defendant in fact represented himself; in those cases, a court should be less likely to find a constitutional violation if standby counsel was present than if not, on the theory that the defendant had counsel available—almost the best of both worlds.

D. Methodology

1. Sample

The aim was to obtain all reported federal district court decisions resolving *Faretta*-based claims by state criminal defendants since the *Faretta* decision. To do this, a LEXIS search was performed for all federal district court cases that included the terms "Faretta" and

49. More malleable facts like the defendant's educational background or intelligence were not measured; this cue was confined to whether the defendant expressly asserted an insanity defense, or whether his competency to stand trial was questioned.
50. Faretta v. California, 422 U.S. 806, 834 (1975).

"habeas." The search brought up 129 cases; actual inspection eliminated 19 cases that mentioned those terms but which did not actually involve a *Faretta* based claim, creating a sample of 110. Of the 110, 17 cases were not actually habeas petitions but were retained in the sample because they were *Faretta*-based claims by state prisoners. The most common examples were Section 1983 claims by state prisoners asserting that *Faretta* required the state to provide a prison library or to improve the contents of or access to it so they could effectively exercise their *Faretta* right of self-representation. Two additional cases from the sample were eliminated because background data about the deciding judge was unavailable.

The factual cues, or factors, were obtained from the opinions themselves.[51] Two resources provided the social background and biographical information of each judge: The *Federal Judiciary Almanac*[52] and the *Almanac of the Federal Judiciary*,[53] both issued annually. Each includes a biography for each federal judge serving on the bench in a particular year.

2. *Coding the Variables*

The following variables were coded:

a. *The decision in the case* (DEC). For most cases, this amounted to the simple question whether a constitutional violation was found. All decisions are quite clear about this, and coding was as follows:

0	yes	(court found a constitutional violation)
1	no	(court found no constitutional violation)

For the handful of decisions involving *Faretta*-based claims in nonhabeas contexts such as the prisoners' claim for library books, whether the decision expanded or limited the reach and requirements of *Faretta* was coded. So for the DEC variable the following codes were assigned:

2	limits the reach of *Faretta* (a conservative decision)

51. This does not necessarily create the kind of problem Segal and Spaeth describe in their fact pattern analysis. See discussion of this and other possible limitations *infra* text accompanying notes 62-68.

52. W. STUART DORNETTE & ROBERT R. CROSS, FEDERAL JUDICIARY ALMANAC (3d. ed. 1987).

53. ALMANAC OF THE FEDERAL JUDICIARY (Stephen Nelson et. al., eds., 1995).

3 expands the reach of *Faretta* (a liberal decision)

Recall that one of the reasons for including these additional decisions was an effort to be exhaustive as to *Faretta*—to count every possible decision involving *Faretta* from its inception to the date of the study.[54]

b. *Party of appointing president* (PARTY):

0 Democrat
1 Republican

c. *Prosecutorial Experience* (PROS). Criminal prosecutorial experience on the federal, state, or municipal level was encoded as "yes." Typical experience was service as an Assistant United States Attorney (AUSA), Assistant District Attorney, or County or City Prosecutor. Service as an AUSA in only the civil division or service in an Attorney General's office was encoded as "no":

0 yes
1 no

d. *Military Background* (MIL). Active or reserve service in any branch (Army, Navy, Air Force, Marines) was encoded as "yes":

0 yes
1 no

e. *Whether the habeas petition (or other prisoner suit) was prepared pro se or by counsel* (COUNSEL):

0 *pro* se
1 with counsel

f. *Seriousness of Crime for which Defendant Convicted* (CRIME). In some cases the defendant was convicted of less than the charged offense, but only conviction was encoded:

0 most serious—death penalty imposed
1 serious (first degree felonies, crimes of violence, or prison terms of ten or more years)
2 less serious (nonviolent, including white collar crimes such as securities

54. The cutoff date for this study was November 4, 1993. As of this writing, a handful of additional decisions have been reported.

fraud and simple marijuana possession)[55]

g. *Posture of Faretta claim* (POSTURE). As described above, *Faretta*-based claims can take several forms. The first two are the classic postures, squarely presenting the basic *Faretta* issue; but to keep the study exhaustive as to *Faretta* claims, other claims that relied explicitly on *Faretta* were retained and encoded:

0	claim that the defendant was improperly allowed to represent himself, usually a "bad waiver" or "invalid waiver" argument;[56]
1	claim that defendant was denied the right to represent himself (in whole or in part)
2	a "bad waiver" claim but limited to pretrial matters; usually a *Miranda*-statements case but in which waiver is expressly linked to *Faretta*
3	nonhabeas *Faretta*-based claim, usually that the prison should provide a library or better access to it
4	miscellaneous *Faretta*-based claims (each a permutation of the self-determination principle, such as the right to testify or control strategy in the presence of counsel or even to control choice of counsel)

h. *Mental Status* (SANITY). Whether the defendant's mental status was raised:

0	yes
1	no

i. *Presence of Standby Counsel* (STANDBY). If POSTURE = 0 (the claim is that the defendant was wrongly allowed to

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55. Incarceration is a requirement for habeas, so even these less serious crimes involved jail sentences. *See* 28 U.S.C. § 2254 (1994).

56. This category includes cases where the claim relates *either* to the entirety of the proceedings *or* to only a portion. For example, in some death cases, the defendant did not waive counsel until the sentencing phase. In another, the defendant dismissed his attorney before closing argument and delivered the closing himself. In still others, the defendant waived counsel and then pleaded guilty, so his claim is limited to wrongful self-representation at that plea appearance.

represent himself), whether standby or advisory counsel was appointed was encoded:

0	yes
1	no

E. The Tests and Resulting Data

1. Set 1: Social Background and Ideology

A series of tests for correlations was performed to search for any quantitative basis for the relations posited in the hypotheses set forth above.[57] For the first set of tests, all the cases were used (including the seventeen involving *Faretta* that were not pure habeas petitions), so N = 108. Again, one of the goals was to be exhaustive as to *Faretta*, so to run this first set of tests the first variable (DEC) was recoded to create a second variable called "DEC2." To create DEC2 each "2" (decisions limiting the reach of Faretta) was converted to "1" (decisions finding no

57. The statistical assistance of Jeffrey Segal is gratefully acknowledged. While I prefer to spare law readers the technicalities of the Spaeth and Segal program, a few terms used throughout my discussion must be explained. For further discussion of statistical methods, see HUBERT M. BLALOCK, SOCIAL STATISTICS (1979).

In this study, two of the figures generated in each set of data are relevant to the statistical significance. Generally, results are considered statistically significant if the Pearson indicator is below 0.05. Pearson chi squared is a test of statistical significance that tells how likely it is that the observed results could have happened by chance if there were no relationship between the variables. As a rule of thumb, significance levels below 0.05 are considered acceptable.

The reliability of results is also indicated by the size of gamma. Gamma (γ) is a proportionate reduction in error statistic that ranges from negative one (-1) to positive one (1). A gamma of 0 indicates that one is not able to improve on predicting the dependent variable (court decisions) by knowing the value of the independent variable (party, etc.). Gammas of -1 or 1 mean that one can perfectly predict the dependent variable from the independent variable (this never occurs). A gamma of 0.50 means that one can reduce the error rate in predicting the dependent variable by 50% by knowing the value of the independent variable. The sign of gamma means simply whether high values on the two variables are positively or negatively associated. Generally, results are more reliable the stronger the value of gamma. For example, gamma of 0.1 is less significant than gamma of 0.4. Negative gammas are highly insignificant.

Finally, the technique of crosstabulation was used in this study to assess the relationship between the variables. Crosstabulation is probably the most common technique for assessing the relationship between two nominal or ordinal variable levels. *See generally* BLALOCK, *supra*.

constitutional violation) and each "3" (decisions expanding Faretta) was converted to "0" (decisions finding a constitutional violation).

The results of DEC2 by PARTY, DEC2 by PROS and DEC2 by MIL are found in Tables 1, 2, and 3, respectively, located in the appendix.[58] None of the results is statistically significant (Pearson measures of significance are 0.57, 0.82, and 0.29, respectively, and gammas are all negative). Nor are there any discernible trends involving the first two factors, Appointing President's Party (Table 1) and Prosecutorial Background (Table 2). Republican and Democrat appointees on the federal district court appear to rule favorably on *Faretta*-based claims at approximately the same rate; indeed, counter to expectations, the Republican rate of 39.3% actually exceeds the Democrat rate of 34.0%. Similarly, federal district judges with prosecutorial experience appear to rule favorably at approximately the same rate as those lacking prosecutorial experience.

Interestingly, military background (Table 3) probably has some role in the decisions. First, while a Pearson measure of 0.29 makes the results formally insignificant by professional statistician's standards, at 0.29 it is still markedly lower than the significance measures of the other two tests. Second, by an almost ten-percentage-point variation, judges with military experience rejected *Faretta*-based claims more often than those without it (67.2% as opposed to 57.4%), consistent with expectations. At a minimum, military background appears to be more related to decisional outcome than either prosecutorial background or the appointing president's political ideology.

2. *Set 2: Limiting the Sample to "Classic" Claims*

For the next set of tests the sample was reduced to habeas petitions (where DEC = 0 or 1) involving one of the two "classic" *Faretta* claims (POSTURE = 0 or 1). For this group, N = 82. DEC (so limited) was crosstabbed with PARTY, PROS, and MIL; the results (Tables 4, 5, and 6) are almost indistinguishable from the first set of results (Tables 1, 2, and 3, for DEC2, where N was 108).

With this same refined sample (N = 82) DEC was crosstabbed with CRIME. Again, the results are not significant (Pearson exceeds 0.8 and gamma is negative) but a trend is visible: Death penalty cases appear to be treated somewhat differently. Consistent with one of the initial hypotheses, district judges granted only 25% of the *Faretta*-based petitions of death row inmates as opposed to 34% and 35%, respectively,

58. The tables are compiled in the appendix to avoid distracting the reader.

of the petitions of persons convicted for the other two categories of crimes (Table 7, row 1).

3. Set 3: Tests Based on POSTURE

The next set of tests focused on the POSTURE factor. Keeping the same refined and reduced N of 82 (where DEC = 0 or 1 and POSTURE = 0 or 1), DEC was crosstabbed by POSTURE. The resulting data is insignificant (significance in excess of 0.58 and gamma negative)(Table 8). Nor were the raw numbers material, though courts appear to respond slightly more favorably to claims that the defendant was denied the right to represent himself (POSTURE = 1) than to claims that the defendant was wrongly allowed to represent himself (granting 36.4% of the former as opposed to 30.6% of the latter).

a. Set 3A: POSTURE = 0.

Tests were then run for each of the two postures separately, and noticeably more significant (or less statistically insignificant) results than in the previous rounds were obtained. First, N was further narrowed from 82 (where DEC = 0 or 1 and POSTURE = 0 or 1) to only those cases in which POSTURE = 0, where the petitioner claimed he was wrongly allowed to represent himself. For those cases, DEC was crosstabbed by CRIME, by PARTY, by PROS, by MIL, by COUNSEL, by SANITY, and by STANDBY. The results are all statistically insignificant (Tables 9 through 15) but a few are nonetheless notable.

First, Table 9 shows that the difference attributable to the level of crime is even more pronounced than in Table 7 (where N was 82 and included claims that the defendant had been denied the right to represent himself). To be sure, this is partly explained by the fact that there are fewer death penalty cases in this sample than in the first set of tests (7 cases as opposed to 12); nonetheless, only one "bad waiver" claim received a favorable ruling.

The second noteworthy result involves PARTY (Table 10). Democratic appointees are strikingly less likely than Republican appointees (19.0% as opposed to 39.3%) to rule favorably on "bad-waiver" claims. This seems especially notable in light of the findings in Tables 1 and 4, which showed virtually no difference in overall decisions based on party. Furthermore, the Pearson significance

indicator, 0.12, is the lowest in the entire project (gamma, however, is still negative).

As for the other social background factors, DEC by PROS (Table 11) and DEC by MIL (Table 12) show no significant results and no notable trend. Military background correlates with a slightly higher favorable ruling rate, consistent with the statistically insignificant trends identified in Tables 3 and 6.

Representation by counsel (column 2 on Table 13) on the petition slightly increases the chances of a favorable ruling (35.5% of such petitions granted, as opposed to 22.2 % of the pro se petitions), which seems to be an intuitive result—presumably, counsel's assistance helps. The findings on the role of the defendant's sanity are statistically insignificant and show no notable trend (see Table 14). Finally, the appointment of standby counsel correlates with a slightly lower favorable ruling rate, an intuitive finding, but again the data are highly insignificant (Table 15).

b. Set 3B: POSTURE = 1

The next set of tests were run on only those cases where the prisoner claimed that he had sought to represent himself at trial and was denied that right (POSTURE = 1). This sample contained only 33 cases (N = 33). Six of the seven tests run in Set 3A were performed here (DEC by CRIME, by PARTY, by PROS, by MIL, by COUNSEL, and by SANITY). DEC by STANDBY was not run, however, because the presence of standby counsel is not applicable; the nature of POSTURE = 1 is that the defendant was represented by counsel. Again, although N was only 33, and each of the resulting data sets is statistically insignificant (Tables 16 through 21), several are notably less so (PARTY, COUNSEL, and SANITY show sizeable variation and have significance levels of 0.16, 0.14, and 0.25, respectively). The results also take on greater meaning when compared with the results of Set 3A (where POSTURE = 0, a claim that the defendant was improperly allowed to represent himself).[59]

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59. The results for DEC by CRIME (Table 16) and DEC by PROS (Table 18) in this sample are insignificant. Furthermore, DEC by CRIME shows that death penalty cases where POSTURE = 1 are actually treated more favorably than other serious crimes and less favorably than nonserious crimes, and also much more favorably than death penalty cases where POSTURE = 0 (40% as opposed to 14.3% granted, see Table 9). One explanation, of course, is that the problem of the small sample (N = 33) is worsened when there are three categories instead of two, and that may partly explain this result. It may also be the case, however, that while posture does not matter overall (see Table 8), when death is involved it does, and the difference according to these two tables

The results of DEC by PARTY (Table 17) in this sample are perhaps the most significant in the project: The significance indicator is low and gamma is positive and moderate (0.47). The results show that when the petition claims that the defendant was denied the right to represent himself, Democratic appointees are twice as likely as Republican appointees to find a *Faretta* violation. On one level this is what was predicted—that Democrats would be more liberal generally and more likely to find a constitutional violation—but coupled with Table 10, it shows a more specific party-ideology link, and one that is not intuitive, although not necessarily counterintuitive: Democratic appointees are more likely to overturn a conviction where a defendant had a lawyer than where he went it alone. This seems atypical of the traits commonly attributed to Democratic party ideology, such as paternalism, protectionism, and government activism. Some of the limits discussed below[60] or other factors not tested might account for this striking difference.

Also notable are the results in DEC by COUNSEL (Table 20), both alone and when compared with the results for the same test when POSTURE = 0 (Table 13). With a relatively low Pearson significance indicator (0.124) and a positive and moderate gamma (0. 52), Table 20 shows that pro se petitions are almost twice as likely to be granted as are petitions prepared by attorneys. This is at first blush counterintuitive, counter to the initial hypothesis, and contrary to the apparent effect of counsel in the other-postured cases. One possible explanation, however, is that when a prisoner claims that he was denied the right to represent himself at trial, he perhaps bolsters the overall credibility of that claim if he behaves consistently by also representing himself on habeas.

The results of DEC by SANITY (Table 21) also present a curious result. With a Pearson significance indicator of 0.25 (again, while not low, it is relatively low for this project) and a moderate-to-strong gamma (0.6), Table 21 shows that a question concerning the defendant's sanity correlates with a granting of the petition more than twice as often as when there is no question of the defendant's sanity. Because this reflects

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(accepting their statistical insignificance) is that courts are more willing to tolerate a defendant going to his death under his own banner (that is, rejecting more claims under POSTURE = 0) than when his liberty to engineer his own destiny was restrained. This is not intuitive, however, which suggests that the other explanation is more likely.

DEC by PROS, to the extent it shows a trend, is consistent with the tests on the larger samples.

60. *See* discussion *infra* part III.B.

only POSTURE = 1 cases, however, this suggests the completely counterintuitive notion that a trial court's forcing of an attorney on a defendant is more likely ruled unconstitutional when the defendant's mental status is questioned than when it is not questioned. Despite the relatively strong (for this study) significance indicators, perhaps one or more of the various limitations discussed below (in particular, the very small sample size: N was only 33 for Set 3B) account for this curious result.[61]

4. Set 4: CRIME tests

The final test focused on the CRIME factor. To better examine the possible importance of the death penalty as a cue, CRIME was recoded as follows:

Death penalty cases = 0
All other cases = 1

Controlling separately for POSTURE = 0 and then for POSTURE = 1, CRIME was then crosstabbed with DEC. The results are insignificant (Tables 22 and 23).

III. DISCUSSION AND ANALYSIS

A. General Implications

To be sure, given the high Pearson indicators throughout, most of the inferences sought to be drawn in the above analysis are strained. Indeed, for some variations attributable to the different posture in which the claim is brought, no statistically significant results were found. The least statistically insignificant results are counterintuitive, especially the favoritism judges appointed by Democratic presidents appear to show for claims that the defendant was denied the right to represent himself—a favoritism relative both to the way Democratic-appointed judges rule on other postured claims (claims that the defendant was wrongly allowed to represent himself) and to the less favorable reactions of Republican-appointed judges to similar claims (Tables 10 and 17). There are some trends in the insignificant numbers, such as a fairly consistent indication of a link between favorable *Faretta* decisions and military service by the

61. The SANITY tests in general seem flawed: Table 14, which shows the result of DEC by SANITY for the other postured sample, shows that the presence of questions about the defendant's sanity has virtually no effect, or a slightly opposite effect, in those cases. That slightly opposite effect, suggesting a slight preference for self-representation by persons of questionable mental status than by others, is equally counterintuitive.

deciding judge (Tables 3, 6, and 12, for example). Similarly, although statistically insignificant, there are fairly consistent indicators that death penalty cases are treated differently: Overall, they seem to be ruled on less favorably than other cases, unless the claim is that the defendant was denied the right to represent himself—the paradigmatic *Faretta* claim. In short, none of the posited hypotheses of ELM influence was proven, though some were supported with strained readings of the results.

B. Limitations of the Study

The first limitation of this study is sample size: Arguably it is too small. Certainly, some of the sample sizes used by Segal and Spaeth are in the thousands of cases, but their fact-pattern analysis of Supreme Court search and seizure cases had an N of 196.[62] The N of 108 in this study is not drastically out of that range. Indeed its virtue, if any, is that it represented exhaustive coverage of an issue. To be sure, the samples in Sets 3A and 3B were only 49 and 33, respectively; curiously, the best significance measures came from tests of those samples. Perhaps a future study could test a larger group of cases, such as the *Faretta*-based decisions of the federal appellate courts,[63] or could select a slightly broader category of cases, such as those involving effective assistance of counsel claims generally, rather than merely *Faretta*-based claims.

Another possible limitation in the eyes of social science's standards is that the factors were obtained from the opinions themselves. This methodology, however does not pose the kind of problem that Segal and Spaeth warn against. As they explain, certain data in the opinions are likely to be tainted by virtue of their appearance there at the hand of the judge whose response to that cue is being studied. Moreover, many of the facts Segal and Spaeth use in their study are closer to legal facts, at great risk of being influenced by—even excluded by—the result the authoring judge desires to reach.[64] The facts in this study, by contrast,

62. SEGAL & SPAETH, *supra* note 2, at 208-21.

63. A LEXIS search of federal appellate decisions for cases mentioning "Faretta" and "habeas" generated a list of over 200 such cases.

64. For example, whether there was probable cause is one of the legal facts Segal and Spaeth measure. It is easy to see how the court's own characterization of this fact—which is more like a legal conclusion—would be influenced by the overall result

are not as susceptible to taint by bias. One of this study's cues—whether the prisoner was represented by counsel on the petition—is not reported by the court at all but by the reporting service. The others—the posture in which the claim is raised, what crime the defendant was convicted of, and whether standby counsel was appointed—are not malleable facts. The potential for a problem with the final factor, SANITY, did not materialize since what was measured was not whether the defendant was in fact insane or incompetent (arguably a court's presentation of this fact would be influenced by its desired ultimate result in the case) but merely whether the defendant's sanity was put in issue.[65]

Another set of limitations relates to the social background and ideology tests. Concededly, the party of an appointing president is a only a rough estimate of ideology, and one might well undertake to examine, as did Segal and Spaeth, media reports about each judge at the time of his or her appointment. Even after accepting the value of looking at the appointing president's party, there could still be refinements. For example, one might code more specifically, perhaps accounting for whether the appointing president was ideologically conscious or overtly politically motivated in his appointments,[66] or for whether the Democrat-appointed judge was a Southerner.[67] Other idiosyncracies, geographic and otherwise, might need to be accounted for. For example, many states do not have the death penalty, so because of habeas jurisdiction rules a federal judge in New York almost never hears a death penalty habeas petition,[68] whereas her brethren in Texas hear many such petitions. A future study might focus on such matters. Furthermore, three of the judges included in the study decided more than one case, and no Clinton appointees had written a decision on a *Faretta*-based habeas petition at the time the data for this study was gathered.

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in the case. The "facts" in this study, by contrast, are not comparably collapsible into the ultimate legal issue.

65. Of course there remains the possibility that competency could have been raised in the trial court but not mentioned by the federal judge, but nearly all opinions include summaries of the procedural history, essential for the exhaustion part of the discussion of any habeas opinion, so they are fairly reliable sources for listing the issues raised at each stage of the litigation process.

66. Tate and Handberg considered this attribute. *See* Tate & Handberg, *supra* note 26.

67. *Id.*

68. Habeas jurisdiction lies wherever the defendant's conviction was obtained or where he is incarcerated. *See supra* note 34. At the time this study was performed, New York had not yet enacted its death penalty statute.

C. Conclusion: Broader Implications of the Study

The overall insignificance, by statisticians' standards, of the many correlations does not make this study nonsignificant. To the contrary, the consistency and high degree of the statistical insignificance signal this study's ramifications: Finding virtually no support for any of the initial hypotheses, this study tends to confirm Segal and Spaeth's hypothesis that attitudinal factors do not measurably influence decisions on the lower courts, at least not nearly to the degree that they affect Supreme Court deliberations. To be sure, this study is not dispositive affirmative proof that ELM factors have no role on the federal district court bench. Nonetheless, given (1) the invitation to the exercise of judicial discretion that *Faretta*-based claims implicitly seem to offer, (2) the absence of statistically significant findings for any of the ELM factors, and (3) the evidentiary challenge whenever absence is sought to be established, the results are probative. They are consistent with the assertion that, on the district court level, when cases are decided in chambers and in writing, and when the parties invoke precedent, the legal model is alive and well.[69] The legal model as Segal and Spaeth define it has not been, and perhaps cannot be, directly proven; the best evidence of its existence or vigor may be indirect, through the elimination of as many ELM factors as one can sensibly identify. This study could be regarded as the beginning of that process.

69. This conclusion excludes many of the other kinds of decisions or rulings that district court judges make day to day, and which are unique to their level of the bench, such as evidentiary rulings in trials, judgments issued from the bench on orally argued motions, and many sentencing decisions, to name a few.

APPENDIX

Table 1

	PARTY OF APPOINTING PRESIDENT			
COURT DECISION ("DEC2")	Count *Col Pct*	Democrat (0)	Republican (1)	Row Total
	Pro-Faretta[1] (0)	16 ***34.0***	24 ***39.3***	40 ***37.0***
	Anti-Faretta[2] (1)	31 ***66.0***	37 ***60.7***	68 ***63.0***
	Column Total	47 ***43.5***	61 ***56.5***	108 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.31997**	**1**	**.57162**
Continuity Correction	.13301	1	.71533
Likelihood Ratio	.32101	1	.57100
Mantel-Haenszel test for linear association	.31701	1	.57341

Minimum Expected Frequency: 17.407

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.11377**	**.19953**	**-.56869**

Number of Missing Observations: 0

[1] "Pro-Faretta" designates (i) all habeas cases in which the court found a constitutional violation and (ii) the handful of non-habeas cases in which the court granted relief on the basis of Faretta.

[2] "Anti-Faretta" designates (i) habeas cases in which the court did not find a constitutional violation and (ii) the handful of non-habeas cases in which the court did not grant Faretta-based relief.

APPENDIX

Table 1

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[1] "Pro-Faretta" designates (i) all habeas cases in which the court found a constitutional violation and (ii) the handful of non-habeas cases in which the court granted relief on the basis of Faretta.

[2] "Anti-Faretta" designates (i) habeas cases in which the court did not find a constitutional violation and (ii) the handful of non-habeas cases in which the court did not grant Faretta-based relief.

Table 2

		PROSECUTORIAL EXPERIENCE		
COURT DECISION (DEC2)	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Pro-*Faretta*[3] (0)	15 ***35.7***	25 ***37.9***	40 ***37.0***
	Anti-*Faretta*[4] (1)	27 ***64.3***	41 ***62.1***	68 ***63.0***
	Column Total	42 ***38.9***	66 ***61.1***	108 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.05157**	**1**	**.82036**
Continuity Correction	.00052	1	.98188
Likelihood Ratio	.05166	1	.82019
Mantel-Haenszel test for linear association	.05109	1	.82118

Minimum Expected Frequency: 15.556

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.04651**	**.20455**	**-.22775**

Number of Missing Observations: 0

[3] "Pro-*Faretta*" designates (i) all habeas cases in which the court found a constitutional violation and (ii) the handful of non-habeas cases in which the court granted relief on the basis of *Faretta*.

[4] "Anti-*Faretta*" designates (i) habeas cases in which the court did not find a constitutional violation and (ii) the handful of non-habeas cases in which the court did not grant *Faretta*-based relief.

Table 3

	MILITARY BACKGROUND			
COURT DECISION (DEC2)	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Pro-*Faretta*[5] (0)	20 ***32.8***	20 ***42.6***	40 ***37.0***
	Anti-*Faretta*[6] (1)	41 ***67.2***	27 ***57.4***	68 ***63.0***
	Column Total	61 ***56.5***	47 ***43.5***	108 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**1.08578**	**1**	**.29741**
Continuity Correction	.70737	1	.40032
Likelihood Ratio	1.08314	1	.29800
Mantel-Haenszel test for linear association	1.07573	1	.29965

Minimum Expected Frequency: 17.407

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.20588**	**.19237**	**-1.03992**

Number of Missing Observations: 0

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[5] "Pro-*Faretta*" designates (i) all habeas cases in which the court found a constitutional violation and (ii) the handful of non-habeas cases in which the court granted relief on the basis of *Faretta*.

[6] "Anti-*Faretta*" designates (i) habeas cases in which the court did not find a constitutional violation and (ii) the handful of non-habeas cases in which the court did not grant *Faretta*-based relief.

Table 4

		PARTY OF APPOINTING PRESIDENT		
COURT DECISION	Count ***Col Pct***	Democrat (0)	Republican (1)	Row Total
	Faretta violation found (0)	11 ***31.4***	16 ***34.0***	27 ***32.9***
	No violation found (1)	24 ***68.6***	31 ***66.0***	55 ***67.1***
	Column Total	35 ***42.7***	47 ***57.3***	82 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.06027**	**1**	**.80326**
Continuity Correction	.00013	1	.99075
Likelihood Ratio	.06220	1	.80305
Mantel-Haenszel test for linear association	.06131	1	.80444

Minimum Expected Frequency: 11.524

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.05931**	**.23756**	**-.24997**

Number of Missing Observations: 0

Table 5

		PROSECUTORIAL EXPERIENCE		
COURT DECISION	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	10 ***32.3***	17 ***33.3***	27 ***32.9***
	No violation found (1)	21 ***67.7***	34 ***66.7***	55 ***67.1***
	Column Total	31 ***37.8***	51 ***62.2***	82 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.01009**	**1**	**.91997**
Continuity Correction	.00000	1	1.00000
Likelihood Ratio	.01011	1	.91992
Mantel-Haenszel test for linear association	.00997	1	.92046

Minimum Expected Frequency: 10.207

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.02439**	**.24268**	**-.10068**

Number of Missing Observations: 0

Table 6

		MILITARY BACKGROUND		
COURT DECISION	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	13 ***28.9***	14 ***37.8***	27 ***32.9***
	No violation found (1)	32 ***71.1***	23 ***62.2***	55 ***67.1***
	Column Total	45 ***54.9***	37 ***45.1***	82 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.73628**	**1**	**.39085**
Continuity Correction	.38683	1	.53397
Likelihood Ratio	.73469	1	.39137
Mantel-Haenszel test for linear association	.72731	1	.39376

Minimum Expected Frequency: 12.183

Statistic	Value	ASE1	Val/ASEO
Gamma	**-.19946**	**.22676**	**-.85614**

Number of Missing Observations: 0

Table 7

		SERIOUSNESS OF DEFENDANT'S CRIME			
COURT DECISION	Count ***Col Pct***	Death Penalty Imposed (0)	Serious: 1° felony, violent (1)	Less Serious (2)	Row Total
	Faretta violation found (0)	3 ***25.0***	17 ***34.0***	7 ***35.0***	27 ***32.9***
	No violation found (1)	9 ***75.0***	33 ***66.0***	13 ***65.0***	55 ***67.1***
	Column Total	12 ***14.6***	33 ***61.0***	20 ***24.4***	82 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.40641**	**2**	**.81611**
Likelihood Ratio	.42266	2	.80951
Mantel Haenszel test for linear association	.26727	1	.60517

Minimum Expected Frequency: 3.951

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.10918**	**.21163**	**-.51234**

Number of Missing Observations: 0

Table 8

		POSTURE OF *FARETTA* CLAIM		
COURT DECISION	Count ***Col Pct***	Defendant "Wrongly" Represented Self (0)	Defendant's Pro Se Request Denied (1)	Row Total
	Faretta violation found (0)	15 ***30.6***	12 ***36.4***	27 ***32.9***
	No violation found (1)	34 ***69.4***	21 ***63.6***	55 ***67.1***
	Column Total	49 ***59.8***	33 ***40.2***	82 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.29535**	**1**	**.58681**
Continuity Correction	.09234	1	.76122
Likelihood Ratio	.29395	1	.58770
Mantel-Haenszel test for linear association	.29175	1	.58910

Minimum Expected Frequency: 10.866

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.12863**	**.23430**	**-.53977**

Number of Missing Observations: 0

Table 9

	SERIOUSNESS OF DEFENDANT'S CRIME (in Cases in Which Defendant Claimed He Was Wrongly Allowed to Represent Himself				
COURT DECISION	Count *Col Pct*	Death Penalty Imposed (0)	Serious: 1° felony, violent (1)	Less Serious (2)	Row Total
	Faretta violation found (0)	1 ***14.3***	10 ***35.7***	4 ***28.6***	15 ***30.6***
	No violation found (1)	6 ***85.7***	18 ***64.3***	10 ***71.4***	34 ***69.4***
	Column Total	7 ***14.3***	28 ***57.1***	14 ***28.6***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**1.24902**	**2**	**.53552**
Likelihood Ratio	1.37282	2	.50338
Mantel Haenszel test for linear association	.16941	1	.68063

Minimum Expected Frequency: 2.143

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.09859**	**.26487**	**-.36983**

Number of Missing Observations: 0

Table 10

		PARTY OF APPOINTING PRESIDENT (in Cases In Which Defendant Claimed He Was "Wrongly" Allowed to Represent Himself)		
COURT DECISION	Count ***Col Pct***	Democrat (0)	Republican (1)	Row Total
	Faretta violation found (0)	4 ***19.0***	11 ***39.3***	15 ***30.6***
	No violation found (1)	17 ***81.0***	17 ***60.7***	34 ***69.4***
	Column Total	21 ***42.9***	28 ***57.1***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**2.31389**	**1**	**.12822**
Continuity Correction	1.45919	1	.22706
Likelihood Ratio	2.39353	1	.12184
Mantel-Haenszel test for linear association	2.26667	1	.13218

Minimum Expected Frequency: 6.429

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.46667**	**.26485**	**-1.60343**

Number of Missing Observations: 0

Table 11

COURT DECISION	PROSECUTORIAL EXPERIENCE (in Cases In Which Defendant Claimed He Was "Wrongly" Allowed to Represent Himself)			
	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	6 ***31.6***	9 ***30.0***	15 ***30.6***
	No violation found (1)	13 ***68.4***	21 ***70.0***	34 ***69.4***
	Column Total	19 ***38.8***	30 ***61.2***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.01365**	**1**	**.90698**
Continuity Correction	.00000	1	1.00000
Likelihood Ratio	.01363	1	.90708
Mantel-Haenszel test for linear association	.01337	1	.90793

Minimum Expected Frequency: 5.816

Statistic	Value	ASE1	Val/ASE0
Gamma	**.03704**	**.31671**	**.11649**

Number of Missing Observations: 0

Table 12

		MILITARY BACKGROUND (in Cases In Which Defendant Claimed He Was "Wrongly" Allowed to Represent Himself)		
COURT DECISION	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	8 ***28.6***	7 ***33.3***	15 ***30.6***
	No violation found (1)	20 ***71.4***	14 ***66.7***	34 ***69.4***
	Column Total	28 ***57.1***	21 ***42.9***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.12810**	**1**	**.72041**
Continuity Correction	.00200	1	.96432
Likelihood Ratio	.12768	1	.72085
Mantel-Haenszel test for linear association	.12549	1	.72315

Minimum Expected Frequency: 6.429

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.11111**	**.30811**	**-.35618**

Number of Missing Observations: 0

Table 13

	WHETHER PETITION/SUIT RAISING *FARETTA* CLAIM WAS PREPARED *PRO SE* OR WITH COUNSEL (in Cases In Which Defendant Claimed He Was Wrongly Allowed to Represent Himself)		
COURT DECISION	Count ***Col Pct***	Suit/ Petition Prepared *Pro Se* (0)	Suit/ Petition Prepared W/Counsel (1)	Row Total
	Faretta violation found (0)	2 ***22.2***	11 ***35.5***	15 ***30.6***
	No violation found (1)	14 ***77.8***	20 ***64.5***	34 ***69.4***
	Column Total	18 ***36.7***	31 ***63.3***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.94288**	**1**	**.33154**
Continuity Correction	.42189	1	.51599
Likelihood Ratio	.97072	1	.32450
Mantel-Haenszel test for linear association	.92363	1	.33652

Minimum Expected Frequency: 5.510

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.31624**	**.30598**	**-1.01427**

Number of Missing Observations: 0

Table 14

	WHETHER ISSUE OF DEFENDANT'S SANITY RAISED (in Cases In Which Defendant Claimed He Was "Wrongly" Allowed to Represent Himself)			
COURT DECISION	Count ***Col Pct***	Issue Raised (0)	Issue Not Raised (1)	Row Total
	Faretta violation found (0)	4 ***28.6***	11 ***31.4***	15 ***30.6***
	No violation found (1)	10 ***71.4***	24 ***68.6***	34 ***69.4***
	Column Total	14 ***28.6***	35 ***71.4***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.03843**	**1**	**.84458**
Continuity Correction	.00000	1	1.00000
Likelihood Ratio	.03873	1	.84398
Mantel-Haenszel test for linear association	.03765	1	.84615

Minimum Expected Frequency: 4.286

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.06796**	**.34573**	**-.19835**

Number of Missing Observations: 0

Table 15

	WHETHER "STANDBY" COUNSEL APPOINTED (in Cases In Which Defendant Claimed He Was Wrongly Allowed to Represent Himself)			
COURT DECISION	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	7 ***28.0***	8 ***33.3***	15 ***30.6***
	No violation found (1)	18 ***72.0***	16 ***66.7***	34 ***69.4***
	Column Total	25 ***51.0***	24 ***49.0***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.16397**	**1**	**.68552**
Continuity Correction	.00901	1	.92439
Likelihood Ratio	.16402	1	.68548
Mantel-Haenszel test for linear association	.16063	1	.68858

Minimum Expected Frequency: 7.347

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.12500**	**.30576**	**-.40521**

Number of Missing Observations: 0

Table 16

		SERIOUSNESS OF DEFENDANT'S CRIME (in Cases In Which Defendant Claimed His Request to Represent Himself Was Wrongly Denied)			
COURT DECISION	Count ***Col Pct***	Death Penalty Imposed (0)	Serious: 1° felony, violent (1)	Less Serious (2)	Row Total
	Faretta violation found (0)	2 ***40.0***	7 ***31.8***	3 ***50.0***	12 ***36.4***
	No violation found (1)	3 ***60.0***	15 ***68.2***	3 ***50.0***	21 ***63.6***
	Column Total	5 ***15.2***	22 ***66.7***	6 ***18.2***	33 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.70714**	**2**	**.70218**
Likelihood Ratio	.69229	2	.70741
Mantel Haenszel test for linear association	.15470	1	.69409

Minimum Expected Frequency: 1.818

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.13636**	**.34762**	**-.38922**

Number of Missing Observations: 0

Table 17

		PARTY OF APPOINTING PRESIDENT (in Cases In Which Defendant Claimed His Request to Represent Himself Was Wrongly Denied)		
COURT DECISION	Count *Col Pct*	Democrat (0)	Republican (1)	Row Total
	Faretta violation found (0)	7 *50.0*	5 *26.3*	12 *36.4*
	No violation found (1)	7 *50.0*	14 *73.7*	21 *63.6*
	Column Total	14 *42.4*	19 *57.6*	33 *100.0*

Chi-Square	Value	DF	Significance
Pearson	**1.95395**	**1**	**.16216**
Continuity Correction	1.06448	1	.30220
Likelihood Ratio	1.95298	1	.16227
Mantel-Haenszel test for linear association	1.89474	1	.16867

Minimum Expected Frequency: 5.091

Statistic	Value	ASE1	Val/ASE0
Gamma	**.47368**	**.28947**	**1.40981**

Number of Missing Observations: 0

Table 18

COURT DECISION	PROSECUTORIAL EXPERIENCE (in Cases In Which Defendant Claimed His Request to Represent Himself Was Wrongly Denied)			
	Count ***Col Pct***	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	4 ***33.3***	8 ***38.1***	12 ***36.4***
	No violation found (1)	8 ***66.7***	13 ***61.9***	21 ***63.6***
	Column Total	12 ***36.4***	21 ***63.6***	33 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**.07483**	**1**	**.78443**
Continuity Correction	.00000	1	1.00000
Likelihood Ratio	.07526	1	.78382
Mantel-Haenszel test for linear association	.07256	1	.78764

Minimum Expected Frequency: 4.364

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.10345**	**.37571**	**-.27599**

Number of Missing Observations: 0

Table 19

	MILITARY BACKGROUND (in Cases In Which Defendant Claimed His Request to Represent Himself Was Wrongly Denied)			
COURT DECISION	Count *Col Pct*	Yes (0)	No (1)	Row Total
	Faretta violation found (0)	5 *29.4*	7 *43.8*	12 *36.4*
	No violation found (1)	12 *70.6*	9 *56.3*	21 *63.6*
	Column Total	17 *51.5*	16 *48.5*	33 *100.0*

Chi-Square	Value	DF	Significance
Pearson	**.73227**	**1**	**.39215**
Continuity Correction	.24373	1	.62152
Likelihood Ratio	.73463	1	.39139
Mantel-Haenszel test for linear association	.71008	1	.39942

Minimum Expected Frequency: 5.818

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.30233**	**.33301**	**-.86313**

Number of Missing Observations: 0

Table 20

	WHETHER PETITION/SUIT RAISING *FARETTA* CLAIM WAS PREPARED *PRO SE* OR WITH COUNSEL (in Cases In Which Defendant Claimed His Request to Represent Himself Was Wrongly Denied)			
COURT DECISION	Count *Col Pct*	Suit/ Petition Prepared *Pro Se* (0)	Suit/ Petition Prepared W/Counsel (1)	Row Total
	Faretta violation found (0)	6 ***54.5***	6 ***27.3***	12 ***36.4***
	No violation found (1)	5 ***45.5***	16 ***72.7***	21 ***63.6***
	Column Total	11 ***33.3***	22 ***66.7***	33 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**2.35714**	**1**	**.12471**
Continuity Correction	1.32589	1	.24954
Likelihood Ratio	2.32186	1	.12758
Mantel-Haenszel test for linear association	2.28571	1	.13057

Minimum Expected Frequency: 4.000

Statistic	Value	ASE1	Val/ASE0
Gamma	**.52381**	**.28006**	**1.50860**

Number of Missing Observations: 0

Table 21

COURT DECISION?	WHETHER ISSUE OF DEFENDANT'S SANITY RAISED (in Cases In Which Defendant Claimed He Was "Wrongly" Allowed to Represent Himself)			
	Count ***Col Pct***	Issue Raised (0)	Issue Not Raised (1)	Row Total
	Faretta violation found (0)	2 ***66.7***	10 ***33.3***	12 ***36.4***
	No violation found (1)	1 ***33.3***	20 ***66.7***	21 ***63.6***
	Column Total	3 ***9.1***	30 ***90.9***	33 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**1.30952**	**1**	**.25248**
Continuity Correction	.26518	1	.60658
Likelihood Ratio	1.25186	1	.26320
Mantel-Haenszel test for linear association	1.26984	1	.25980

Minimum Expected Frequency: 1.091

Statistic	Value	ASE1	Val/ASE0
Gamma	**.60000**	**.41105**	**1.01078**

Number of Missing Observations: 0

Table 22

		WHETHER DEATH PENALTY IMPOSED (in Cases In Which Defendant Claimed He Was Wrongly Allowed to Represent Himself)		
COURT DECISION	Count ***Col Pct***	Death As Penalty (0)	All Other Cases (1)	Row Total
	Faretta violation found (0)	1 ***14.3***	14 ***33.3***	15 ***30.6***
	No violation found (1)	6 ***85.7***	28 ***66.7***	34 ***69.4***
	Column Total	7 ***14.3***	42 ***85.7***	49 ***100.0***

Chi-Square	Value	DF	Significance
Pearson	**1.02484**	**1**	**.31137**
Continuity Correction	.32426	1	.56906
Likelihood Ratio	1.15555	1	.28239
Mantel-Haenszel test for linear association	1.00392	1	.31636

Minimum Expected Frequency: 2.143

Statistic	Value	ASE1	Val/ASE0
Gamma	**-.50000**	**.42324**	**-1.18427**

Number of Missing Observations: 0