Washington Law Review

Volume 91 | Number 4

12-1-2016

The Antidemocratic Sixth Amendment

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THE ANTIDEMOCRATIC SIXTH AMENDMENT

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Abstract: Criminal procedure experts often claim that poor people have no Sixth Amendment right to choose their criminal defense lawyers. These experts insist that the Supreme Court has reserved the Sixth Amendment right to choose for the small minority of defendants who can afford to hire counsel. This Article upends that conventional wisdom with new doctrinal, theoretical, and practical arguments supporting a Sixth Amendment right to choose for all defendants, including the overwhelming majority who are indigent. The Article's fresh case analysis shows the Supreme Court's "no-choice" statements are dicta, which the Court's own reasoning and rulings refute. The Article's new theoretical framework exposes the "no-choice" stance as an antidemocratic concentration of judicial power, which blocks pressure from poor people to strengthen the right to counsel. Finally, the Article addresses practical objections to an equal right of attorney choice with innovative strategies that promote meaningful choice for all defendants.

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INTRODUCTION

Criminal procedure experts often claim that poor people have no Sixth Amendment right to choose their criminal defense lawyers.[1] These experts insist that the Supreme Court has reserved the Sixth Amendment right to choose counsel for the small minority of defendants who can afford to hire their lawyers.[2] The Court itself has made the same claim.[3]

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1. *See, e.g.*, RONALD JAY ALLEN ET AL., CRIMINAL PROCEDURE: ADJUDICATION AND RIGHT TO COUNSEL 277–86 (11th ed. 2011) (discussing Sixth Amendment right to choose for those who "can afford an attorney" or recruit pro bono help (citing United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) and Morris v. Slappy, 461 U.S. 1 (1983))); STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1478 (10th ed. 2014) ("The Supreme Court has held that so long as an indigent receives effective representation, he has no right to choose a particular counsel" (citing *Slappy*, 461 U.S. 1)); *see also* YALE KAMISAR ET AL., ADVANCED CRIMINAL PROCEDURE: CASES, COMMENTS AND QUESTIONS 121 (13th ed. 2012) ("[A] defendant may not insist on representation by an attorney he cannot afford . . . . " (citing Wheat v. United States, 486 U.S. 153, 202 (1988))).

2. *See, e.g.*, SALTZBURG & CAPRA, *supra* note 1.

3. *See, e.g.*, Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1089 (2016) ("[A]n indigent defendant, while entitled to adequate representation, has no right to have the Government pay for his preferred representational choice" (internal citation omitted)); United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006) ("We have previously held that an element of this right is the right *of a defendant who does not require appointed counsel* to choose who will represent him." (emphasis added) (internal citation omitted)). *But see infra* section II.A (showing that the Supreme Court's anti-choice statements are dicta). The Court also has indicated that defendants who can recruit pro bono counsel may have a Sixth Amendment right to choose. *Gonzalez-Lopez*, 548 U.S. at 144. This Article focuses on disparate application of the Sixth Amendment right to choose based on ability to hire counsel because recruitment of pro bono counsel is relatively rare. *See, e.g.*, Douglas A. Berman, *Professor Mark Osler's Informed Perspective on Recent Federal Clemency Developments*, SENTENCING L. & POL'Y BLOG (June 4, 2015), http://sentencing.typepad.com/sentencing_

This Article shows that those claims are mistaken and offers new arguments supporting a Sixth Amendment right to choose for all defendants—including the overwhelming majority who are indigent[4] and who are disproportionately people of color.[5]

These new arguments answer a blunt question that Chief Justice John Roberts asked during oral argument on the Sixth Amendment right to choose. On hearing that indigent defendants have no right to choose their lawyers, the Chief Justice asked, "Why not?"[6] The correct answer is that there is no good reason to discriminate against poor people in the vindication of this fundamental constitutional right. To the contrary, such de jure discrimination is antidemocratic. It concentrates judicial power and blocks pressure from poor people to improve the quality, fairness, and legitimacy of criminal legal systems as well as the content of constitutional law.

Chief Justice Roberts did not receive that answer during oral argument because the Sixth Amendment right to choose counsel is understudied by scholars, undertheorized by courts, and underutilized by advocates of criminal justice reform. This Article fills the gap with new doctrinal, theoretical, and practical analysis that shows why it is important to include poor people in the right to choose counsel.

The argument unfolds as follows. Since the Sixth Amendment right to choose is understudied and undertheorized, Part I explains how judges discriminate against poor people in vindicating the right to choose counsel and how this de jure discrimination is antidemocratic. This Part applies the author's democracy-enhancing framework for criminal law and procedure,[7] which moves beyond dominant justifications for

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law_and_policy/2015/06/professor-mark-oslers-informed-perspective-on-recent-federal-clemency-developments.html [http://perma.cc/6N5H-CJFQ].

4. *See, e.g.*, CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: DEFENSE COUNSEL IN CRIMINAL CASES 1 (2000), http://www.bjs.gov/index.cfm?ty=pbdetail&iid=772 [http://perma.cc/54XC-TNMS] (estimating that eighty-two percent of criminal defendants facing felony charges cannot afford to hire counsel).

5. *See* KATHLEEN SHORT, U.S. DEP'T OF COMMERCE, THE SUPPLEMENTAL POVERTY MEASURE: 2014 1–2 (2015) (defining poverty metrics); *id.* at 5, tbl.2 (documenting disproportionate poverty rates for Black and Hispanic populations).

6. Transcript of Oral Argument at 34, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352).

7. *See* Janet Moore, *Democracy Enhancement in Criminal Law and Procedure*, 2014 UTAH L. REV. 543, 563–72; *cf.* Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1893 (2014) (reframing federalism in terms of promoting "a well-functioning national democracy").

criminal law (utilitarian-retributive),[8] for criminal procedure (due process-crime control),[9] and for the right to choose counsel (libertarian-free market).[10] The democracy-enhancing approach focuses on whether and how criminal legal policies reduce reliance on incarceration by promoting equal capacities for individual and communal self-governance.[11] This mode of analysis focuses particularly on the capacities of poor people and people of color who have disproportionately high contact with crime and criminal legal systems, but little voice in generating and administering the governing law.[12]

This new democracy-enhancing framework exposes the "no-choice" stance as one that denigrates the agency and silences the individual and collective voices of poor people and people of color. Conversely, this framework reveals the right to choose counsel as a mode of grassroots lawmaking that frees the overwhelming majority of defendants to press for improvements in the governing law. This transformation can occur as more defendants demand better information about key performance indicators for quality defense service. Those indicators include independence from funders and judges, resource parity with the prosecution, and enforcement of best-practice standards for attorney qualification, workload and performance.[13]

Transparency begets accountability.[14] More defendants making more informed choices raises pressure to improve prevailing standards for attorney performance. Significantly, those same standards define the substantive meaning of the Sixth Amendment right to counsel under

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8. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14–23 (6th ed. 2012) (discussing distinction between retributivism's focus on moral desert, and utilitarianism's focus on promoting social benefits and reducing social costs).

9. *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149–74 (1968) (discussing distinction between the due process focus on fairness and the crime-control focus on harm reduction).

10. *See, e.g.*, Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 109–10 (1993) (combining libertarian focus on individual autonomy with free-market analysis).

11. *See* Moore, *supra* note 7.

12. *See id.* at 545–63; Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2174, 2185–89 (2014).

13. *See infra* Part I.

14. At least under conditions posited here. *See* Jonathan Fox, *The Uncertain Relationship Between Transparency and Accountability*, 17 DEV. IN PRAC. 663, 667–69 (2007). I thank Jennifer Laurin for insights on the application of these concepts in the context of public defense reform. *See* Jennifer E. Laurin, *Data and Accountability in Indigent Defense*, 14 OH. ST. J. CRIM. L. (forthcoming 2017).

Strickland v. Washington.[15] *Strickland*'s laissez-faire approach to attorney performance has kept prevailing attorney performance standards low.[16] By pressing to improve those standards, poor people and people of color can contribute, collectively and over time, to strengthening the substantive meaning of this fundamental constitutional right.[17]

Thus, the new democracy-enhancing framework for the Sixth Amendment right to choose has significant practical implications. Yet the Sixth Amendment right to choose has been underutilized by criminal justice reform advocates. Therefore, this Article offers additional support for an inclusive right to choose that benefits all defendants. Parts II and III offer new doctrinal analysis that supports the indigent defendant's right to choose counsel. Part II shows that the Supreme Court's discriminatory "no-choice-for-the-poor" statements are dicta, which the Court's own rulings and reasoning refute. Part III uncovers new tension over the "no-choice" rule in state courts and lower federal courts, which litigators and policy advocates can exploit.

Part IV supplements these doctrinal discoveries with practical strategies to make an inclusive right of counsel choice meaningful. These strategies include client-rights and client-feedback protocols as well as community organizing techniques that can reduce the opacity of the legal market and promote more informed attorney choice. This Article concludes that reform advocates should use these new doctrinal, theoretical, and practical arguments to replace "no-choice" discrimination with an inclusive right of counsel choice that applies equally to all defendants.

I. THE ANTIDEMOCRATIC SIXTH AMENDMENT

Part I lays a foundation for the doctrinal and practical analysis that follows. Section I.A explains how judges discriminate against poor people in vindicating the right to choose counsel. Sections I.B–D explain how this de jure discrimination is antidemocratic—that is, how it concentrates judicial power and blocks pressure by poor people to strengthen the right to counsel. Section I.E explains how these problems undermine system legitimacy.

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15. 466 U.S. 664, 687 (1984); *see also* Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010).

16. *See infra* notes 60–68 and accompanying text.

17. *Cf.* Cecelia Klingele, *Editor's Observations: Vindicating the Right to Counsel*, 25 FED. SENT'G REP. 87, 90 & nn.32–33 (2012) (discussing how line attorneys can reshape meaning of Sixth Amendment right to counsel).

A. The Double Standard

This section explains how judges discriminate against poor people in vindicating the right to choose counsel. The analysis begins with the constitutional text. The Sixth Amendment secures a criminal defendant "the right . . . to have the Assistance of Counsel for his defense."[18] The Supreme Court has held that the right to counsel is a "fundamental" constitutional guarantee[19] because it is "necessary to insure . . . life and liberty."[20] Therefore, the Court has held, a defendant cannot be incarcerated for any conviction unless he or she either receives the assistance of counsel or waives the right to a lawyer.[21] This fundamental right applies to the minority of defendants who can hire lawyers as well as to the majority who need government-paid counsel because they cannot afford an attorney.[22]

The minority of defendants who can afford to hire counsel have a Sixth Amendment right to hire any lawyer who is willing to take the case.[23] However, the right to hire counsel of choice is subject to several important limitations. Those limitations include forfeiture laws, which empower governments to seize resources that can be traced to criminal activity and that defendants would otherwise use to pay their chosen counsel.[24]

Another important limitation on the right to hire counsel of choice is the ability of trial judges to override that choice.[25] Several circumstances can justify such overrides.[26] Trial judges may deem a chosen lawyer to be unqualified to handle the case, unavailable to proceed in a timely manner without disrupting the court's docket, or unable to cure a conflict

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18. U.S. CONST. amend. VI.

19. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986).

20. Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

21. Alabama v. Shelton, 535 U.S. 654, 658–59 (2002) (right applies to any case involving incarceration, including misdemeanors resulting in subsequently revoked probation); Gideon v. Wainwright, 372 U.S. 335, 339–41, 345 (1963) (right incorporated against the states in felony cases under the Due Process Clause of the Fourteenth Amendment); *Zerbst*, 304 U.S. at 467–68 (absent a knowing and voluntary waiver, "failure to complete the court" by providing counsel for indigent defendants violates the Sixth Amendment and divests federal courts of jurisdiction).

22. *See Gideon*, 372 U.S. at 345; HARLOW, *supra* note 4.

23. United States v. Gonzalez-Lopez, 548 U.S. 140, 144 (2006).

24. *See infra* section II.A.3.

25. *See Gonzalez-Lopez*, 548 U.S. at 151–52.

26. *Id.*

of interest.[27] Thus, the right to hire counsel of choice is confined to lawyers who are qualified, available, and conflict-free.[28]

If a trial judge deems a defendant's chosen lawyer to be unqualified, unavailable, or conflicted, the judge can require the defendant to proceed with alternate counsel. If the defendant is required to proceed with alternate counsel and the case ends in a conviction, the defendant may raise the counsel-choice issue on appeal as a basis for obtaining a new trial.[29] To prevail on that claim, the defendant must prove that the trial court abused its discretion in overriding the defendant's choice of hired counsel.[30]

The abuse-of-discretion standard is difficult to meet. The standard requires deference to a trial judge's assessment of fact-intensive matters,[31] such as whether a particular lawyer is sufficiently qualified, available, and conflict-free to handle a particular case. That deference is based on the trial judge's superior "feel of the case[,] which no appellate . . . transcript can impart."[32]

These substantive and procedural limitations on the Sixth Amendment right of counsel choice are significant. Nevertheless, the Supreme Court has defined the right to choose an attorney as the "root meaning" of the Sixth Amendment right to counsel.[33] The Court excavated that "root meaning" in *United States v. Gonzalez-Lopez*.[34] The case is noteworthy for several reasons.

First, the prosecution conceded in *Gonzalez-Lopez* that the judge erred in overriding the defendant's choice of counsel.[35] In other words, the prosecution conceded that the defendant's chosen lawyer should have been allowed to represent the defendant at trial because that lawyer was qualified, available, and free from conflicts of interest.[36] That concession lifted a heavy burden of proof from the defendant's shoulders.

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27. *See id.*

28. *See id.*

29. *See id.*

30. *Id.* at 152.

31. *See* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 759–61 (1982).

32. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947) (quoted in Friendly, *supra* note 31, at 761.

33. *Gonzalez-Lopez*, 548 U.S. at 147–49.

34. *Id.*

35. *Id.* at 152.

36. *See id.*

Because the prosecution conceded that the trial judge violated the defendant's Sixth Amendment right to choose counsel, the only issue in *Gonzalez-Lopez* was the standard of review that appellate courts should use to evaluate such an error.[37] Typically, prosecutors must prove that constitutional errors are harmless—that is, that the errors did not affect the outcome of the trial—in order to win a case on appeal.[38] In *Gonzalez-Lopez*, however, Justice Scalia authored a 5-4 majority opinion that rejected harmless-error review.[39] Instead, the Court held that denial of a criminal defendant's Sixth Amendment right to choose counsel is structural error.[40]

Application of the structural error standard to the right of counsel choice is significant because, under that standard, appellate courts may not ask whether a trial judge's override of counsel choice affected the case outcome.[41] Regardless of the strength of the case, or how well the trial lawyer performed, reversal is automatic and the conviction must be vacated.[42]

It is also important to note that structural error is the most appellant-friendly standard of review and applies only to a tiny set of constitutional claims.[43] Such claims encompass violations of the right to an indictment by a grand jury selected without racial bias,[44] the rights to an impartial judge[45] and a public trial,[46] and the right to accurate jury instructions on reasonable doubt.[47] Violations of these rights are of "the rare type" that "infect the entire trial process . . . and necessarily render [it] fundamentally unfair."[48]

Gonzalez-Lopez is therefore noteworthy because the case ushered the Sixth Amendment right to choose counsel into an elite pantheon of constitutional errors that are structural and require automatic reversal. Equally significant, however, are the Court's statements that poor people

37. *See id.* at 148.

38. *See* Glebe v. Frost, __ U.S. __, 135 S. Ct. 429, 430 (2014).

39. *Gonzalez-Lopez*, 548 U.S. at 142, 150, 152.

40. *Id.* at 150–51.

41. *See id.*

42. *Id.*

43. *Id.* at 146–48, 149 n.4.

44. Vasquez v. Hillery, 474 U.S. 254, 262–63 (1986).

45. United States v. Marcus, 560 U.S. 258, 263 (2010).

46. Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984).

47. Sullivan v. Louisiana, 508 U.S. 275 (1993).

48. Glebe v. Frost, __ U.S. __ ,135 S. Ct. 429, 430 (2014) (quoting Neder v. United States, 527 U.S. 1, 8 (1999) (internal citations and quotation marks omitted)).

have "no right to choose" their criminal defense lawyers,[49] and therefore cannot benefit from the same generous standard of review enjoyed by defendants who can afford to hire counsel. The Court's "no-choice-for-the-poor" statements are dicta,[50] but lower courts and commentators misconstrue them as settled law.[51]

When lower courts apply the "no-choice-for-the-poor" stance as settled law, trial judges have final authority to appoint defense lawyers for poor people who face criminal charges.[52] Even if an indigent defendant finds a lawyer who is qualified, available, and free from conflicts of interest—in other words, if the indigent defendant satisfies the same criteria for vindicating the right to choose counsel that apply to defendants who can hire counsel—the indigent defendant nevertheless has no Sixth Amendment right to choose that lawyer.[53]

Instead, the indigent defendant must prove to the trial judge that there is an irreconcilable conflict or total breakdown of communication with the court-appointed lawyer, which will prevent that lawyer from presenting an adequate defense.[54] Nor will appellate courts reverse a subsequent conviction for structural error if they determine that the trial judge wrongly forced the indigent defendant to proceed with the unwanted lawyer.[55] Instead, the indigent defendant must meet a far more onerous test, which the Supreme Court established in *Strickland v. Washington*.[56]

Understanding the antidemocratic effects of this de jure double standard requires a brief explanation of *Strickland* and how that case defines the substantive meaning of the right to counsel. Section I.B provides that explanation.

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49. *See, e.g.*, Montejo v. Louisiana, 556 U.S. 778, 784 (2009) (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006)).

50. *See infra* section II.A.

51. *See supra* note 1; *infra* Part III.

52. *See infra* section I.C.

53. *See infra* Part III. State and lower federal courts have applied the "no-choice" constitutional rule to trump counsel choice by indigent defendants even when local rules or statutes allow defendants to substitute counsel. *See, e.g*, United States v. Davis, 604 F.2d 474, 479 (7th Cir. 1979) (distinguishing 18 U.S.C. § 3006A(c), which grants judicial discretion to approve requests for substitute counsel "in the interests of justice"); State v. Jones, 797 N.W.2d 378, 391–92, 392 n.17 (Wis. 2010) (applying similar reasoning to WIS. ADMIN. CODE PD § 2.04 (2016)).

54. *See Jones*, 797 N.W.2d at 390–91.

55. *Id.* at 394–95.

56. *Id.* at 381 (citing United States v. Mutuc, 349 F.3d 930, 934 (7th Cir. 2003)); *see* Strickland v. Washington, 466 U.S. 668, 688 (1984).

B. Strickland *and the Meaning of the Right to Counsel*

In *Strickland v. Washington*, the Court established a two-part definition of what it means "to have the Assistance of Counsel."[57] To overturn a conviction or sentence under *Strickland*, a defendant must prove two things. First, the defendant must prove that his or her lawyer acted unreasonably in light of prevailing attorney performance standards.[58] Second, the defendant must show a reasonable possibility that this substandard performance hurt the defendant's case.[59]

Significantly, the first prong of the *Strickland* test bakes real-world attorney practices into the substantive definition of the Sixth Amendment right to counsel.[60] Those real-world practices include promulgation of formal guidelines for attorney performance, which address core duties to communicate, investigate, and advocate.[61] Courts often use those guidelines to assess the reasonableness of a lawyer's performance when a defendant claims that the lawyer's constitutional ineffectiveness requires a new trial or sentencing hearing.[62]

Unfortunately, the gap between formal attorney performance guidelines and real-world practice is immense.[63] *Strickland*'s performance-and-prejudice test is maligned for giving free passes to drunk, sleeping, lazy, and overworked lawyers.[64] Less a constitutional floor than a leaky, sewage-filled basement, the first prong of the test requires strong judicial deference to possible (and sometimes fanciful) strategic reasons for challenged attorney conduct.[65] Examples include

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57. 466 U.S. at 685 (quoting U.S. CONST. amend. VI); *id*. at 687 (setting standard).

58. *Id.* at 687.

59. *Id.*

60. *See* Padilla v. Kentucky, 559 U.S. 356, 366–67 (2010).

61. *See id.* at 367 (citing examples).

62. *Id.*

63. *See generally* NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), http://www.constitutionproject.org/pdf/139.pdf [http://perma.cc/3NGS-3EPM] [hereinafter JUSTICE DENIED] (urging reform); *see also* Gary Feldon & Tara Beech, *Unpacking the First Prong of the* Strickland *Standard: How to Identify Controlling Precedent and Determine Prevailing Professional Norms in Ineffective Assistance of Counsel Cases*, 23 U. FLA. J.L. & PUB. POL'Y 1, 15–24 (2012) (proposing method for identifying prevailing professional norms).

64. *See* Janet Moore, Marla Sandys & Raj Jayadev, *Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform*, 78 ALB. L. REV. 1281, 1295 (2015).

65. Strickland v. Washington, 466 U.S. 668, 687 (1984); *see, e.g.*, Scanlon v. Harkleroad, 740 F. Supp. 2d 706, 728–30 (M.D.N.C. 2010), *aff'd per curiam*, 467 F. App'x 164 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 164 (2012) (finding trial counsel ineffective in guilt/innocence phase, but denying defendant new trial). The author represented Petitioner Donald Scanlon in state and federal

the "strategic" decision not to investigate and present evidence of actual innocence in the guilt/innocence phase of a capital case.[66]

Thus, defendants have an extremely difficult burden in attempting to satisfy *Strickland*. An abundant literature documents the costs of that burden, including an ongoing crisis of overloaded, underfunded, low-quality public defense service.[67] That scholarship is not re-canvassed here. There is wide agreement, however, that *Strickland* contributes to the indigent defense crisis with abysmally low constitutional standards for defense attorney performance.[68]

But *Strickland* has a narrow escape hatch—at least for certain defendants who have the means to hire counsel. As discussed above, for those defendants, violation of their right to choose a specific lawyer requires structural error review.[69] Appellate courts may not inquire into the quality of substitute counsel's performance or whether it hurt the defendant's case.[70] Reversal is automatic.[71] The *Strickland* escape hatch is therefore a significant procedural benefit, which the "no-choice-for-the-poor" stance restricts to the minority of defendants who can hire counsel.

Blocking poor people from *Strickland*'s escape hatch is perverse for several reasons. De jure discrimination in the vindication of a fundamental constitutional right violates equal protection and due process guarantees.[72] That discrimination also makes the Sixth Amendment antidemocratic.

Those antidemocratic effects are manifest in three ways. First, the discriminatory "no-choice-for-the-poor" stance blocks pressure from poor people and people of color to strengthen the right to counsel. Second, that stance concentrates unchecked judicial power. Finally, that stance undermines the legitimacy of criminal legal systems. Each of these problems is explained more fully below. For current purposes, it is important to summarize how abolishing that discrimination can increase

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appellate and post-conviction challenges to his convictions and death sentence. *Scanlon*, 740 F. Supp. 2d at 708.

66. *Scanlon*, 740 F. Supp. 2d at 728–30.

67. *See, e.g.*, JUSTICE DENIED, *supra* note 63.

68. *See, e.g.*, *id*. at 38–43, 212–13 (urging reform).

69. *See supra* section I.A (discussing United States v. Gonzalez-Lopez, 548 U.S. 140, 150–51 (2006)).

70. *Gonzalez-Lopez*, 548 U.S. at 150–51.

71. *Id.*

72. *See infra* section II.B.

pressure to improve both attorney performance and the substantive meaning of the right to counsel.

Extending the right of counsel choice to poor people encourages more defendants to demand information about attorney performance, to use that information to choose better-performing lawyers, and, through the collective influence of those choices, to pressure more lawyers to provide better performance. Since *Strickland* bakes real-world performance standards into the substantive definition of the right to counsel, improving those performance standards should gradually strengthen the meaning of the right.

History demonstrates that such pressure can be effective. Past improvements in real-world performance standards have trickled up to redefine and strengthen the right to counsel under *Strickland*. Those improvements, and the resulting substantive redefinition of "assistance of counsel," were driven primarily by elites, however, and not by indigent defendants. *Wiggins v. Smith*[73] is a leading example. In that case, pressure to improve standards of performance came from a changing zeitgeist among leaders in the capital defense bar.[74]

Wiggins raised the question whether capital defense lawyers met *Strickland*'s substantive definition of "assistance" of counsel. To answer that question, the Court followed *Strickland* and compared counsel's performance with local and national standards for capital defense representation.[75] The Court concluded that the decision to truncate a mitigation investigation in a capital case must itself be informed by an objectively reasonable investigation.[76] In other words, capital defense lawyers cannot make objectively reasonable decisions about evidence they never bother to investigate.[77] The Court concluded that counsel had failed to meet that standard, and vacated the death sentence.[78]

The Court decided *Wiggins* amidst a "cataclysmic" shift in performance standards for capital defense.[79] Those standards were moving from an "unwise and unsound and . . . increasingly obsolete" focus on obtaining acquittals in the guilt/innocence phase to a new norm

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73. 539 U.S. 510 (2003).

74. David R. Dow, Bell v. Cone*: The Fatal Consequences of Incomplete Failure*, *in* DEATH PENALTY STORIES 395 (John H. Blume & Jordan M. Steiker eds., 2009).

75. *Wiggins*, 539 U.S. at 524–25, 534.

76. *Id.*

77. *See id.*

78. *Id.* at 538.

79. *See* Dow, *supra* note 74, at 395.

under which "mitigation [is] a mainstay."[80] *Wiggins* therefore demonstrates that the substantive meaning of the right to counsel can change over time as the Court incorporates improvements in prevailing attorney performance standards into the two-part *Strickland* test.[81]

Wiggins also illustrates how change in the substantive meaning of the Sixth Amendment right to "assistance of counsel" occurs dialogically. As reformed practice standards elevate the constitutional floor, new training programs are designed and implemented to bring more practitioners up to that new performance level.[82] Unfortunately, *Wiggins* also demonstrates the rate of that change has been excruciatingly slow and its scope minimal. Indeed, it should shock the uninitiated reader to realize that a Supreme Court ruling was necessary to establish the constitutional duty of capital defense counsel to investigate readily-available evidence that could save a client's life. It should be equally concerning that the Court established the constitutional duty to investigate mitigation evidence nearly twenty years before *Wiggins* was decided—in *Strickland v. Washington*.[83]

The pace of this constitutional change could quicken, and its limited scope could expand, if courts stop discriminating against the overwhelming majority of defendants who are indigent with respect to the Sixth Amendment right to choose counsel. Moreover, excluding that majority from the right of counsel choice concentrates virtually unreviewable power in the judiciary. Understanding these antidemocratic aspects of the "no-choice-for-the-poor" stance requires a more thorough explanation of existing mechanisms for connecting indigent defendants with lawyers. Section I.C provides that explanation.

C. The Problem of Judicial Appointments

Judges have final responsibility for appointing lawyers to represent indigent defendants.[84] They fulfill that responsibility by drawing from a

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80. *Id.*

81. *Padilla v. Kentucky*, 559 U.S. 356, 374–75 (2010), marked a similar seismic shift in the substantive meaning of the Sixth Amendment right to counsel under *Strickland* by requiring defense attorneys to inform clients of deportation consequences connected to plea offers.

82. *See* Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 316 (2011).

83. 466 U.S. 664, 675–76, 691, 699 (1984).

84. *See, e.g.*, James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 191–93 (2012) (discussing process in Philadelphia).

list or pool of available attorneys.[85] Those attorneys may work in public defender offices or in private practice.[86] Defense lawyers in private practice may accept indigent clients on a case-by-case basis or take batches of cases under flat-fee contracts.[87] When judges appoint lawyers in any of these categories, they may exercise discretion based on the same concerns about attorney qualification, availability, and conflicts of interest that limit a defendant's choice of retained counsel.[88]

Thus, regardless of the particular mix of service providers in a given jurisdiction, by necessity criminal legal systems across the country have preexisting infrastructures for identifying lawyers who are available to take criminal cases. As discussed more fully below, those infrastructures can be adapted to accommodate counsel choice by indigent defendants.[89] Indeed, longstanding experience in England and other countries demonstrate that administrability is a relatively minor hurdle to implementing an inclusive right of counsel choice that applies equally to all defendants.[90] A recent experiment with counsel choice for indigents in Texas tends to corroborate that point.[91] The program is ongoing as social scientists evaluate the results of initial implementation, which was recently completed with support from a state grant and revealed that "a substantial majority of defendants . . . preferred to select their own lawyers rather than have the court appoint lawyers for them."[92]

These facts are important because the judicial appointment of counsel for indigent defendants raises a number of problems. For one thing, the "no-choice-for-the-poor" stance gives judges virtually unreviewable

85. *See id.*

86. *See* JUSTICE DENIED, *supra* note 63, at 82–84.

87. *See id.*

88. *See, e.g.*, Rachel Dissell, *Conflicts and 'Candy Lists': Debates Continue Between County Judges, Defense Attorneys and Prosecutor Over Indigent Case Assignments*, CLEVELAND PLAIN DEALER (Dec. 14, 2014, 7:06 PM), http://www.cleveland.com/courtjustice/index.ssf/2014/12/conflicts_and_candy_lists_deba.html [http://perma.cc/KA54-3RPD] (discussing factors affecting judicial appointments).

89. *See infra* Part IV.

90. *See* Norman Lefstein, *In Search of* Gideon*'s Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 873 (2004).

91. *See* Stephen J. Schulhofer, *Client Choice for Indigent Criminal Defendants: Theory and Implementation*, 12 OHIO ST. J. CRIM. L. 505, 544–56 (2015); Email from Norman Lefstein, Dean Emeritus and Professor, Indiana University—Robert H. McKinney School of Law, to Janet Moore, Associate Professor of Law, University of Cincinnati College of Law (Nov. 19, 2016, 6:33 PM) (on file with author) (describing project as "successfully implemented").

92. Email from Norman Lefstein, *supra* note 91; *see also* Email from Jim Bethke, Executive Director, Texas Indigent Defense Commission, to Janet Moore, Associate Professor of Law, University of Cincinnati College of Law (Oct. 26, 2016, 10:14 AM) (on file with author).

authority in making defendant-lawyer matches. Concerns about such unchecked judicial power are embodied in the American Bar Association's *Ten Principles of a Public Defense Delivery System*.[93]

The *Ten Principles* have been described as "essential" for evaluating the effectiveness of indigent defense systems.[94] The first of these essential principals is political independence of the defense function.[95] Independence promotes zealous advocacy by raising a firewall between the funding authority and the lawyer.[96] That firewall protects lawyers from inevitable pressure to please (or avoid irritating) people with ultimate power over their paychecks.[97] Thus, the first of the *Ten Principles* requires severing the link between judges and attorney appointments.[98]

This requirement is mediated in some jurisdictions when judges appoint the local public defender who then assigns a staff attorney or private lawyer to take the case.[99] Other jurisdictions keep the appointment authority inside the courthouse, but strive for greater neutrality by distributing appointments randomly through a court administrator.[100]

Unfortunately, appointment processes in too many jurisdictions lack oversight and accountability.[101] Moreover, judges retain authority to trump counsel assignments made by a local public defender or court administrator based on their own independent assessments of counsel's qualifications, availability, or potential conflict of interest.[102] In addition, some appointment processes are tainted by pay-to-play conflicts and low-bid contracts, in which judges distribute cases in exchange for

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93. *See* ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 1–2 (2002), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf [http://perma.cc/3CJQ-KTCW] [hereinafter TEN PRINCIPLES].

94. Eric H. Holder, Jr., Attorney Gen., U.S. Dep't of Justice, Keynote Address at the American Bar Association's National Summit on Indigent Defense (Feb. 4, 2012), http://www.justice.gov/opa/speech/attorney-general-eric-holder-speaks-american-bar-association-s-national-summit-indigent [http://perma.cc/3SMH-Q255] [hereinafter Holder, Keynote Address] (discussing the importance of the Ten Principles).

95. TEN PRINCIPLES, *supra* note 93, at 2.

96. *See id.*

97. *See id.*

98. *See id.*

99. *See* Dissell, *supra* note 88.

100. JUSTICE DENIED, *supra* note 63, at 82 (discussing random assignment procedures available in Texas).

101. *See id.* at 82–84.

102. *See, e.g.*, Morris v. Slappy, 461 U.S. 1, 5–6 (1983).

campaign contributions or other concessions from defense lawyers.[103] Such quid pro quo arrangements pressure lawyers to dial back their advocacy toward "meet-'em-and-plead-'em" case processing[104] as part of the local "courtroom work group" culture.[105] As the Texas State Bar reported,

> Unlike prosecutors, court-appointed defense attorneys have no easy access to investigators, experts, or witnesses. In many cases, they are not given enough time or money to do a good job. Many court-appointed lawyers feel pressured to back off from aggressively representing their clients out of fear that their efforts will go unpaid or that they will be removed from the list of attorneys doing such cases.[106]

Such tainted decision making results when concentrated power operates without transparency and accountability. Courts concentrate their own power, and reduce transparency and accountability, by excluding poor people from exercising the same Sixth Amendment right to attorney choice that is enjoyed by defendants who have the means to hire counsel. Viewing attorney choice as a democracy-enhancing mechanism reveals its potential to check that concentrated power and to operate as a form of grassroots lawmaking. Section I.D explains the latter potential more fully.

D. Counsel Choice and Democracy Enhancement

Including poor people in the right to choose counsel serves a democracy-enhancing function on multiple levels in addition to checking concentrated judicial power. Inclusive attorney choice can force greater transparency from what currently are very opaque systems. Inclusive attorney choice also increases pressure to improve standards of attorney performance. As courts incorporate those improved standards into the governing law, inclusive attorney choice can strengthen the substantive

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103. *Id.*; *see also* Dissell, *supra* note 88.

104. Steven B. Bright, *The Past and Future of the Right to an Attorney for Poor People Accused of Crimes*, *in* THE CONSTITUTION AND THE FUTURE OF CRIMINAL JUSTICE IN AMERICA 14 (John T. Parry & L. Song Richardson, eds., 2013) (describing "meet 'em and plead 'em" case processing).

105. *See, e.g.*, NICOLE GONZALEZ VAN CLEVE, CROOK COUNTY: RACISM AND INJUSTICE IN AMERICA'S LARGEST CRIMINAL COURT xiii–xiv, 3–6, 21–32 (2016) (describing degrading effects of "courtroom work group" culture).

106. Jeff Blackburn & Andrea Marsh, *The New Performance Guidelines in Criminal Cases: A Step Forward for Texas Criminal Justice*, 74 TEX. B.J. 616, 617 (2011), https://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=14703 [https://perma.cc/JK7L-N5UD].

meaning of the right to counsel. Finally, inclusive attorney choice can improve system legitimacy. This subsection focuses on the how an inclusive right of counsel choice can enhance democracy by improving information flow, raising pressure to improve counsel performance, and strengthening the substantive meaning of "assistance of counsel."

1. Improving Information Flow

Meaningful attorney choice requires defender systems to disclose information on their own structures as well as on the lawyers who operate within those structures.[107] System quality and attorney quality are separate issues. Defendants need information on both.

Information on system quality includes levels of system compliance with the American Bar Association's *Ten Principles*, including the political independence of the defense function.[108] Thus, defendants should know who is making important decisions about the quality of their legal services. Optimally, those decisions would be made by a broad-based, state-wide commission that is not beholden to any branch of government.[109] Alternatives devolve too easily, as legislators push low-bid contracts and judges appoint pay-to-play lawyers in exchange for campaign contributions[110] or perfunctory, go-along-to-get-along advocacy.[111]

According to the *Ten Principles*, the independent commission is more likely than the alternatives to promote both higher-quality defense service and greater system efficiency.[112] Expanding the number of defendants who are able to exercise constitutionally-protected choice of counsel should force systems to self-disclose more of this information. System administrators can do so easily and at little cost through existing websites, intake forms, and other media.

Meaningful choice also requires information on the existence and enforcement of standards for attorney qualification, training,

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107. *See* Jennifer E. Laurin, Gideon *by the Numbers: The Emergence of Evidence-Based Practice in Indigent Defense*, 12 OHIO ST. J. CRIM. L. 325, 334–36 (2015); Janet Moore, *Indigent Defense Attorney Toolbox*, U. OF CIN. (Mar. 7, 2016), http://guides.libraries.uc.edu/c.php?g=222533&p=1473687 [https://perma.cc/8222-E5HA]. It took the author and research assistants three years to compile this electronic multijurisdictional standards dataset, with the goal of creating a real-time, publicly accessible standards website.

108. TEN PRINCIPLES, *supra* note 93.

109. JUSTICE DENIED, *supra* note 63, at 185–91.

110. *See* Dissell, *supra* note 88; JUSTICE DENIED, *supra* note 63, at 80–84.

111. *See* Blackburn & Marsh, *supra* note 106.

112. *See* TEN PRINCIPLES, *supra* note 93.

performance, and workload.[113] The existence and enforcement of such standards will turn in part on the degree to which systems provide resource parity between prosecutors and defenders, which is another important factor in evaluating quality defense representation.[114] Other important standards include the ABA's guidelines on excessive defender workloads[115] and the same organization's Formal Ethics Opinion 06-441.[116] Those standards are designed to prevent lawyers from taking or keeping cases when their workloads impede competent, diligent representation.[117] "Competence" and "diligence" comprise the core duties to communicate, investigate, and advocate.[118]

Thus, indigent defendants should know whether counsel's failure to communicate or investigate—the two counsel-related problems most frequently reported by people facing criminal charges[119]—indicate structural flaws such as excessive caseloads and inadequate funding, training, and oversight. Defendants who know the governing standards and avenues for their enforcement are better positioned to identify and respond effectively to substandard performance, both in managing their own specific cases and in organizing support for system reform.[120] An equal right to choice of counsel will increase the number of defendants

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113. *See* Padilla v. Kentucky, 559 U.S. 356, 367 (2010) (citing sources of formal standards). For examples of state-level standards, *see* Blackburn & Marsh, *supra* note 106, at 620–37, and NORTH CAROLINA COMM'N ON INDIGENT DEF. SERVS, PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL 1–2 (Nov. 12, 2004), http://www.ncids.org/Rules%20&%20Procedures/Performance%20Guidelines/Trial%20Level%20Final%20Performance%20Guidelines.pdf [https://perma.cc/P6ZU-ALRH].

114. *See* Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 263–68 (2004) (discussing the need for parity in resources for case investigation, evidence testing, expert testimony, and attorney hours to support constitutionally effective representation).

115. EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS, AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS (2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf [https://perma.cc/8LUD-MNBU] [hereinafter *Eight Guidelines*].

116. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (May 13, 2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.authcheckdam.pdf [https://perma.cc/Q2E9-D46U].

117. *See id.*

118. *Id.*

119. *See* Christopher C. Campbell, Janet Moore, Wesley Maier & Mike Gaffney, *Unnoticed, Untapped, and Underappreciated: Clients' Perceptions of their Public Defenders*, 33 BEHAV. SCI. & L. 751, 759–61 (2015) (discussing quantitative analysis); *id.* at 761–64 (discussing focus group results).

120. *See* Moore et al., *supra* note 64, at 1309–15.

seeking such information, and push systems toward greater transparency and accountability.

2. Attorney Choice and Grassroots Lawmaking

The foregoing discussion underscores how including poor people in the right of attorney choice can raise pressure for systems to provide defendants with more and better information to empower better decision making in the exercise of that right. This Article claims such transparency as a democracy-enhancing function of the expanded constitutional right. The same democracy-enhancement framework enriches the dominant narrative surrounding that right. In that dominant narrative, constitutionally-protected attorney choice protects the autonomous individual's purchase of services in the free market as a check on governmental threats to life, liberty, and property.[121]

The democracy-enhancement framework extends the analysis from the market to the commons. That shift reveals the right's potential as a mode of grassroots lawmaking that can check concentrated government power while strengthening the substantive meaning of the constitutional right to counsel. Thus, the Sixth Amendment right to choose can be more than an anomalous constitutional right to shop—a right that is, by definition, reserved for those who can afford the price of entry. Instead, to borrow a phrase from Professor Heather Gerken, including poor people in the exercise of this right should speed "the democratic churn necessary for an ossified national system to move forward."[122]

This is so because an inclusive counsel-choice rule that applies to all defendants instead of a small minority can exponentially increase pressure to improve attorney performance standards. To date, that pressure has been created primarily by elites and has proved minimally effective. Freeing the majority of indigent defendants to exercise the right of counsel choice should increase that pressure. As discussed above, inclusive choice should force greater self-disclosure of information about system and attorney quality. That information should increase the number of defendants who request representation from better-performing lawyers. Those patterns of choice should encourage better standards of attorney performance. In the aggregate and over time, that grassroots pressure should raise expectations—including judicial

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121. *See, e.g.*, Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1105 (2014) (Roberts, C.J., Breyer & Sotomayor, JJ., dissenting); Schulhofer, *supra* note 91.

122. Heather K. Gerken, *The Supreme Court 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 10 (2010).

expectations—for the level of performance that can be deemed "reasonable" as a matter of constitutional law.

In the longer term, a stronger defense function may help to rebalance criminal legal systems set askew by the widely acknowledged and historically unprecedented concentration of power in the prosecutorial function.[123] Factors contributing to this imbalance of power include expansive criminal codes, virtually unchecked prosecutorial charging discretion, and imposition of higher punishment as a trial tax on defendants who refuse plea offers.[124] These factors have helped to degrade many criminal legal systems into the plea mills[125] and debtor's prisons[126] that feed hyperincarceration[127] and undermine system legitimacy,[128] particularly for the low-income people and people of color who are disproportionately enmeshed in these systems.[129]

Thus, vindicating the Sixth Amendment right to choose for all defendants can provide a number of benefits. Those benefits include a democracy-enhancing function that can operate on multiple levels. Ultimately, inclusive choice may help to shore up the meaning and value of cognate rights that are guaranteed to criminal defendants and are in a state of decline correlative to increasing concentration of prosecutorial power.[130] Those enfeebled guarantees include the prosecutor's due

123. *See, e.g.*, Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150, 2155–60 (2013).

124. *See id.* Notably, concern over these developments spans the ideological spectrum. *Cf.* Alex Altman, *Koch Brother Teams Up with Liberals on Criminal Justice Reform*, TIME (Jan. 29, 2015), http://time.com/3686797/charles-koch-criminal-justice/ [https://perma.cc/ZPT3-P4NW].

125. *See, e.g.*, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122, 1124 (W.D. Wash. 2013); Michelle Alexander, Opinion, *Go to Trial: Crash the Justice System*, N.Y. TIMES (Mar. 11, 2012), http://www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html [https://perma.cc/NK6P-U3H2] (discussing analysis of criminal justice reform advocate Susan Burton).

126. *See, e.g.*, Class Action Complaint, Fant v. City of Ferguson, No. 4:15-cv-253 (E.D. Mo. Feb. 2, 2015); Joseph Shapiro, *In Ferguson, Court Fines and Fees Fuel Anger*, NPR (Aug. 25, 2014), http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger [http://perma.cc/PS79-2CZS].

127. *See* Moore, *supra* note 7, at 553–54 & nn.61–62 (discussing distinction between mass incarceration and hyperincarcation) (citing Loïc Wacquant, *Class, Race and Hyperincarceration in Revanchist America*, 139 DAEDALUS 74, 78–79 (2010)); *see also* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 314–16 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014) [hereinafter NRC REPORT].

128. *See generally* Campbell et al., *supra* note 119, at 754–55.

129. *See* Moore, *supra* note 7, at nn.37–42.

130. *See id.* at nn.70–76.

process duty to disclose information beneficial to the defense[131] and the Sixth Amendment right to jury trial.[132] Their continued decline is a threat to liberty and warrants prompt intervention.

Courts have aborted these potential benefits of an inclusive right to choose counsel. They have done so by imposing a discriminatory double standard that excludes the overwhelming majority of defendants from exercising agency at a pivotal point in their cases. Such participation can improve not only the content of the governing law, but also the legitimacy of the systems through which that law is created and administered. Both badly need shoring up.

E. Counsel Choice and Legitimacy

Democracy deficits have undermined the legitimacy of U.S. criminal legal systems to the point of rendering the term "criminal justice" oxymoronic or utopian.[133] People who experience crime and carceral policies—whether as victims, witnesses, offenders or, as is often the case, in overlapping roles—are disproportionately poor people and people of color who have little voice in generating and administering the governing law.[134] Excluding poor people from the Sixth Amendment right to choose counsel deepens that silence and compounds those democracy deficits.

These democracy deficits are not new.[135] Periodically, however, public and sometimes violent protest focuses fresh attention on the roles of race and socioeconomic class in the formation and implementation of criminal justice policies.[136] Indeed, the episodic development of the indigent defendant's right to government-paid counsel coincided with such protests.[137]

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131. *See* Janet Moore, *Democracy and Criminal Discovery Reform After* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1329–30 (2012).

132. *See, e.g.*, Daniel Givelber, *Punishing Protestations of Innocence: Denying Responsibility and Its Consequences*, 37 AM. CRIM. L. REV. 1363, 1399–400 (2000).

133. *See* Moore, *supra* note 7, at 548–63; Anthony Bottoms & Justice Tankebe, *Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice*, 102 J. CRIM. L. & CRIMINOLOGY 119, 125–26 (2012) (defining legitimacy as the "necessarily *conditional* or *defeasible*" dialogic relationship involving "positive *recognition* by citizens of the powerholder's *moral right* to exercise that power") (emphases in original).

134. *See* Moore, *supra* note 7, at 548–49.

135. *See id.* at 560–62.

136. *See, e.g.*, Yamiche Alcindor, *Civil Rights Leaders at Odds as Ferguson Protests Grow*, USA TODAY (Dec. 28, 2014, 4:01 PM), http://www.usatoday.com/story/news/nation/2014/12/28/as-ferguson-protest-grows-so-do-tensions/20664395/ [https://perma.cc/ZL2F-UB6E].

137. Moore et al., *supra* note 64, at 1291–96.

Bursts of Supreme Court activity have occurred during periods of heightened national and international controversy over racialized socioeconomic inequalities in the United States and their disparate impact on criminal proceedings.[138] Those periods, in the 1930s, 1960s, and early twenty-first century, have been marked by embarrassment over what historian John Hope Franklin described as the nation's broken "promise of real equality."[139]

In the 1930s, international scrutiny and public protest surrounded litigation of *Powell v. Alabama*,[140] which constitutionalized the right to capital defense counsel.[141] During the Civil Rights era of the 1950s and 1960s, similar scrutiny and protest surrounded the generation of the right to government-paid counsel in felony trials and in criminal appeals.[142] Twenty-first century embarrassments include the degeneration of criminal legal systems into the plea mills and debtor's prisons that feed racially disparate patterns of hyperincarceration.[143] As in the earlier periods, public protest and heightened international attention have been accompanied by expansions of the right to counsel.[144]

It is important to note another key aspect of this doctrinal history. From its inception, the indigent defendant's right to government-paid counsel has comprised an idiosyncratic federal constitutional mandate to distribute resources from haves to have-nots.[145] That mandate derives from equal protection and due process principles as well as the Sixth Amendment text and related case law.[146] The right to government-paid defense counsel is therefore an exception to what Professor Julie Nice describes as the effective deconstitutionalization of poverty law.[147]

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138. *Id*. For a more recent example of such international attention, see Sam Fulwood, *Race and Beyond: Putin Should Not Throw Stones* (Sept. 30, 2015), https://www.americanprogress.org/issues/race/news/2015/09/30/122391/putin-should-not-throw-stones/ [https://perma.cc/G8MT-NTUN] (discussing President Vladimir Putin's deflecting questions about democracy in Russia by pointing to policing practices in Ferguson, Missouri).

139. *See* Moore et al., *supra* note 64, at 1291–96; JOHN HOPE FRANKLIN, DEMOCRACY BETRAYED: THE WILMINGTON RACE RIOT OF 1898 AND ITS LEGACY xi–xii (David S. Cecelski & Timothy B. Tyson eds., 1998).

140. 287 U.S. 45 (1932).

141. *See* Moore et al., *supra* note 64, at 1291–93.

142. *Id*. at 1293–94.

143. *See supra* notes 125–29.

144. *See* Moore et al., *supra* note 64, at 1294–96.

145. *See* Janet Moore, *G Forces*: Gideon v. Wainwright *and Matthew Adler's Move Beyond Cost-Benefit Analysis*, 11 SEATTLE J. SOC. J.1025, 1051–58 (2013).

146. *See* Moore et al., *supra* note 64, at 1291–96.

147. Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 629–36 (2008).

This brief account locates the Court's overtly discriminatory "no-choice-for-the-poor" statements within a doctrinal history that reflects the contested role and meaning of equality as a constitutional norm.[148] That contestation includes repeated moments of geopoliticized embarrassment[149] over this country's distinctive intersection of race, poverty, and carceral policies. To be sure, it is no doubt true that "[e]quitable treatment was an underlying concern" as the Court sought "to reduce the disadvantages of poverty in litigation" by developing the right to government-paid counsel.[150] It is no doubt equally true, however, that those judicial motives have been mixed.[151]

The fragility of those mixed motives is reflected in the weak definition and enforcement of the indigent defendant's right to counsel under *Strickland*, the resulting ongoing crisis of overloaded, underfunded, low-quality public defense service, and the role of that crisis in the wider upheaval over U.S. carceral policies.[152] Public concern is further piqued by unprecedented, budget-busting levels of hyperincarceration[153] and economic inequality.[154] News headlines trumpet disparities and unfairness in grand jury charging[155] as well as in other criminal legal processes and outcomes.[156] Predictable responses

148. *See, e.g.*, Moore, *supra* note 7, at 558–63, 575–86.

149. *See supra* notes 136–44 and accompanying text.

150. Darryl K. Brown, *The Warren Court, Criminal Procedure Reform, and Retributive Punishment*, 59 WASH. & LEE L. REV. 1411, 1424 (2002) (citing Gideon v. Wainwright, 372 U.S. 335, 344 (1963)).

151. *See, e.g.*, MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004); Derrick A. Bell, Jr., *Racial Realism*, *in* THE LEGAL STUDIES READER: A CONVERSATION & READINGS ABOUT THE LAW 250, 253 (George Wright & Maria Stalzer Wyan Cuzzo eds., 2004); Stephen M. Feldman, *Do the Right Thing: Understanding the Interest-Convergence Thesis*, 106 NW. U. L. REV. 248, 250–52 (2012) (discussing Professor Bell's interest-convergence and racial-realism theories).

152. *See supra* sections I.B–D.

153. *See supra* note 123127 and accompanying text.

154. *See* Moore, *supra* note 7, at 548–49 & nn.37–38; *see also* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23–26, 246–50, 291–304 (Arthur Goldhammer trans., 2014) (discussing patterns).

155. *See, e.g.*, Maria Gallucci, *Tamir Rice Shooting: Protesters Call for Cleveland Prosecutor to Resign After Grand Jury Declines to Indict Officers*, INT'L BUS. TIMES (Jan. 1, 2016), http://www.ibtimes.com/tamir-rice-shooting-protesters-call-cleveland-prosecutor-resign-after-grand-jury-2246699 [https://perma.cc/5QVT-AFS5]; James Pinkerton, *Bulletproof, Part 3: Hard to Charge*, HOUS. CHRON. (2013), http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php [https://perma.cc/25V9-R542] (discussing an investigation that raises questions about whether the grand jury system in Harris County favors the police).

156. *See supra* notes 125–29.

include more task forces issuing another round of reports.[157] History indicates that such responses will have minimal impact on the resilient interlocking set of networked institutions and policies that comprise the carceral state.[158]

Breaking this Sisyphean cycle requires a new analytical framework. The dominant theories of criminal law (retributive/utilitarian), criminal procedure (due process/crime control), and constitutionally-protected attorney choice (libertarian-free market)[159] are inadequate to support meaningful or sustainable criminal justice reform. The democracy-enhancing approach offers an alternative.[160]

Viewed from a democracy-enhancement perspective, overt judicial discrimination in the vindication of the Sixth Amendment right to choose counsel concentrates judicial power and prevents grassroots lawmaking. The same de jure discrimination also undermines system legitimacy by denigrating the agency and silencing the voices of poor people, who are disproportionately people of color. Indeed, some judges expressly justify excluding poor people from the right of attorney choice by claiming to have greater expertise in evaluating attorney qualification and performance than indigent defendants.[161] But as Dean Norman Lefstein notes, there is no reason to think that indigent defendants in the United States are less savvy than those in England and other common law countries, which trust poor people to choose their own lawyers instead of forcing them into arranged matches.[162]

Moreover, claims of superior judicial expertise in evaluating counsel performance denigrate the agency of poor people and people of color by

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157. *See, e.g.*, Exec. Order No. 13684, 79 Fed. Reg. 76865 (Dec. 18, 2014); *cf.* NRC REPORT, *supra* note 127; NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 11 (1968); OHIO COMM'N ON RACIAL FAIRNESS, REPORT OF THE OHIO COMMISSION ON RACIAL FAIRNESS 36–56 (1999).

158. *See, e.g.*, MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS (2014) (discussing the interlocking, resilient structures that compose the carceral state and render it resistant to reform); *cf.* Utah v. Strieff, __U.S.__, 136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting) (interpreting majority's construction of Fourth Amendment as "impl[ying] that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged").

159. Moore, *supra* note 7, at 550, 563–69; *see also supra* notes 8–10.

160. Moore, *supra* note 7, at 550, 563–69.

161. *See, e.g.*, Drumgo v. Superior Court of Marin Cty., 506 P.2d 1007, 1009 (Cal. 1973) (justifying denial of a capital murder defendant's request for appointment of an available, qualified, conflict-free lawyer despite appointed counsel's request to be removed from the case due to lack of experience because "the court knew [appointed counsel] to be competent [and that] he had previously served as court appointed counsel").

162. *See* Lefstein, *supra* note 90, at 918–20.

reinforcing stereotypes of their dependence, irrationality, and incapacity.[163] It is precisely because these communities have disproportionate contact with crime and criminal legal systems that they are well-positioned to assess defense performance.[164] The participatory defense movement exemplifies that expertise.[165]

Participatory defense is a social justice movement that applies community organizing strategies to improve public defense.[166] The movement shows that the collective wisdom of the community can outstrip that of court personnel when it comes to evaluating (and demanding) quality defense.[167] Other research tends to corroborate this point. Indeed, when empirical researchers bother to ask indigent defendants what they think about their lawyers, the evidence shows a good deal of sophistication (as well as some surprising empathy) in those assessments.[168]

The few other proffered justifications for the "no-choice" stance are also more reflexive than reasoned.[169] For example, judges have warned of delays if untrammeled choice "allow[s] a popular attorney to have the courts marking time to serve his convenience."[170] But the constitutional right to choose counsel does not include lawyers with full dance cards. An equal right of counsel choice limits the choices of all defendants to lawyers who are available to resolve cases within timelines established through the court's calendaring authority.[171]

More often than not, judges simply adopt the "no-choice" stance with no justification whatsoever. That is, they state summarily that indigents are entitled to constitutionally effective assistance and nothing more.[172] Professor Wayne Holly translates such assertions into an underlying premise that "beggars can't be choosers."[173] Professor Holly counters

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163. *Cf.* MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 105–06 (3d ed. 2015) (discussing processes of social stratification).

164. Moore, *supra* note 7, at 548–49.

165. Moore et al., *supra* note 64, at 1281–91.

166. *Id.* at 1282–83.

167. *Id.* at 1281–91.

168. *See id.* at 1309–14; Campbell et al., *supra* note 119.

169. *See* Wayne D. Holly, *Rethinking the Sixth Amendment for the Indigent Criminal Defendant: Do Reimbursement Statutes Support Recognition of a Right to Counsel of Choice for the Indigent?*, 64 BROOK. L. REV. 181, 201 (1998).

170. *See, e.g.*, People v. Dowell, 266 P. 807, 809 (Cal. 1928).

171. United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (citing Morris v. Slappy, 461 U.S. 1 (1983)).

172. *See* Drumgo v. Superior Court of Marin Cty., 506 P.2d 1007, 1010 (Cal. 1973).

173. Holly, *supra* note 169, at 182–83.

that most indigent defendants should have constitutionally-protected attorney choice because they do have skin in the game; they pay for counsel through contribution and recoupment procedures.[174]

Other scholars have argued against the "no-choice" stance based on equal protection,[175] promotion of attorney-client trust and individual autonomy,[176] and market efficiencies as clients "drive out" bad lawyers by rewarding the good.[177]Such arguments led *The New York Times* to promote attorney choice for all defendants,[178] and encouraged the Texas Indigent Defense Commission to test what appears to be the nation's first attorney-choice program for poor people in a single rural county.[179]

The scholarly arguments against the "no-choice" stance are well taken, and the Texas experiment is worth watching.[180] Nevertheless, prior arguments for an inclusive right to attorney choice have missed a bigger payoff. The Sixth Amendment right to choose counsel has strong democracy-enhancing potential. Including poor people in the right to choose counsel fulfills core constitutional values by promoting equal participation in the generation and administration of law.[181] As a mode of grassroots lawmaking, attorney choice promotes transparency and accountability while checking concentrated judicial and executive power and improving system legitimacy.

Unfortunately, a discriminatory double standard infects the right of counsel choice. That discrimination results primarily from a widespread misimpression that the Supreme Court has established as a matter of law that indigent defendants have no Sixth Amendment right to choose counsel.[182] Part II's fresh scrutiny of the case law exposes those "no-choice" statements as dicta. The analysis also shows how those dicta

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174. *Id.* at 218–24.

175. Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 87–89 (1974).

176. *See, e.g.*, Hoeffel, *supra* note 224, at 541–45. Professor Hoeffel argues for the narrower right to continue a relationship with an appointed lawyer. *Id.*

177. *See* Schulhofer & Friedman, *supra* note 10.

178. Adam Liptak, *Need-Blind Justice*, N.Y. TIMES (Jan. 4, 2014), http://www.nytimes.com/2014/01/05/sunday-review/need-blind-justice.html?_r=0 [http://perma.cc/3X2D-S93L].

179. *Id.*; *see also supra* notes 91–92. A recent census of Comal County, the site of the Texas attorney-choice experiment, reports the population of 108,000 is 69.5% white and 26.2% Latino-Hispanic with median household income of $65,839 and a poverty rate of 10.2%. *See State & County Quickfacts Comal County Report*, U.S. CENSUS BUREAU (Aug. 5, 2015), http://quickfacts.census.gov/ qfd/states/48/48091.html [http://perma.cc/SS2V-2JVN].

180. *But see infra* Part IV (discussing problems with the Texas project).

181. *See* Moore, *supra* note 7, at 563–65.

182. *See supra* note 1 and accompanying text.

have distracted courts and commentators from reasoning and rulings in the same Supreme Court cases that strongly support a right of counsel choice for all defendants. The analysis offers tools for advocates to dismantle the "no-choice" rule and end de jure discrimination against poor people in the vindication of this fundamental constitutional right.

II. DEMOCRATIZING COUNSEL CHOICE: A NEW LOOK AT SUPREME COURT CASE LAW

This Part corrects the widespread misunderstanding that Supreme Court statements excluding poor people from constitutionally-protected attorney choice are holdings. Section II.A shows that those "no-choice" statements are dicta belied by the Court's own reasoning and rulings, including due process and equal protection doctrines discussed in section II.B.

A. The Court's Discriminatory Dicta

There are three Supreme Court cases that courts and commentators cite most frequently when asserting that people who require government-paid counsel are categorically excluded from exercising the Sixth Amendment right to attorney choice that is enjoyed by those with means to hire counsel. In chronological order by date of decision, those cases are *Wheat v. United States*,[183] *Caplin & Drysdale, Chartered v. United States*,[184] and *United States v. Gonzalez-Lopez*.[185] The first two decisions, *Wheat* and *Caplin*, rejected right-to-choose claims and restricted the right's application.[186]

Only the third of these frequently-cited cases, *Gonzalez-Lopez*, vindicated the right to choose through structural error review.[187] More recently, however, in *Luis v. United States*[188] the Court followed *Gonzalez-Lopez* and held that the defendant had a Sixth Amendment right to access $2 million in assets that were "untainted" by an alleged $45 million criminal conspiracy in order to hire her chosen counsel.[189]

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183. 486 U.S. 153 (1988); *see* KAMISAR, ET AL., *supra* note 1 (citing *Wheat*).

184. 491 U.S. 617 (1989). *Caplin* was issued on the same day, and with a similar holding and reasoning as a companion case, *United States v. Monsanto*, 491 U.S. 600 (1989).

185. 548 U.S. 140 (2006); *see* ALLEN ET AL., *supra* note 1 (citing *Gonzalez-Lopez*).

186. *Wheat*, 486 U.S. at 164; *Caplin*, 491 U.S. at 617.

187. 548 U.S. at 150.

188. __ U.S. __, 136 S. Ct. 1083 (2016).

189. *Id*. at 1087–88.

All four of these cases were hotly contested; each was decided by the narrowest possible one-vote margin.[190] The four cases share two other key characteristics. First, each recites the "no-choice-for-the-poor" mantra.[191] Second, none of the defendants were indigent. Each had ample means to hire counsel.[192]

Statements in these Supreme Court cases that dismiss the indigent defendant's right to choose are therefore dicta.[193] Similar "no-choice" dicta appear in three other important Supreme Court cases that do involve indigent defendants and the exercise of choice in the appointment of counsel. Those cases are *Faretta v. California*,[194] *Morris v. Slappy*,[195] and *Montejo v. Louisiana*.[196]

This Part provides an integrated analysis of these seven cases. The analysis supports three conclusions. First, the Court's statements excluding poor people from constitutionally protected attorney choice have limited precedential value. Second, the Court's own limitations on the Sixth Amendment right to choose answer some of the most significant practical concerns about vindicating the right for poor people. The cases allow judges to override attorney choice if the lawyer is unqualified, unavailable, unwilling, or has a conflict of interest.[197] These restrictions make it unlikely that current methods for connecting defendants with attorneys would be overwhelmed by a rule protecting the right to attorney choice for indigent defendants as well as those who can afford to hire counsel.

Third, previously unnoticed subtexts in *Faretta* and *Montejo* provide additional grounds for supporting a right of counsel choice that applies to indigent defendants as well as to those who can afford to hire counsel.

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190. *See Luis*, 136 S. Ct. at 1087; *Gonzalez-Lopez*, 548 U.S. at 152–53; *Caplin*, 491 U.S. at 634–36; *Wheat*, 486 U.S. at 164–65, 172.

191. *Luis*, 136 S. Ct. at 1093 (plurality opinion); *id.* at 1102 (Thomas, J., concurring); *id.* at 1110 (Kennedy & Alito, JJ., dissenting); *Gonzalez-Lopez*, 548 U.S. at 152–53; *Caplin*, 491 U.S. at 624; *Wheat*, 486 U.S. at 158–59.

192. *Luis*, 136 S. Ct. at 1087–88; *Gonzalez-Lopez*, 548 U.S. at 142; *Caplin*, 491 U.S. at 620–21; *Wheat*, 486 U.S. at 155.

193. *See* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 960–61 (2005) (reasoning that an issue must be "actually decided . . . based upon the facts of the case" to qualify as a holding); Judith M. Stinson, *Teaching the Holding/Dictum Distinction*, 19 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 192 (2011) ("[M]ost typically 'holding' is defined as that portion of a legal opinion that is 'necessary to the result.'").

194. 422 U.S. 806 (1975).

195. 461 U.S. 1 (1983).

196. 556 U.S. 778 (2008).

197. *See, e.g.*, *Wheat*, 486 U.S. at 164 (holding that a court can deny counsel choice to prevent conflict of interest).

Faretta shows that an inclusive right to choose counsel can increase perceptions of system legitimacy while saving time and money.[198] *Montejo* emphasizes the importance of indigent defendants' choices about legal representation, even when counsel is automatically appointed.[199] These new insights into *Faretta* and *Montejo* bookend the case analysis below.

1. The Right of Forced Refusal: Faretta*'s Untold Story*

Faretta v. California might seem odd support for an inclusive right to *choose* counsel, since the case created the right to *refuse* counsel.[200] The case came to the Supreme Court because Anthony Faretta thought he could do a better job defending himself than his public defender, who he alleged was overworked,[201] biased, and conflicted.[202] The trial judge refused to allow Faretta to represent himself and kept the public defender on the case.[203] The jury heard strong evidence of Faretta's guilt, and found that he had committed multiple felonies.[204]

Despite the evidence and verdicts, the Supreme Court found that the trial judge violated Faretta's Sixth Amendment right to represent himself.[205] Moreover, the Court did not apply harmless-error analysis, which is the typical standard of review for violations of constitutional rights.[206] Instead, the Court reversed under the structural error standard, that is, without asking whether Faretta could have done better without his unwanted lawyer.[207] The dissent derided the defendant's new constitutional "right . . . to make a fool of himself."[208] The majority conceded that self-representation would likely harm defendants, but

198. *See infra* section II.A.1.

199. *See infra* section II.A.5.

200. Faretta v. California, 422 U.S. 806, 836 (1975).

201. *Id.* at 807.

202. Joint App. at 49, 54, 58–59, Faretta v. California, 422 U.S. 806 (No. 73-5772) [hereinafter *Faretta* JA].

203. *Id.* at 58–59.

204. *Id.* at 11–19, 26.

205. *Faretta*, 422 U.S. at 835–36.

206. *Id.*

207. *Id.*

208. *Id.* at 852 (Blackmun, J., dissenting). *But see* Erica J. Hashimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. REV. 423, 442, 444–46 (2007) (presenting data on positive pro se outcomes while conceding the study's limitations).

insisted that the right to refuse court-appointed counsel vindicates "that respect for the individual which is the lifeblood of the law."[209]

Faretta is traditionally viewed as championing individual autonomy against overbearing government authority.[210] More specifically, the standard narrative claims the case as safeguarding the liberty of poor people against social-welfare paternalism.[211] But that narrative elides a crucial and often ignored fact: Anthony Faretta wanted a government-paid lawyer.[212]

Citing the Sixth Amendment, Faretta "urged without success that he was entitled to counsel of his choice, and three times moved for the appointment of a lawyer other than the public defender" whom the judges had chosen for him.[213] Courts routinely appoint such "panel" or "list" lawyers, often when public defender offices are overloaded or have conflicts.[214]

By invoking his right to choose counsel, Faretta offered an alternative to three unattractive options. The first unattractive option was for Faretta to proceed without a lawyer. The second was for Faretta to proceed with the unwanted lawyer from the public defender office. The third was years of subsequent litigation ending in reversal of Faretta's convictions.

Instead of granting Faretta's request for a different lawyer or his back-up request to represent himself, the trial judge forced him to proceed with the unwanted public defender and infected the proceedings with structural error.[215] Interestingly, Faretta's right-to-choose claim was not addressed on direct appeal, despite the facts that he raised the issue at trial and that the issue was pending before the state Supreme Court.[216]

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209. *Faretta*, 422 U.S. at 834 (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

210. *See, e.g.*, Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 165 (2000) (Scalia, J., concurring) ("Our system of laws generally presumes that the criminal defendant, after being fully informed, knows his own best interests and does not need them dictated by the State. Any other approach is unworthy of a free people.").

211. *Id.* (stating that the Framers "would not have found acceptable the compulsory assignment of counsel *by the government* to plead a criminal defendant's case" (emphasis in original)); *see also id*. (stating that such an imposition "'imprison[s] a man in his privileges and call[s] it the Constitution.'" (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942))).

212. *Faretta*, 422 U.S. at 811 n.5; *Faretta* JA, *supra* note 202, at 49.

213. *Faretta*, 422 U.S. at 811 n.5; *Faretta* JA, *supra* note 202, at 49.

214. *See* JUSTICE DENIED, *supra* note 63, at 82–84.

215. *Faretta* JA, *supra* note 202, at 50, 54, 58–59.

216. *Id*. at 25–26 (appending People v. Faretta 1–2 (2d Dist. Crim. No. 22722, June 26, 1973)); *see also* Drumgo v. Superior Court of Marin Cty., 506 P.2d 1007 (Cal. 1973). *Drumgo* issued on March 5, 1973—well after Faretta's 1972 trial proceedings, but before his appeal was decided. *Faretta* JA, *supra* note 202, at 25.

Nor did Faretta include the right-to-choose claim in his pro se petition to the U.S. Supreme Court.[217] Only the lone Supreme Court amicus brief urged reversal based on the violation of Faretta's right to choose.[218] The majority opinion submerged the issue in a passing reference to California's "not unusual rule[] . . . [that a]n indigent criminal defendant has no right to appointed counsel of his choice."[219]

Thus, the "no-choice-for-the-poor" statement was literally a footnote in *Faretta*.[220] Excavating *Faretta*'s subtext exposes an untold right-to-choose story that counters the traditional right-to-refuse case narrative. In the guise of "affirm[ing] the dignity and autonomy" of the individual,[221] *Faretta* substitutes one form of coercion for another and gores indigent defendants on a sharp-horned dilemma. Unable to secure counsel of choice, they must proceed either with an unwanted attorney or with unwanted (and as the Court conceded, probably prejudicial) pro se status.[222]

Thus, Faretta won the oxymoronic right of being forced to refuse counsel. This conundrum may help explain why the Court has imposed many subsequent restrictions on *Faretta* while insisting that pro se defendants "may, at least occasionally" present their own "best possible defense."[223] *Faretta*'s untold story raises other possibilities. On one hand, Faretta might have been unhappy with, and rejected the assistance of any lawyer appointed to his case. On the other hand, granting indigents like Faretta the right to choose counsel "may, at least occasionally"—and likely would, more often—prevent protracted litigation, preserve finality of judgments, promote attorney-client cooperation, and shore up system legitimacy.

Despite these potential benefits of an inclusive Sixth Amendment right of attorney choice that applies equally to all defendants, Supreme

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217. Petition for Writ of Certiorari, Faretta v. California, 422 U.S. 806 (1975) (No. 73-5772).

218. Brief for Amicus Curiae John E. Thorne at 9–15, Faretta v. California, 422 U.S. 806 (1975) (No. 73-5772).

219. *Faretta*, 422 U.S. at 812 n.8 (citing *Drumgo*, 506 P.2d 1007). *Drumgo* was decided after Faretta's trial and while his appeal was pending. *See supra* note 216.

220. *Faretta*, 422 U.S. at 810 n.5, 812 n.8.

221. McKaskle v. Wiggins, 465 U.S. 168, 176–77 (1984).

222. *Faretta*, 422 U.S. at 812 n.8.

223. *McKaskle*, 465 U.S. at 177, 184–85 (approving appointment of "standby" trial counsel); *see also* Indiana v. Edwards, 554 U.S. 164, 171 (2008) (approving appointment of counsel over the objection of mentally ill defendant found competent to stand trial); Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 162 (2000) (denying right to proceed pro se on direct appeal).

Court cases decided after *Faretta* continued to recite dicta denigrating the indigent defendant's interest in the identity of his or her lawyer.

2. No Right to the Relationship?: Morris v. Slappy

Morris v. Slappy is like *Faretta* in that neither case involved a Supreme Court ruling on the broad Sixth Amendment right of indigent defendants to choose their lawyers.[224] Courts and commentators sometimes mistakenly cite *Slappy* as rejecting the indigent defendant's right to choose; in support, they recite the majority's grumpy statement that criminal defendants have "no Sixth Amendment right to a meaningful [attorney-client] relationship."[225] Professor Janet Hoeffel correctly describes those words as dicta.[226] This subpart builds on Professor Hoeffel's argument by explaining the distinction between *Slappy*'s holding and dicta, as well as the implications of that distinction for an inclusive right of attorney choice that applies equally to all defendants.

Slappy arose in the opposite circumstances of *Faretta*. Shortly before Joseph Slappy's trial, his public defender was hospitalized.[227] Slappy wanted to keep that lawyer on his case.[228] Instead, despite Slappy's protests, the judge ordered another public defender to take over.[229] Slappy was convicted of multiple serious felonies and lost his state court appeals.[230] A Ninth Circuit panel held that the trial judge had improperly denied Slappy's motion to continue the case.[231] The panel concluded that the judge's ruling violated the Sixth Amendment, applied structural error review, and ordered a new trial.[232]

The Supreme Court reversed.[233] All nine justices agreed on a single procedural ground for reversing: the Ninth Circuit mistook Slappy's

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224. *See* Janet C. Hoeffel, *Toward a More Robust Right to Counsel of Choice*, 44 SAN DIEGO L. REV. 525, 534 (2007) (discussing Morris v. Slappy, 461 U.S. 1 (1983)).

225. *See, e.g.*, Virgen v. Ryan, No. CV-13-1294-TUC-DTF, 2014 U.S. Dist. LEXIS 141861, at *17 (D. Ariz. Oct. 6, 2014); SALTZBURG, ET AL., *supra* note 1.

226. Hoeffel, *supra* note 224, at 526, 528–32, 545–50 (discussing *Slappy*, 461 U.S. at 13–15 & n.6).

227. *Slappy*, 461 U.S. at 5.

228. *Id.* at 8.

229. *Id.* at 5–9; *id.* at 25–26 (Brennan, J., concurring) (describing the trial court's failure to inquire into likely length of delay).

230. Slappy v. Morris, 649 F.2d 718, 718–20 (9th Cir. 1981), *rev'd on other grounds*, 461 U.S. 1 (1983).

231. *Id.*

232. *Id.*

233. *Slappy*, 461 U.S. at 15.

protests as a timely motion to continue.[234] All nine justices also agreed that the trial judge properly exercised his calendaring authority and properly sought timely resolution of Slappy's cases by proceeding with substitute counsel.[235] In the course of ruling on these procedural grounds, the majority went on to opine that "there is no Sixth Amendment right to a meaningful attorney-client relationship," and described that statement as a "holding."[236] Lower courts occasionally cite this "holding" to override indigent defendants' choice of counsel.[237]

A closer reading shows that those citations are unsupported. First, they fail to account for the full text of the "no right to a relationship" statement. The majority went on to explain that "[n]o court could possibly guarantee that a defendant will develop the kind of rapport with his attorney—privately retained or provided by the public—that the Court of Appeals thought part of the Sixth Amendment guarantee of counsel."[238] Properly understood, the "no right to a relationship" statement merely sets inarguable boundaries for any positive constitutional right: it must be clearly defined in order to be judicially enforced.

The second reason that *Slappy* does not support the "no-choice" stance is procedural. Despite the majority's labeling of the "no right to a relationship" statement as a "holding," all nine justices also described the statement and related discussion as unnecessary to resolving the case.[239] Such unnecessary discussion is dictum.[240] The Court has also (sometimes) followed a "settled policy to avoid unnecessary decisions of

234. *Id.* at 4, 11–13 (majority opinion of Burger, C.J., White, Powell, Rehnquist & O'Connor, JJ.); *id.* at 17–19 (Blackmun & Stevens, JJ., concurring); *id.* at 29 (Blackmun, J., concurring).

235. *Id.* at 4, 11–13 (majority opinion of Burger, C.J., White, Powell, Rehnquist & O'Connor, JJ.); *id.* at 17–19 (Brennan & Marshall, JJ., concurring); *id.* at 29 (Blackmun & Stevens, JJ., concurring).

236. *Slappy*, 461 U.S. at 13–15, 14 n.6.

237. *See, e.g.*, Virgen v. Ryan, No. CV-13-1294-TUC-DTF, 2014 U.S. Dist. LEXIS 141861, at *17 (D. Ariz. Oct. 6, 2014).

238. *Slappy*, 461 U.S. at 13–14.

239. *Id.* at 4 (opinion of Burger, C.J., White, Powell, Rehnquist, & O'Connor, JJ.) (describing procedural ground as "dispositive, independent of the . . . novel Sixth Amendment guarantee announced by the Court of Appeals"); *id.* at 15, 19 (Brennan & Marshall, JJ., concurring) (citing majority's "recognition that [the Sixth Amendment issue] is unnecessary to its decision"); *id.* at 29 (Blackmun & Stevens, JJ., concurring) (describing the majority's Sixth Amendment discussion as "dicta").

240. *Judicial dictum*, BLACK'S LAW DICTIONARY 549 (10th ed. 2010) (defining "judicial dictum" as "[a]n opinion by a court . . . that is not essential to the decision and therefore not binding"); *see also* Stinson, *supra* note 193.

constitutional issues."[241] That policy may have led all nine justices to indicate that their unanimous agreement on the lack of a timely continuance motion was dispositive to the case, rendering the "no right to a relationship" statements superfluous.[242]

That reasoning follows even if one allows alternative grounds as holdings.[243] Fleshing out the distinction between *Slappy*'s dicta and holding reduces the precedential value of the case for those who would continue to deny indigent defendants the same Sixth Amendment right to choose counsel that is enjoyed by defendants with means to hire counsel. As Professor Hoeffel argues, at minimum those dicta should not dissuade judges from advancing Sixth Amendment concerns for fairness and finality by deferring to existing attorney-client relationships when ruling on motions to continue.[244]

In fact, *Slappy* offers strong support for an inclusive right to attorney choice that applies equally to all defendants. The Court itself has made this point clear by citing *Slappy* as commanding strong deference to courts' calendaring authority.[245] Judges exercise that authority from the earliest stage of criminal proceedings when attorney-client relationships are first being formed. They do so whether those relationships involve retained or appointed counsel. These preexisting practices, and the resulting limitations on attorney choice in our current systems for connecting clients with counsel, should ease transitions to an inclusive right of counsel choice rule that applies equally to all defendants. The same is true of the additional restrictions that the Court imposed upon attorney choice in *Wheat*[246] and *Caplin*[247]—despite the subsequent easing of one such restriction in *Luis*.[248]

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241. Mills v. Rogers, 457 U.S. 291, 305 (1982).

242. *See Slappy*, 461 U.S. at 4, 11–13 (majority opinion of Burger, C.J., White, Powell, Rehnquist & O'Connor, JJ.); *id.* at 17–19 (Blackmun & Stevens, JJ., concurring); *id.* at 29 (Blackmun, J., concurring).

243. *See* Abramowicz & Stearns, *supra* note 193, at 953, 961, 972 (holdings must "lead to the judgment" but may include "alternative justifications"); *see id.* at 1029–32 (distinguishing supportive and nonsupportive propositions, cautioning that judicial resolution of issues "in a manner that does not contribute to the disposition of the case [indicates] a strong possibility that the judge . . . holds relatively strong views").

244. Hoeffel, *supra* note 224, at 540–45; *cf.* Slappy v. Morris, 649 F.2d 718, 721–22 (9th Cir. 1981), *rev'd*, 461 U.S. 1 (1983).

245. Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1107 (2014); United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006).

246. Wheat v. United States, 486 U.S. 153, 154 (1988) (holding that Sixth Amendment presumption in favor of counsel can be overcome by demonstration of conflict or serious potential for conflict).

3. Rights, Risks, and Retainers: Wheat, Caplin, *and* Luis

Like *Morris v. Slappy*, *Wheat v. United States* and *Caplin & Drysdale, Chartered v. United States* held that competing interests can trump a defendant's Sixth Amendment right to choose his or her lawyer.[249] *Slappy* requires deference to the trial judge's calendaring authority.[250] In *Wheat*, the Supreme Court ruled that a lawyer's conflict of interest can trump the right to choose that lawyer—even when the defendant waives the protection against such conflict, and even when prosecutors arguably manufactured the conflict to bump a successful defense lawyer off the case.[251] In *Caplin*, the Court held that interests in crime suppression can trump attorney choice—even when asset forfeitures require law firms to surrender large retainers and fees.[252]

The defendants in *Wheat* and *Caplin* had ample means to hire their lawyers.[253] Therefore, the question whether indigent defendants have a Sixth Amendment right to choose counsel was not before the Court in either case. In *Wheat*, the issue of constitutionally-protected attorney choice for indigents was wholly irrelevant to the question whether conflicts of interest could trump the right to attorney choice. The *Wheat* majority nevertheless noted in passing, while discussing other restrictions on the Sixth Amendment right to choose, that "a defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant."[254]

The *Wheat* majority cited no authority for this dictum. Nevertheless, the *Caplin* majority seized it and doubled down. In that case, the Court rejected a law firm's attempt to recover fees that were forfeited to the government after the client pled guilty.[255] The firm argued that the government violated its client's Sixth Amendment right to choose

247. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 618 (1989) (holding that a forfeiture statute does not impermissibly burden a Sixth Amendment right to retain counsel of one's choice).

248. Luis v. United States, __ U.S. __, 136 S. Ct. 1083 (2016).

249. *Caplin*, 491 U.S. at 618; *Wheat*, 486 U.S. at 154.

250. *See Slappy*, 461 U.S. at 4, 11–13 (majority opinion of Burger, C.J.); *id.* at 17–19 (Brennan, J., concurring); *id.* at 29 (Blackmun, J., concurring).

251. *Wheat*, 486 U.S. at 163 (acknowledging risk of manufactured conflict); *id.* at 170 n.3 (Marshall & Brennan, JJ., dissenting) (citing evidence of prosecutorial bad faith).

252. *Caplin*, 491 U.S. at 619–21.

253. *See supra* note 192.

254. *Wheat*, 486 U.S. at 158–59.

255. *Caplin*, 491 U.S. at 623–25.

counsel by seizing the assets he would have used to pay the firm.[256] In the course of the opinion, the *Caplin* majority stated that:

> Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel. . . . [T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts.[257]

The *Caplin* court then vindicated the government's "pecuniary interest" in the defendant's multimillion dollar assets.[258] The Court concluded that ill-gotten gains do not properly belong to wrongdoers, and therefore eliminated the defendant's "undeserved economic power . . . to command high-priced legal talent."[259] For such people, the Court reasoned, appointed or pro bono counsel would suffice,[260] given "the harsh reality" that quality representation often turns on hiring "the best counsel money can buy."[261] A companion case applied the same reasoning to approve pretrial, post-indictment forfeiture of assets that the defendant otherwise would have used to pay counsel of choice.[262]

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256. *Id.* at 621–22.

257. *Id.* at 624.

258. *Id.* at 626–30; *see also id.* at 629 n.6 (noting the government's sale of "just one [of the defendant's assets], a parcel of land known as 'Shelburne Glebe,' . . . for $ 5.3 million."); Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 718–20 (1992) (discussing government interests in preventing attorney facilitation of organized criminal activity).

259. *Caplin*, 491 U.S. at 630 (quoting *In re Forfeiture Hearing as to Caplin & Drysdale, Chartered*, 837 F. 2d 637, 649 (1988)).

260. *Id.* at 625.

261. *Id.* at 630 (quoting Morris v. Slappy, 461 U.S. 1, 23 (1983) (Brennan, J., concurring)).

262. United States v. Monsanto, 491 U.S. 600, 615 (1989); *see also* Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1102–03 (2014) (following *Monsanto* to hold that the Sixth Amendment does not require pretrial hearings to challenge asset freezes based on alleged lack of probable cause to prosecute). *But see id.* at 1105 (inviting Congressional override); Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1087 (2016) (plurality opinion) (pretrial forfeiture of "untainted" assets violates Sixth Amendment right to choose counsel); *id.* at 1096–97 (Thomas, J., concurring in the judgment); *id.* at 1112 (Kagan, J., dissenting) (describing *Monsanto* as "troubling" and "not altogether convinc[ing]," but noting that since Luis did not ask the Court to overrule or modify *Monsanto* the Court had to take the case "as a given"). On the *Kaley* invitation for Congressional override, see U.S. Senator Chuck Grassley, *Q&A: Civil Asset Forfeiture* (Apr. 20, 2015), http://www.grassley.senate.gov/ news/commentary/qa-civil-asset-forfeiture [https://perma.cc/UK6V-RPA2] ("Part of addressing this problem lies in reversing the Supreme Court's recent decision that allows the government to prevent people from showing that they need access to their seized funds to hire a lawyer."); Jonathan P. Bach, *Written Statement on Behalf of the New York Council of Defense Lawyers Before the United States Senate Committee on the Judiciary for the Hearing Entitled "The Need to Reform Asset Forfeiture"* (Apr. 15, 2015),

The *Caplin* dissent attacked the majority rulings in both of these companion cases for subordinating the right of well-off defendants to buy a top-shelf commodity.[263] The dissent warned that to "beggar" people of means—that is, to put them on the same plane as indigents with overworked, underfunded public defenders—would "[devastate] . . . our adversarial system of justice" and dirty courts' hands by besmirching "the integrity of the judicial process."[264] Such degradation threatened the attorney-client trust required "to be a truly effective advocate" because appointed counsel "is too readily perceived as the Government's agent rather than [the defendant's] own."[265] The dissent also predicted that forfeiture would drive high-priced talent out of the market, causing the "virtual socialization of criminal defense . . . [,] standardiz[ed] . . . criminal-defense services and diminish[ed] defense counsel[] independence."[266]

It is difficult to imagine a more open and forceful indictment of the Court's failure to enforce a meaningful Sixth Amendment right to counsel for the poor than the *Caplin* dissent's denunciation of indigent defense representation. Comments about indigent defendants in these majority and dissenting opinions also mark the Court's nearest approach to an actual ruling that poor people have no right to choose their lawyers. On this reading, it is only because indigents have no such right that the Court could transform otherwise well-off defendants into beggars who cannot be choosers.

Closer scrutiny and subsequent case law show that such a reading is mistaken. Statements in *Caplin* regarding the lack of constitutionally protected attorney choice for indigents are unnecessary to the holding of the case.[267] Instead of holding as a matter of law that indigent defendants have no right to choose their lawyers, *Caplin* instead followed *Slappy* and *Wheat* in holding that a sufficiently strong countervailing governmental interest can trump the right to choose counsel.[268] In *Slappy*, the Court protected judicial discretion over dockets and court calendars.[269] In *Wheat*, the Court protected the integrity of criminal

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http://www.judiciary.senate.gov/imo/media/doc/04-15-15%20Bach%20Testimony.pdf [https://perma.cc/XWW4-FSBM] (arguing for amendment reversing *Kaley*).

263. *Caplin*, 491 U.S. at 644–48 (Blackmun, Marshall, Brennan & Stevens, JJ., dissenting).

264. *Id.* at 635, 645.

265. *Id.* at 645.

266. *Id.*

267. *See supra* notes 192–93.

268. *Caplin*, 491 U.S. at 625–33.

269. *See supra* section II.A.2.

proceedings from conflicts of interest.[270] In *Caplin*, the Court protected government interests in separating criminals from their ill-gotten gains.[271]

The rulings in these cases turn on the Court's weighing of the countervailing government interest. The rulings do not turn on the separate question whether indigent defendants have the same (trumpable) Sixth Amendment right to choose their lawyers as defendants who have the means to hire counsel. Significantly, four members of the Court, including the Chief Justice, applied exactly this type of interest-balancing analysis to right-to-choose limitations in *Luis v. United States*,[272] and a fifth Justice appears prepared to do the same.[273]

In *Luis*, the government froze $2 million of the defendant's assets as potentially forfeitable due to her alleged involvement in a criminal conspiracy.[274] The defendant claimed that the freeze involved "legitimate, untainted" assets that were "not traceable to a criminal offense," which she needed in order to hire the lawyers she wanted to work on her case.[275] The plurality concluded that the government's interest in the untainted assets could not trump the defendant's countervailing Sixth Amendment right to choose counsel.[276] Justice Kagan expressed sympathy with that conclusion in her dissent.[277]

While applying this interest-balancing approach to the right to choose counsel, the *Luis* plurality, like the *Caplin* dissent, was solicitous of the "substantial risk" that forcing wealthy defendants into overburdened public defense systems through asset forfeiture would render their Sixth Amendment right to counsel "less effective."[278] Two dissenting Justices in *Luis* found that allegation "troubling," and condemned the majority's "constitutional command to treat a defendant accused of committing a

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270. *See supra* note 251 and accompanying text.

271. *See supra* notes 258–62 and accompanying text.

272. Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1093–94 (2016) (describing government interests in the defendant's assets as "important" but "compared to the right to counsel of choice . . . seem[ing] to lie somewhat further from the heart of a fair, effective criminal justice system").

273. *Id.* at 1112 (Kagan, J., dissenting) (doubting whether "[g]overnment's interest in recovering the proceeds of crime ought to trump the defendant's . . . right to retain counsel of choice").

274. *Id.* at 1087–88.

275. *Id.* at 1088.

276. *Id.* at 1086. Justice Thomas's concurring opinion concluded that no balancing test applied. *Id*. at 1101–03 (Thomas, J., concurring).

277. *Id.* at 1112.

278. *Id.* at 1095.

lucrative crime differently than a defendant who is indigent from the outset."[279]

Those dissenting Justices in *Luis* hinted at the equal protection problems infecting the differential treatment of indigent defendants and defendants with means to hire counsel regarding the fundamental constitutional right to choose counsel. Those problems are unpacked more fully in section II.B. For current purposes, it suffices to note that, despite their differences in *Luis*, all eight Justices invoke the "no-choice-for-the-poor" mantra.[280] As the foregoing analysis shows, however, reciting a mantra does not make the mantra law. The Court could have reached the same results in these cases even if the indigent defendant's Sixth Amendment right to choose were firmly established as a matter of law. In that scenario, forcing people into public defense systems through forfeiture of tainted assets would simply narrow their field of choice to the same set of qualified, conflict-free counsel who made themselves available to indigents. The fact that the range of choices would be narrower does not mean that there would be no right to choose at all.

Deeper understanding of the substantive and procedural importance of that right, and the unconstitutional, antidemocratic effects of denying that right to poor people, requires a closer look at *United States v. Gonzalez-Lopez.*

4. Gonzalez-Lopez *and the Sixth Amendment Right to Shop*

Gonzalez-Lopez is distinguished among right-to-choose cases because the government conceded that the trial judge violated that right.[281] The sole issue before the Court was the appropriate standard of review.[282] The Court affirmed the majority rule in the lower courts that the error is structural and requires automatic reversal without either the harmless-error inquiry typical of other federal constitutional claims or the more onerous performance-and-prejudice inquiry of *Strickland v.*

279. *Id.* at 1110 (Kennedy and Alito, JJ., dissenting).

280. *Id.* at 1089 (plurality opinion); *id.* at 1102 (Thomas, J., concurring); *id.* at 1109 (Kennedy & Alito, JJ., dissenting); *see also* Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1102–03 (2014) (majority opinion authored by Justice Kagan).

281. United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006). Other Supreme Court cases in addition to those discussed here affirm the criminal defendant's right to have an opportunity to hire a lawyer. *See, e.g.*, Chandler v. Fretag, 348 U.S. 3, 10 (1954) (construing due process right to counsel and stating that "a defendant must be given a reasonable opportunity to employ and consult with counsel; otherwise, the right to be heard by counsel would be of little worth").

282. *Gonzalez-Lopez*, 548 U.S. at 140–41.

Washington.[283] Thus, the ruling elevated a criminal defendant's right to choose an attorney into the tiny structural-error pantheon comprising the rights to an impartial judge, a public trial, and a grand jury selected without racial discrimination.[284] The terse majority opinion accomplished that result in two moves.

First, the Court distinguished two Sixth Amendment rights: the right to choose a particular lawyer and the right to receive effective assistance from that lawyer.[285] The majority reasoned that, although it is "the purpose of [both] rights . . . to ensure a fair trial," the right to choose a lawyer "has never been derived from the Sixth Amendment's purpose of ensuring a fair trial."[286] Nor, it must be added, is the right to choose contained in the Amendment's textual guarantee that an accused will "have the Assistance of Counsel for his defence."[287] Assistance means "help,"[288] which a defendant can "have" just as readily through benevolence or performance of assigned duty as through the purchase of services in the marketplace.

The right to choose is similarly deracinated from the Amendment's surrounding text. The right to assistance of counsel is not free-standing. It concludes a series of independent entitlements to notice, a speedy and public trial, confrontation of adverse witnesses, and compulsory process.[289] Satisfaction of these rights requires action by a prosecutor, a court, or both. None can be realized solely through a criminal defendant's independent exercise of will or purchase of private services in the marketplace.[290]

Whence, then, the right to choose? The *Gonzalez-Lopez* majority openly admitted to having "formulated" it, while describing the right to choose as "the root meaning" of the Sixth Amendment right to

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283. *Id.* at 148–52 (2006), *aff'g* 399 F.3d 924, 933–34 (8th Cir. 2005); *see also* Holly, *supra* note 169, at 186 n.28, 187–88 (discussing federal circuit court decisions applying structural error analysis in right-to-choose cases).

284. *See supra* notes 44–48 and accompanying text.

285. *Gonzalez-Lopez*, 548 U.S. at 146–48, 149 n.4.

286. *Id.* at 145–47.

287. U.S. CONST. amend. VI.

288. *Assistance*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/assistance [https://perma.cc/GJT4-QNNP].

289. U.S. CONST. amend. VI.

290. *Cf.* Paul Alessio Mezzina, *Elevating Choice over Quality of Representation:* United States v. Gonzalez-Lopez, *126 S. Ct. 2557 (2006)*, 30 HARV. J.L. & PUB. POL'Y 451, 455–56, 461 (2006) (citing and distinguishing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 90 (1997), and noting that there is little argument that the "per se entitlement to appointed counsel . . . was not identified by the Court until some 150 years after the signing of the Constitution").

assistance of counsel.[291] The Court cited three cases and a history book to support this formulation.[292] Two of the cases, *Wheat* and an 1898 habeas case, *Andersen v. Treat*,[293] actually rejected the defendants' right-to-choose claims[294]—beautifully illustrating the "peculiar sacredness" of right-to-counsel doctrine.[295]

Moreover, deeper excavation of the right's history reveals a complex tangle of root meanings. In the founding era, free-market choice commingled with overt denigration of the poor[296] as well as with benevolence of some pro bono counsel and conscription of others to provide representation for indigent defendants.[297] Indeed, founding-era egalitarianism encompassed long-standing practices of appointing counsel for indigent criminal defendants, as well as proposals to socialize all legal services and create a federal Advocate General to defend the people as zealously as the Attorney General would prosecute.[298]

All that said, neither the Court's cursory originalism nor the tangled root meanings of the right to counsel undermine the Court's conclusion in *Gonzalez-Lopez*: the right to choose counsel is among those root meanings, and that violation of the right alters the "framework" of litigation.[299] As the *Luis* plurality acknowledged, the right of counsel

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291. *Gonzalez-Lopez*, 548 U.S. at 147–48, 147 n.3; *cf.* Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (Sixth Amendment right to counsel was "originally understood to protect *only* the right to hire counsel of choice") (emphasis added); *id*. at 1098 ("As understood in 1791, the Sixth Amendment protected a defendant's right to retain an attorney he could afford.").

292. *Gonzalez-Lopez*, 548 U.S. at 147–48, 147 n.3 (citing Wheat v. United States, 486 U.S. 153, 159 (1988), Powell v. Alabama, 287 U.S. 45, 53 (1932), Andersen v. Treat, 172 U.S. 24 (1898), and WILLIAM M. BEANEY, THE RIGHT TO COUNSEL IN AMERICAN COURTS 18–24, 27–33 (1955)).

293. 172 U.S. 24 (1898).

294. *Wheat*, 486 U.S. at 164; *Andersen*, 172 U.S. at 30–31.

295. Avery v. Alabama, 308 U.S. 444, 447 (1940) (rejecting defendant's right-to-counsel claim while proclaiming the right's "peculiar sacredness," and citing Lewis v. United States, 146 U.S. 370, 374–75 (1892)).

296. *See* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE 14–20 (1996); ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 7–21, 49–50 (2000).

297. *See* Betts v. Brady, 316 U.S. 455, 467 & n.20 (1942); Act of Apr. 30, 1790, ch. 9, § 29, 1 Stat. 112, 118; BEANEY, *supra* note 292, at 16–21.

298. *See* LAWRENCE FRIEDMAN, A HISTORY OF AMERICAN LAW 81 (1973) and CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 130–31, 212–23 (1911).

299. United States v. Gonzalez-Lopez, 548 U.S. 140, 150 (2006); *cf.* Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1097 (2016) (Thomas, J., concurring) (stating that the Sixth Amendment right to counsel was "originally understood to protect *only* the right to hire counsel of choice" (emphasis added)).

choice relates directly to "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust . . . ."[300] Counsel choice often affects pretrial investigation, discovery, and plea counseling as well as theory development, jury selection, presentation of evidence, closing argument, and sentencing advocacy.[301] Counsel choice also alters relationships between the defense and prosecutors, on one hand, and the defense and jurors, on the other.[302]

The *Gonzalez-Lopez* Court concluded that such systemic effects of attorney choice make it "impossible to know" how events would have unfolded had there been no violation of the right to choose.[303] Like the poet in the autumn wood, appellate judges can only highlight choice itself as making "all the difference."[304] Roads not taken lead to an "alternate universe" from which appellate judges are epistemologically and legally banned.[305] Indeed, the right of attorney choice is considered so crucial that at least one jurisdiction subjects alleged violations to immediate appeal.[306]

These procedural facts are remarkable. Criminal defendants rarely enjoy either the right of interlocutory appeal or the benefit of structural error review. Equally notable is the fact that Gonzalez-Lopez, like the defendants in *Wheat*, *Caplin*, and *Luis*, had ample means to hire counsel of choice. Indeed, Gonzalez-Lopez had not just one lawyer retained on his case, or two, but three.[307]

Nevertheless, after defining the "root meaning" of the Sixth Amendment right to counsel as choosing counsel, and after adding counsel choice to the tiny set of constitutional rights that are reversible for structural error, the majority added dicta that denied the same right to

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300. *Luis*, 136 S. Ct. at 1089.

301. *Gonzalez-Lopez*, 548 U.S. at 150.

302. *Id.* at 150–51. Notably, the *Gonzalez-Lopez* majority did not reiterate the grumpy statements in *Morris v. Slappy*, 461 U.S. 1, 14 (1983), that the Sixth Amendment does not entitle criminal defendants to a "meaningful relationship" with their attorneys. While the dissent did so, *Gonzalez-Lopez*, 548 U.S. at 154, the majority instead cited *Slappy*'s unremarkable holding that trial judges have discretion to consider scheduling matters when ruling on a defendant's motion to continue. *Id.* at 152 (citing *Slappy*, 461 U.S. at 11–12); *cf.* Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1107 (2014).

303. *Gonzalez-Lopez*, 548 U.S. at 150.

304. Robert Frost, *The Road Not Taken*, MOUNTAIN INTERVAL 9 (1916).

305. *Gonzalez-Lopez*, 548 U.S. at 150.

306. State v. Chambliss, 947 N.E.2d 651, 655 (Ohio 2011) (concluding that *Gonzalez-Lopez* abrogated the holding of *Flanagan v. United States*, 465 U.S. 259 (1984), that such rulings are not immediately appealable).

307. *Gonzalez-Lopez*, 548 U.S. at 142–43.

poor people.[308] The four dissenters threw in with the majority on this point.[309] No member of the Court disputed the statement that "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them."[310]

Thus, *Gonzalez-Lopez* continued the development of the Sixth Amendment's root meaning into the right of the individual, autonomous consumer to purchase services in the marketplace. Yet the dictum barring indigent defendants from attorney choice was not based on the sparse briefing in the case. The parties' written submissions were silent on the subject, with one exception. A single line at the end of the government's reply brief noted the "anomaly" of granting "defendants with means" the right to choose while denying the same right to the poor.[311]

The "no-choice" dictum in *Gonzalez-Lopez* was similarly unsupported by any meaningful exchange during oral argument. When the Chief Justice was told that indigents do not have the right to choose a lawyer, he asked, "Why not?"[312] Justice Kennedy then indicated that the core justification proffered for the right to choose—the vindication of personal autonomy—would apply to indigents as well as defendants with means to hire counsel.[313]

Gonzalez-Lopez's lawyer responded that the government has no duty to provide individuals with the means to effectuate their rights, citing the failure to distribute printing presses under the First Amendment.[314] He further argued that the right to choose is confined to "the [ten] percent, or whatever number" of defendants who can afford to hire counsel, and that class-based disparate enforcement is warranted by the interests of this "small . . . but . . . important universe of people" in exercising personal autonomy.[315]

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308. *Id.* at 147–48.

309. *See id.* at 152–62.

310. *Id.* at 151 (citing Wheat v. United States, 486 U.S. 153, 159 (1988)).

311. Reply Brief for the United States at 16, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352).

312. Transcript of Oral Argument at 33–34, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352).

313. *Id.* at 30–32; *cf.* Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1110 (2016) (Kennedy & Alito, JJ., dissenting) (questioning the majority's "constitutional command to treat a defendant accused of committing a lucrative crime differently than a defendant who is indigent from the outset").

314. Transcript of Oral Argument at 35, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352).

315. *Id.* at 35–36.

5. The Duty to Declare: Montejo v. Louisiana

Gonzalez-Lopez's vindication of personal autonomy and freedom of choice continues a theme from *Faretta.* Both of these cases reversed criminal convictions for structural error and did so out of similar "respect for the individual which is the lifeblood of the law."[316] The same constitutional interests in personal autonomy and freedom of choice played a prominent role in *Wheat* and *Caplin*. In those cases, dissenting justices emphasized that the majority opinions imposed restrictions on the right to choose counsel that improperly sacrificed personal autonomy in favor of government interests.[317] The plurality opinion in *Luis* framed similar concerns in terms of the significance under the Sixth Amendment of "the necessarily close working relationship between lawyer and client, the need for confidence, and the critical importance of trust."[318]

Close analysis of *Montejo v. Louisiana*[319] reveals a similar focus on core constitutional values of personal autonomy and choice. It is easy to miss this point and the strong support *Montejo* offers for an inclusive right of attorney choice that applies to all defendants. Indeed, *Montejo* echoes the "no-choice-for-the-poor" dicta from *Gonzalez-Lopez.*[320] Nevertheless, the Court's ruling in *Montejo* turns on the indigent defendant's capacity for exercising personal autonomy and choice with respect to appointment of counsel. Thus, the Court's own choice-championing reasoning again trumps discriminatory "no-choice" dicta.

Montejo arose in Louisiana, where the defendant was charged with murder.[321] Local rules required automatic appointment of counsel in such cases.[322] As Montejo's lawyer scrambled to meet his new client and discourage uncounseled communication about the case, law enforcement officers were already interrogating their suspect.[323] They did so after

316. Faretta v. California, 422 U.S. 806, 834 (1975) (quoting Illinois v. Allen, 397 U.S. 337, 350–51 (1970) (Brennan, J., concurring)).

317. Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 644–45 (1989) (Blackmun, Marshall, Brennan & Stevens, JJ., dissenting); Wheat v. United States, 486 U.S. 153, 165–66 (1988) (Marshall & Brennan, JJ., dissenting).

318. Luis v. United States, __ U.S. __, 136 S. Ct. 1083, 1089 (2016) (plurality opinion).

319. Montejo v. Louisiana, 556 U.S. 778 (2009).

320. *Id.* at 784 (citing United States v. Gonzalez-Lopez, 548 U.S. 140, 151 (2006)). Like all of the leading right-to-choose cases, *Montejo* involved a testy 5-4 division among the justices. *Id.* at 779.

321. *Id.* at 781–82.

322. *Id.*

323. *Id.*

obtaining Montejo's waiver of his right to consult with counsel before and during the interrogation.[324] The tactic paid off. The officers obtained incriminating information from Montejo, and the prosecutor used that evidence to win a capital murder conviction and death sentence.[325]

Montejo argued that admission of his uncounseled statements at trial was reversible error.[326] Many assumed that the issue was settled in Montejo's favor more than twenty years earlier. Under *Michigan v. Jackson*,[327] the prosecutor faced a rebuttable presumption that Montejo's waiver of appointed counsel was invalid and the uncounseled statements were therefore inadmissible. Instead of ruling accordingly, the 5-4 *Montejo* majority distinguished and then overruled *Jackson*.[328]

The reasoning offered to support this ruling also supports the indigent defendant's Sixth Amendment right to choose counsel. In distinguishing and overruling *Jackson*, the *Montejo* Court reasoned that, when Montejo was automatically appointed counsel, he did "*nothing at all* to express his intentions with respect to his Sixth Amendment rights" and therefore there was "[n]o reason . . . to assume that [he] . . . would not be perfectly amenable to speaking with the police without having counsel present."[329] The Court concluded that such amenability promoted "truth-seeking" and outweighed the "marginal benefits" of *Jackson*'s heightened Sixth Amendment protections.[330]

Montejo's relevance to the right-to-choose issue should now be clear. The Court imposed a duty upon defendants to declare their interest in protected Sixth Amendment attorney-client relationships in order to vindicate those protected interests fully—even when those relationships are created automatically as a matter of law.[331] The duty to declare and the correlative right to choose presume and promote the exercise of virtually identical capacities for personal autonomy and freedom of choice that permeate the Court's right-to-choose reasoning. It therefore makes good sense to pair *Montejo*'s imposition of a heightened duty to understand and actively vindicate one's own Sixth Amendment interests with an inclusive rule that grants all defendants constitutionally protected attorney choice.

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324. *Id.*

325. *Id.*

326. *Id.* at 782–83.

327. 475 U.S. 625, 630, 633 (1986).

328. *Montejo*, 556 U.S. at 799.

329. *Id.* at 789 (emphasis in original).

330. *Id.* at 793.

331. *Id*. at 799.

B. Due Process, Equal Protection, and the "No-Choice" Rule

The foregoing analysis of Supreme Court cases uncovered support for arguments favoring an inclusive right to attorney choice that the Court's "no-choice" dicta had previously masked. First, a closer look at *Faretta* indicates that granting indigent defendants the right to choose counsel is at least as likely to promote finality in case outcomes as the current rule, which forces indigent defendants to choose between unwanted counsel and no counsel at all. Second, *Slappy* and *Wheat* reduce administrative problems by cabining counsel choice to lawyers who are qualified, available, and conflict-free. Third, questions from the bench during the *Gonzalez-Lopez* argument and the reasoning of the opinions in *Luis* highlight the equal autonomy and liberty interests of indigents and those with means to hire lawyers, at least with respect to choice of counsel. Finally, the same autonomy and liberty interests underscore *Montejo*'s "pro-choice" logic, which requires that indigents exercise agency and actively assert their views regarding appointed counsel even when local procedures render such assertions superfluous.

These constitutionally relevant interests in the indigent defendant's autonomy and freedom of choice implicate two additional, intertwined constitutional doctrines that support vindication of the right to choose counsel for indigents as well as for those with means to hire lawyers. Those doctrines are due process and equal protection. As the Court made clear decades ago, "[b]oth equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'"[332]

That concern for equal treatment and basic fairness may help to explain why the Supreme Court has never adopted the "no-choice-for-the-poor" rule as a matter of law. As Professor Heather Gerken notes in a different context, "some opinions don't write."[333] This subsection uses two syllogisms to explain why a Supreme Court "no-choice" ruling won't write. The first syllogism establishes that the Sixth Amendment right to choose counsel is a fundamental right. The second establishes that wealth-based denial of this fundamental right violates due process and equal protection.

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332. Griffin v. Illinois, 351 U.S. 12, 17 (1956) (citation omitted); *see also* Tague, *supra* note 175; Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197, 1201 (2013).

333. Heather K. Gerken, *Slipping the* Bonds *of Federalism*, 128 HARV. L. REV. 85, 93 (2014).

First, the Sixth Amendment right to counsel is a fundamental right incorporated through the Due Process Clause of the Fourteenth Amendment.[334] The Court has further defined the "root meaning" of the Sixth Amendment right to counsel as the right to choose an attorney.[335] Therefore, the Sixth Amendment right to choose counsel should be considered a fundamental right.[336]

Second, the Court has subjected class-based, de jure discrimination that "might invade or restrain" fundamental rights to heightened review, reasoning that such discriminatory rules "must be closely scrutinized and carefully confined."[337] In doing so, the Court emphasized the importance of such close scrutiny when "[l]ines [are] drawn on the basis of wealth or property, [which] like those of race . . . are traditionally disfavored."[338] Applying that reasoning, the "no-choice" rule should receive close scrutiny. A heavy justificatory burden should rest on those who would continue to exclude poor people from exercising a fundamental right that is protected for those with means to hire counsel.

Indeed, a proponent of the "no-choice" rule would seem to have an insurmountable burden even under the lowest, rational-basis test. In key cases, the Court has struck down wealth-based rules that discriminate against criminal defendants. Those cases specifically reject wealth-based discrimination affecting the right to counsel, whether that right derives from the Sixth Amendment[339] or is an unenumerated right arising from local rules of appellate procedure.[340]

Moreover, under any level of scrutiny, the "no-choice" rule has been more reflexive than reasoned.[341] For purposes of due process and equal protection analysis, a defendant's indigency does not set him or her apart in any relevant way from defendants with means to hire attorneys. This is certainly true regarding the exercise of personal autonomy and choice that is protected by *Faretta*, *Gonzalez-Lopez*, and *Luis*, and that is required by *Montejo* to fully vindicate the right to counsel. It is also true

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334. Kimmelman v. Morrison, 477 U.S. 365, 374 (1986); Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

335. United States v. Gonzalez-Lopez, 548 U.S. 140, 147–48 n.3 (2006).

336. *See* Kaley v. United States, __ U.S. __, 134 S. Ct. 1090, 1103 (2014); *id.* at 1107 (Roberts, C.J., and Breyer & Sotomayor, JJ., dissenting).

337. Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966).

338. *Id.* at 668.

339. Gideon v. Wainwright, 372 U.S. 335, 343–45 (1963).

340. Douglas v. California, 372 U.S. 353, 354–58 (1963); Halbert v. Michigan, 545 U.S. 605, 609 (2005); *see also* Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) (striking down fee for transcript on appeal).

341. *See supra* section I.E.

regarding the exercise of collective wisdom and will that is nascent in an inclusive, democracy-enhancing right of counsel choice that is available to all defendants.[342]

Thus, a Supreme Court "no-choice" opinion won't write because the "no-choice" stance is the effective equivalent of the poll tax held unconstitutional in *Harper v. Virginia State Board of Elections*.[343] In both settings, a wealth-based rule excludes indigents from exercising a right on the same terms as those with the means to purchase entry. Just as "wealth or fee paying has . . . no relation to voting qualifications,"[344] such assets are irrelevant to exercising personal autonomy and choice, as well as collective wisdom and will, in the context of the Sixth Amendment right to counsel. Just as "the right to vote is too precious, too fundamental to be so burdened or conditioned,"[345] so, too, is the Sixth Amendment right to choose an attorney.

III. DISCRIMINATION'S DIVISIVENESS: A NEW LOOK AT LOWER COURT CASES

Part II revealed how the Supreme Court's "no-choice" dicta mask justifications for an inclusive right to counsel choice that are contained in the same cases. In combination with equal protection and due process doctrines disfavoring de jure wealth-based discrimination against criminal defendants, this analysis helps to explain new tension and divisions among state courts and lower federal courts over the "no-choice" rule. These new tensions and divisions open opportunities for reform through litigation and policy advocacy.

A. Tension in Wisconsin: State v. Jones

The case of Dwight Jones illustrates rising tension over the rule excluding indigent defendants from constitutionally-protected attorney choice. In the spring of 2005, Jones faced multiple charges arising from car thefts in a Milwaukee parking garage.[346] Like the majority of criminal defendants,[347] Jones had court-appointed counsel because he

342. *See supra* sections I.B–D.

343. 383 U.S. at 670.

344. *Id.*

345. *Id.*

346. State v. Jones, 797 N.W.2d 378, 382 (Wis. 2010).

347. *See* HARLOW, *supra* note 4.

could not afford to hire a lawyer.[348] Unfortunately, Jones was unhappy with his appointed lawyer and repeatedly requested a different attorney.[349]

Jones had an advantage over some indigent defendants because Wisconsin's rules allow indigents some freedom to seek substitute defense counsel.[350] Jones therefore asked for another lawyer, who was qualified and conflict-free, months before trial.[351] The state conceded that this request was timely; thus, it did not appear that substitution of counsel would have impeded the progress of the case or the court's schedule.[352]

If Jones had been among the minority of criminal defendants able to hire a lawyer, his timely request for a qualified, available, conflict-free attorney would have met the requirements for exercising his Sixth Amendment right to choose an attorney.[353] Denying the request would have been an abuse of discretion.[354] Any subsequent conviction or sentence would have to be vacated automatically under the structural error standard of review.[355]

Consequently, had Dwight Jones been able to pay his chosen lawyer, he would have satisfied the criteria for winning a new trial under *Gonzalez-Lopez* regardless of the strength of the prosecution's case against him. The Supreme Court issued *Gonzalez-Lopez* during the litigation of Jones' case.[356] He met the otherwise applicable criteria for exercising the Sixth Amendment right to choose (i.e., a timely request for a qualified, available, conflict-free lawyer). Nevertheless, because Jones required government-paid counsel, the trial judge required him to prove there was an irreconcilable conflict or total breakdown of communication with his assigned lawyer that would prevent an adequate defense.[357] Finding no such conflict or breakdown, the court denied the motion for new counsel.[358]

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348. *Jones*, 797 N.W.2d at 382.

349. *Id.* at 383–85.

350. *Id.* at 391–92 n.14 (citing WIS. ADMIN. CODE PD § 2.04 (2016)).

351. *Id.* at 383.

352. *Id.* at 390.

353. *See* United States v. Gonzalez-Lopez, 548 U.S. 140, 146–48 (2006) (unwarranted judicial interference with criminal defendant's right to choose retained counsel is structural error).

354. *See id.* at 148.

355. *Id.* at 146–48.

356. *See id.*; *Jones*, 797 N.W.2d at 382–83.

357. *Jones*, 797 N.W.2d at 390–91.

358. *Id.*

Nor did the appellate courts vacate Jones's subsequent convictions for structural error.[359] Instead, he had to meet the far more onerous ineffective assistance test of *Strickland v. Washington*.[360] That is, he had to prove that his lawyer engaged in unreasonable acts or omissions according to prevailing professional standards, as well as a reasonable probability that those failures altered the case outcome.[361]

Three decades of case law and commentary document *Strickland*'s shortcomings.[362] While this Article does not summarize that literature, it suffices to say that courts have found no reversible error due to the poor performance of sleeping lawyers,[363] habitually drunken lawyers,[364] and lawyers who (although awake and apparently sober) fail to investigate and present readily available evidence of actual innocence in capital murder cases.[365] It was therefore unsurprising that Jones could not satisfy *Strickland* and, as a result, that his convictions were affirmed.[366]

The Wisconsin Supreme Court acknowledged that the Sixth Amendment's "root meaning" was meaningless for Jones solely because he was too poor to hire a lawyer.[367] To justify the outcome, the court invoked U.S. Supreme Court dicta that the poor have no right to choose an attorney.[368] A concurring opinion of two justices, including Wisconsin's then-Chief Justice, noted that such wealth-based discrimination in the vindication of a fundamental constitutional right raised equal protection concerns.[369]

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359. *Id.* at 394–95.

360. *Id.* at 381 (citing United States v. Mutuc, 349 F.3d 930, 934 (7th Cir. 2003) (citing Strickland v. Washington, 466 U.S. 664, 688 (1984))).

361. *Strickland*, 466 U.S. at 688.

362. *See, e.g.*, JUSTICE DENIED, *supra* note 63, at 50.

363. *See* Muniz v. Smith, 647 F.3d 619, 623–25 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1575 (2012) (discussing "sleeping [lawyer]" cases).

364. Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000), *cert. denied*, 533 U.S. 960 (2001) (affirming death sentence although "troubled" at capital defense attorney's admitted "decades-long routine" of drinking "twelve ounces of rum" each night during trial); *see also* Ronald J. Tabak, *Why an Independent Appointing Authority is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1112–13 (2003).

365. *See, e.g.*, Scanlon v. Harkleroad, 740 F. Supp. 2d 706, 728–30 (M.D.N.C. 2010), *aff'd per curiam*, 467 F. App'x 164 (4th Cir. 2012), *cert. denied*, 133 S. Ct. 164 (2012) (finding trial counsel ineffective in guilt/innocence phase, but denying defendant new trial). The author represented Petitioner Donald Scanlon in state and federal appellate and post-conviction challenges to his convictions and death sentence. *Scanlon*, 740 F. Supp. 2d at 708.

366. State v. Jones, 797 N.W.2d 378, 394–95 (Wis. 2010).

367. *Id.* at 393–94; *id.* at 398 (Bradley, J., & Abrahamson, C.J., concurring).

368. *Id.* at 391. *But see supra* section II.A (explaining that the Supreme Court's "no-choice" statements are dicta).

369. *Jones*, 797 N.W.2d at 395–98 (Bradley, J., & Abrahamson, C.J., concurring).

That concern echoes those raised by Chief Justice Roberts and Justice Kennedy.[370] As discussed in section II.B, the Supreme Court has rejected schemes that discriminate against poor people in the exercise of fundamental constitutional rights related to court access and criminal process. However, instead of relying on that line of cases, the *Jones* concurrence proposed a different solution. The opinion suggested that courts should level down by applying the rigorous *Strickland* ineffective assistance test to rich and poor alike when the Sixth Amendment right to choose is at issue.[371]

The *Jones* concurrence marks new tension over the constitutionality of the "no-choice" rule. Nevertheless, it does not appear that Jones's lawyer sought review in the U.S. Supreme Court. To the contrary, her state court pleadings denied that Jones sought to *choose* a particular attorney under *Gonzalez-Lopez*.[372] Instead, she argued, he merely sought to *reject* appointed counsel under *Faretta v. California*—albeit serially, as necessary to accomplish his goals.[373]

That argument was not unreasonable. After all, the *Faretta* right to refuse trial counsel, although subject to vociferous criticism, is well-established as a fundamental right.[374] Moreover, as discussed in section II.A, the Supreme Court itself has mistakenly cited its own "no-choice" dicta as rulings.[375] Finally, while the Court's "no-choice" statements are dicta, they reflect the majority rule among lower courts.[376] Any of these reasons might have informed the reframing of Jones's right-to-choose claim as a serial right-to-reject claim. Nevertheless, closer examination of lower court cases shows that *Jones* embodies new tensions over the "no-choice" rule that are deepening into jurisdictional divides.

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370. *See supra* notes 312–13 and accompanying text.

371. *Jones*, 797 N.W.2d at 398 (Bradley, J., & Abrahamson, C.J., concurring).

372. Brief and Appendix of Defendant-Appellant-Petitioner at 21–22, State v. Jones, 797 N.W.2d 378 (Wis. 2010) (No. 2008AP002342-CR).

373. Reply Brief of Defendant-Appellant-Petitioner at 1–3, State v. Jones, 797 N.W.2d 378 (Wis. 2010) (No. 2008AP002342-CR) (citing Faretta v. California, 422 U.S. 806, 836 (1975)); *see supra* section II.A.1 (discussing the role of *Faretta* in the Supreme Court's right-to-choose doctrine).

374. *See* Martinez v. Court of Appeal of Cal., Fourth Appellate Dist., 528 U.S. 152, 162 (2000).

375. *See supra* section II.A.

376. Holly, *supra* note 169, at 198–99. *But see* Rodriguez v. Chandler, 382 F.3d 670, 674–75 (7th Cir. 2004), *cert. denied*, 161 L. Ed. 2d 124 (2005) (acknowledging but declining to apply majority rule of structural error review to right-to-choose claim raised on habeas).

B. Jurisdictional Divides

Close study of the case law reveals jurisdictional divides over a specific application of the "no-choice" rule. The issue arises when defendants hire counsel, but for financial reasons eventually must proceed with government-paid lawyers. A few defendants have cited their Sixth Amendment right to choose in seeking to replace retained counsel with appointed counsel.[377] When trial judges deny those requests, state appellate courts tend to apply the same abuse of discretion and structural error analyses that benefit defendants with means to hire counsel.[378]

In contrast, the majority of the federal circuit courts reject such appeals, reasoning that the defendants are merely seeking public services and not exercising a federal constitutional right to hire counsel on the private market.[379] Those rulings leave defendants in the same fix as any indigent trying to replace one public defender with another.[380] They lack the Sixth Amendment right to choose that is enjoyed by those with means to retain counsel.[381] They must meet the more onerous cause-and-prejudice test applied by the Wisconsin Supreme Court in *Jones*. They do not benefit from the more generous abuse of discretion and structural error analyses enjoyed by those who can hire counsel.

The following chart illustrates points of uniformity and division among jurisdictions. The chart categorizes the various rules that courts apply depending on whether the defendant seeks to hire a new lawyer (whether the prior lawyer was retained or appointed), to obtain

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377. *See, e.g.*, People v. Ortiz, 800 P.2d 547, 555–56 (Cal. 1990); People v. Munsey, 232 P.3d 113, 126–27 (Colo. App. 2009); People v. Abernathy, 926 N.E.2d 435, 444 (Ill. App. Ct. 2010); Dixon v. Owens, 865 P.2d 1250 (Okla. Crim. App. 1993); State v. Barber, 206 P.3d 1223, 1235–36 (Utah Ct. App. 2009).

378. *See, e.g.*, *Ortiz*, 800 P.2d at 555–56; *Munsey*, 232 P.3d at 126–27; *Abernathy*, 926 N.E.2d at 444; *Owens*, 865 P.2d 1250; *Barber*, 206 P.3d at 1235–36.

379. *See* United States v. Hagen, 468 F. App'x 373, 385 (4th Cir. 2012).

380. *Id.* at 383–84 (requiring defendant to show cause for substitution); United States v. Mota-Santana, 391 F.3d 42, 47 (1st Cir. 2004).

381. The typical three-part balancing test requires weighing the motion's timeliness, the scope of the trial court's inquiry into the reason for the motion, and the defendant's showing of good cause for the substitution. *See, e.g.*, United States v. Rivera-Corona, 618 F.3d 976, 984 (9th Cir. 2010) (Fisher, J., concurring) (discussing Ninth Circuit standard); United States v. Van Anh, 523 F.3d 43, 48 n.3 (1st Cir. 2008) (applying standard); United States v. Iles, 906 F.2d 1122, 1130–31 (6th Cir. 1990) (discussing same standard in other circuits); Drumgo v. Superior Court of Marin Cty., 506 P.2d 1007, 1010 (Cal. 1973) (denying relief for indigent defendant who sought new public defender); State v. Jones, 797 N.W.2d 378, 393–94 (Wis. 2010) (same).

appointed counsel as a replacement for retained counsel, or to substitute one appointed lawyer for another:

Substitution Type	Cause Required		Structural Error	
	States	Circuits	States	Circuits
Retained - Retained			✓	✓
Appointed - Retained			✓	✓
Retained- Appointed		✓	✓	
Appointed - Appointed	✓	✓		

The top two rows show that courts routinely apply the most generous standard to the minority of defendants with means to hire counsel. Those defendants need not show cause for hiring a qualified, available, conflict-free lawyer to replace current counsel, regardless of whether the original attorney was retained or appointed. Denial of such motions is considered an abuse of discretion. Subsequent convictions are reversed automatically as structural error.[382]

The bottom row shows that courts routinely hold poor people to the most demanding standard. The majority of defendants who cannot afford to hire counsel must show cause to substitute one appointed lawyer for another. Showing cause is a high hurdle for many litigants, requiring an irreconcilable conflict, total breakdown of communication, or comparable difficulty. Even if defendants can meet that test, they cannot reverse a subsequent conviction without proving that the wrongful denial of the substitution motion resulted in constitutionally ineffective assistance under *Strickland*.[383]

The row marked with a bold outline illustrates the division between the states and federal courts in cases involving retained-to-appointed substitutions. State courts that have considered the issue apply the more generous abuse of discretion and structural error standards of review when trial judges refuse to allow defendants to substitute qualified,

382. *See, e.g.*, Bradley v. Henry, 510 F.3d 1093, 1100–04 (9th Cir. 2007), *modified and rehearing denied*, 518 F.3d 657 (9th Cir. 2008).

383. *See supra* section III.A.

available, conflict-free appointed counsel for retained counsel.[384] In contrast, federal courts have applied the more demanding cause-and-prejudice test.[385]

Still deeper analysis of the federal cases reveals new tension over the "no-choice" rule in the retained-to-appointed substitution context as well. Like the concurring justices in Dwight Jones's Wisconsin Supreme Court decision, some federal judges are indicating concern (or at least bemusement) about the class-based discrimination embedded in the "no-choice" rule.[386] Panels from the Fifth and Ninth Circuits made initial steps toward leveling the constitutional playing field—steps that they promptly retracted.[387]

In *United States v. Mason*,[388] the defendant claimed that the trial court violated his Sixth Amendment right to choose by denying his motion to substitute a government-paid lawyer for his retained counsel before the sentencing proceedings.[389] The defendant had run out of money litigating the case and felt that the hired attorney was skimping on his efforts in an attempt to cut his losses.[390]

By a 2-1 vote, the appellate panel initially ruled for the defendant and ordered a new sentencing hearing under the *Gonzalez-Lopez* structural error standard.[391] The majority found

> no basis in precedent or principle for extending the right [to choose] to defendants who seek to replace retained counsel with new retained counsel but not to financially eligible defendants who seek to replace retained counsel with court-appointed counsel.[392]

Noting a circuit split on the issue, the panel aligned itself with the Ninth Circuit's more forgiving standard.[393] That alignment lasted about

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384. *See supra* note 378.

385. *See supra* note 379.

386. *See* United States v. Mason, 668 F.3d 203, 214 (5th Cir. 2012), *withdrawn and opinion substituted*, 480 F. App'x 329 (5th Cir. 2012); United States v. Rivera-Corona, 618 F.3d 976, 979–81 (9th Cir. 2010).

387. *Mason*, 668 F.3d. 203, 214; *Mason*, 480 F. App'x 329; *Rivera-Corona*, 618 F.3d at 979–81.

388. 668 F.3d at 214.

389. *Id.* at 206.

390. *Id.* at 207–08.

391. *Id.* at 215–16.

392. *Id.* at 215 n.8.

393. *Id.* at 214–15 (citing United States v. Rivera-Corona, 618 F.3d 976, 979–81 (9th Cir. 2010) (applying a "qualified" right to choose in the retained-appointed substitution context); United States v. Mota-Santana, 391 F.3d 42, 45–47 (1st Cir. 2004) (reaching the opposite conclusion)).

six months.[394] The *Mason* panel then retracted its constitutional holding, and by another 2-1 vote ordered the same relief based on the trial court's violation of the defendant's statutory right to appointed counsel.[395]

The Ninth Circuit decision referenced in *Mason* made a similar move. Two judges on the panel cited a prior opinion as "unequivocally" holding that retained-to-appointed substitution motions "implicated the qualified right to choice of counsel[,]" but with the concurring judge demurring on that point, ultimately ordered relief on statutory grounds.[396]

These new tensions over the "no-choice" rule reflect unease with the unconstitutional wealth-based discrimination that infects the doctrine. These tensions also open the "no-choice" rule to renewed challenges from reform advocates. To that end, Part IV offers some practical strategies for making attorney choice meaningful for all defendants.

IV. STRATEGIES FOR IMPLEMENTATION

The elevation of the Sixth Amendment right to choose an attorney into the structural error pantheon has drawn relatively little attention. The implications of that move for improving the meaning and enforceability of the right to counsel, and in turn for broader criminal justice reform, depend in part on whether the right to choose remains exclusively in the hands of the relatively few defendants who can afford to hire counsel. This Part discusses some practical problems and responsive strategies related to implementing an inclusive right of counsel choice for all defendants.

In keeping with precedent defining and limiting the right to choose, an inclusive counsel-choice rule would mean that all defendants have the right to choose a lawyer who is qualified, available, and free from conflicts of interest. As discussed in Sections I.A and II.A, those court-imposed restrictions on the right to choose answer major practical objections to an inclusive right to counsel choice that applies to all defendants. Those court-imposed restrictions do so in part by allowing judges to prioritize efficient resolution of cases and court dockets. No defendant has the right to choose a lawyer whom the court properly

394. *See Mason*, 480 F. App'x at 335.

395. *Id.*

396. *Rivera-Corona*, 618 F.3d at 979–81 (citing Bland v. Cal. Dep't of Corr., 20 F.3d 1469 (9th Cir. 1994)).

deems to be unqualified, unavailable, or tainted by a conflict of interest.[397]

Moreover, criminal legal systems have already operationalized processes for matching defendants with attorneys.[398] An inclusive right of counsel choice simply puts that machinery into the hands of the people who have the strongest interest in securing quality representation. Those are the people who face criminal charges, a disproportionate number of whom are poor people and people of color.

It also is important to note that, on the Richter scale of disruptions to indigent defense service systems, a Supreme Court decision constitutionalizing counsel choice for all defendants would be orders of magnitude below rulings that imposed unfunded mandates. Examples of such seismic shifts include *Argersinger v. Hamlin*,[399] which requires state-supported representation for misdemeanor charges that could result in jail time,[400] and *Padilla v. Kentucky*,[401] which demands that already overloaded and overworked defenders counsel clients on the immigration consequences of convictions.[402]

In addition, as discussed in Part I, an inclusive right to choose can force greater transparency and accountability from defender systems. Currently, a significant information deficit regarding attorney performance in the United States undermines capacities for informed choice of counsel.[403] It is unclear whether this information deficit is more or less significant in the civil or the criminal setting, or whether in the criminal setting there are different types and levels of information available regarding public defenders versus private defense counsel. It is clear, however, that the information deficit extends beyond clients seeking service.

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397. *See supra* sections I.A and II.A.

398. Lefstein, *supra* note 90, at 873; *see also* Schulhofer, *supra* note 91, at 547.

399. 407 U.S. 25 (1972).

400. *Id.*; *see also* ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009), https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=20808 [https://perma.cc/5ZG3-WWEF] (discussing system overload); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) (same).

401. 559 U.S. 356 (2010).

402. *Padilla*, 559 U.S. 356; *see also* Andres Benach, Sejal Zota & Maria Navarro, *How Much to Advise: What Are the Requirements of* Padilla v. Kentucky, American Bar Association Section on Litigation Annual Conference (May 24–26 2013), http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/18_world_after_padilla_v_kentucky.authcheckdam.pdf [https://perma.cc/FV89-6VUE] (discussing practitioner "panic" over concerns that "advising on immigration consequences will be an overwhelming burden in an already complex job").

403. *See supra* section I.D.1.

For example, a recent U.S. Department of Justice survey revealed that more than forty percent of responding public defenders admitted their lack of even moderate familiarity with the American Bar Association's *Ten Principles of a Public Defense Delivery System*,[404] which has been cited as an "essential guidepost" for evaluating system effectiveness.[405] In addition, for most jurisdictions, data on the existence and enforcement of standards for attorney qualifications, training, workload, and performance are difficult to obtain.[406] The information deficit includes data on the resources necessary to fulfill counsel's basic duties to communicate, investigate, and litigate.[407] In addition, client-rights information protocols are rare, and solicitation of client feedback is almost nonexistent.[408]

It also must be conceded that even the British indigent defense system, which Dean Lefstein cites as a successful attorney-choice regime,[409] has been rocked by debates over a lack of transparency and accountability, generally poor service quality, and inattentiveness to the client's perspective on those issues.[410] As a result, and over considerable resistance, a detailed peer-review protocol was introduced while contracts for service were increasingly channeled toward government-paid attorneys competing with private solo practitioners and small firms.[411] The Ministry of Justice even proposed eliminating attorney choice for indigent defendants as barristers staged protests against fee cuts and increased regulation.[412]

A robust right of counsel choice for indigent defendants also has implications for the internal culture of public defense systems.[413] Culture

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404. U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE ASSISTANCE ET AL., *Survey: Adherence of Public Defense Providers to ABA Ten Principles* (Sept. 2014), http://www.american.edu/spa/jpo/gideon/upload/Gideon-Issues-Paper-1.pdf [https://perma.cc/UE6R-AKC6].

405. Holder, Keynote Address, *supra* note 94.

406. *See supra* section I.D.1.

407. *See supra* section I.D.1.

408. *Supra* section I.D.1.; *see also* Campbell et al., *supra* note 119, at 751–54 (discussing limited research on client perceptions).

409. Lefstein, *supra* note 90, at 861, 893–900.

410. National Audit Office, *Report by the Comptroller and Auditor General*: *The Procurement of Criminal Legal Aid in England and Wales by the Legal Services Commission* 6–9 (Nov. 27, 2009).

411. *See QASA: Quality Assurance Scheme for Advocates: Criminal Advocacy Evaluation Form* and *QASA FAQs* (on file with the author).

412. Owen Bowcott, *Criminal Barristers Announce Half-Day Refusal to Work in Legal Aid Protest*, GUARDIAN (Dec. 3, 2013), http://www.theguardian.com/law/2013/dec/03/criminal-barristers-action-legal-aid-cuts?INTCMP=ILCNETTXT3487[https://perma.cc/LW9M-R423].

413. I thank Eve Brensike Primus for raising this concern.

change in this context is notoriously difficult.[414] Lawyers and offices may resist demands for increased transparency and accountability that accompany an expanded right to choose counsel. On the other hand, expanded choice in many settings will often merely highlight information about attorney performance, or perceptions of attorney performance, that is already embedded in local culture and consciousness. Thus, much will turn on whether lawyers and managers use that increased transparency to demean and denigrate one another or to encourage improved performance through strength-based evaluation and training programs.[415]

All of these problems indicate that inclusive choice, standing alone, is no panacea for the structural ills that beset indigent defense systems. The counsel-choice experiment in Comal County, Texas,[416] illustrates a key aspect of the problem. Attorney reimbursements for felony guilty pleas are fee-capped at $650 in that county.[417] This is so despite the state's own workload study, which showed that completing the necessary tasks before entering guilty pleas in high-level felony cases should take between nineteen and twenty-six hours.[418]

Thus, lawyers who participate in the Comal counsel-choice program can anticipate reimbursement rates ranging from $19 to $34 per hour. Those rates are among the lowest in the nation,[419] and could not even cover "the basic costs of keeping a law practice open in Mississippi in 1990."[420] Absent significant supplementation through judicial discretion, conscription, or voluntarism, such fee rates are unlikely to support a

414. *See* Eve Brensike Primus, *Culture as a Structural Problem in Indigent Defense*, 100 MINN. L. REV. 1769 (2016); Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-Based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 163–64 (2009).

415. *See* Rapping, *supra* note 414, at 173–80.

416. *See* Schulhofer, *supra* note 91.

417. The Hon. R. Bruce Boyer et al., Order Adopting Local Rules for Appointment of Counsel in Criminal Cases and Schedule of Fees for Payment of Compensation to Appointed Counsel (Oct. 22, 2013), http://tidc.tamu.edu/IDPlanDocuments/Comal/Comal%20District%20Court%20Attorney%20Fee%20Schedule.pdf [https://perma.cc/2TDS-J6AZ].

418. Dottie Carmichael et al., *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission*, TEX. INDIGENT DEF. COMM'N, App. I-1 (2015), http://www.tidc.texas.gov/media/31818/150122_weightedcl_final.pdf [https://perma.cc/NYQ6-A7PL].

419. John P. Gross, *Gideon at 50: A Three-Part Examination of Indigent Defense in America*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS 12–14 (2013), https://www.nacdl.org/gideonat50/ [https://perma.cc/EV5G-V9J9].

420. SIXTH AMENDMENT CTR., *Justice Shortchanged: Assigned Counsel Compensation in Wisconsin* 2 (2015), http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wijusticeshortchanged_2015.pdf [https://perma.cc/9NYF-MCXH].

counsel-choice program that has both consistently high service quality and long-term viability.

Responding in detail to such problems is beyond the scope of this Article. Indeed, the argument presented in this Article assumes that significant increases in support for indigent defense are improbable. Nevertheless, some innovative strategies are available that can help promote informed, meaningful attorney choice for all defendants. By integrating broad attorney choice with data collection and grassroots organizing in a participatory defense model, these strategies are further examples of a democracy-enhancing theory in action.

To that end, a model system for inclusive, meaningful attorney choice should meet three criteria. First, choice should be informed by relevant data on jurisdictional compliance with best-practice standards for indigent defense system structure and attorney qualification, training, performance, and workloads. Second, attorney choice should include all qualified lawyers. Every attorney should have a duty to accept cases for which she is qualified, pursuant to best-practice standards, without regard to client income, in some measure that is related to the percentage of practice devoted to criminal defense, unless and until attorney workload and investigative resources reach limits established by best-practice standards.[421] Third, judges should follow the lead of the Missouri and Florida court systems by working toward dismissal of cases that exceed workload and resource limits, in reverse-triage order beginning with minor misdemeanors.[422]

The latter two criteria are likely to spark controversy. Comprehensive discussion of possible objections is beyond the scope of this paper. Before turning to the less controversial matter of improved data access, however, it is important to note that conscripting qualified private counsel does more than reinvigorate a constitutional root meaning,[423] and reverse triage does more than clear dockets.

To be sure, some lawyers who are qualified to handle particular cases will respond to conscription by exiting the field or reducing quality of service. On the other hand, pressing more qualified private lawyers into

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421. For citations to comparable scholarly arguments and proposed alternatives, *see, e.g.*, Judith L. Maute, *Changing Conceptions of Lawyers' Pro Bono Responsibilities: From Chance Noblesse Oblige to Stated Expectations*, 77 TUL. L. REV. 91, 92–93 n.2, 155–57 (2002).

422. *See* Moore et al., *supra* note 64, at 1303–09 (discussing Public Defender v. Florida, 115 So. 3d 261 (Fla. 2013) and Pub. Def. Comm'n v. Waters, 370 S.W.3d 592 (Mo. 2012)); BORUCHOWITZ ET AL., *supra* note 400, at 7 (arguing that the "explosive growth" of misdemeanor cases results in underrepresented misdemeanants and high tax costs).

423. *See supra* notes 272–77 and accompanying text (discussing Luis v. United States, __ U.S. __, 136 S. Ct. 1083 (2016)).

indigent defense service will also motivate more attorneys to challenge resource deficits through policy advocacy and litigation.[424] Indeed, such challenges are occurring across the country, including in Louisiana, whose fee-funded system is in a state of near-collapse.[425] Where such challenges have met with success, defenders and their allies built rich factual records that document the degradation of the defense function into a mouthpiece for the prosecutor's charging and plea decisions.[426]

But these cases also raise a number of difficult questions. They require prosecutors, defenders, and trial judges to cooperate in winnowing the defense workload down to a manageable burden. How are these stakeholders to negotiate separation of powers doctrine and other concerns that affect charging, plea, and diversion decisions? How will speedy trial rights be protected? Will already-overextended lawyers be called upon to fill the breach?[427]

These are serious questions. Their answers will be shaped through the continued effort of dedicated reform advocates. As argued elsewhere,[428] one effective strategy is for defenders to embrace their strongest allies in the struggle for high-quality services: informed, proactive clientele. Indigent defendants who fully understand their rights and lawyers' corresponding duties are in a better position to support defense demands for the time and resources necessary to fulfill those duties.

Optimal information protocols include client-rights information forms and feedback surveys.[429] Recent empirical research in Hamilton County, Ohio points to the feasibility of both protocols.[430] Indigent defendants can receive a concise statement of basic components of defense

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424. *See* Simmons v. State Public Defender, 791 N.W.2d 69, 89 (Iowa 2010) (rejecting hard fee cap as unenforceable due to its "chilling effect" on the right to counsel); *id.* at 79–82 (discussing alternate theories sounding contractual equity, due process-takings doctrine, and separation of powers); *cf.* ABA CRIM. JUSTICE STANDARDS COMM., ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES 5-1.2(b) (3d ed.) (1992) (recommending "the active and substantial participation of the private bar[]" in all indigent defense systems); *see also* TEN PRINCIPLES, *supra* note 93 ("Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.").

425. Campbell Robertson, *In Louisiana, the Poor Lack Legal Defense*, N.Y. TIMES (Mar. 19, 2016), http://www.nytimes.com/2016/03/20/us/in-louisiana-the-poor-lack-legal-defense.html?_r=0 [https://perma.cc/4QBR-5FCX]; David Carroll, *Louisiana's Right to Counsel Problems Explained*, SIXTH AMENDMENT CTR. (Apr. 4, 2016), http://sixthamendment.org/louisianas-right-to-counsel-problems-explained/ [https://perma.cc/WNM4-XR8G].

426. *See, e.g.*, Wilbur v. City of Mount Vernon, 989 F. Supp. 2d 1122 (W.D. Wash. 2013).

427. *See* Moore et al., *supra* note 64, at 1307–09.

428. *Id.*; *see also* Campbell et al., *supra* note 119.

429. *See* Moore et al., *supra* note 64, at 1309–15.

430. Campbell et al., *supra* note 119.

representation, such as communication and investigation, to which they have constitutional and regulatory rights.[431] Client feedback surveys have documented the high priority defendants gave to their relationships and communication with attorneys.[432] The same empirical evidence, including data from focus group interviews revealing the serious thought and consideration that indigent defendants give to these issues, tends to rebut paternalistic assumptions that poor people charged with crimes lack the same capacities for self-governance as those who have the means to hire counsel.[433]

To exercise those capacities more fully, defendants can benefit from new strategies for data collection and assessment pioneered by the Texas Indigent Defense Commission (TIDC) and the North Carolina Systems Evaluation Project (NCSEP). TIDC is developing data dashboards that reveal, for example, local attorney caseloads and reimbursement rates.[434] NCSEP is one of the most advanced national efforts to define and implement key performance indicators for high-quality defense service.[435] Examples include core duties to communicate and investigate. Implementation is underway in several pilot sites. Goals include increased transparency, accountability, and service quality.[436]

Unfortunately, data have limited utility, at least with respect to sustainable system reform, absent a robust reform-oriented politics. Therefore, another important strategy for promoting meaningful choice of counsel for all defendants involves grassroots community organizing. A promising example is the participatory defense model pioneered by Silicon Valley DeBug, a small nonprofit in San Jose, California. The model trains defendants, their families, and their communities on the rights and duties embodied in the defendant-defender relationship.[437]

Participants improve case outcomes by using that training to support counsel with case investigation and sentencing advocacy.[438] Evidence of the model's success include a recent celebration of more than 2,500

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431. Moore et al., *supra* note 64, at 1309–15.

432. Campbell et al., *supra* note 119.

433. *Id.*

434. *See* TEX. INDIGENT DEF. COMM'N, *Texas Indigent Defense Data*, http://tidc.tamu.edu/public.net/default.aspx [https://perma.cc/G9PL-PDTW].

435. *See* N.C. OFFICE OF INDIGENT DEF. SERVS., *The North Carolina Systems Evaluation Project*, http://www.ncids.org/Systems%20Evaluation%20Project/SEP%20HomePage.html?c=Research%20%20and%20%20Reports,%20Systems%20Evaluation%20Project [https://perma.cc/F4PE-67SU].

436. *Id.*

437. *See* Moore et al., *supra* note 64, at 1281–91.

438. *Id.*

years transformed from potential time served to "time saved" for individual defendants through community involvement in their cases.[439] Participants also use the training to drive broader system change through classic organizing techniques such as public protest and policy advocacy. Examples of success include the provision of counsel previously unavailable at key process points such as misdemeanor arraignment.[440] Thus, the participatory defense movement provides additional evidence to rebut paternalistic assumptions about the inability of poor people and people of color to exercise self-governance in the context of public defense services.

To be sure, even augmented with these and other innovative strategies, an inclusive right to counsel choice is no cure-all for the myriad of complex, institutionalized, and interlocking factors that contribute to hyperincarceration and all its costs, which include the declining legitimacy of criminal legal systems. Nevertheless, these strategies do offer practical ways to promote meaningful attorney choice for all defendants. While an inclusive right to choose counsel can make no more than an incremental contribution to the struggle for criminal justice reform, it is a contribution worth making.

CONCLUSION

The Supreme Court should include poor people in the Sixth Amendment right to choose counsel. Inclusive choice can force greater transparency and accountability from defenders and defense systems. More people exercising more informed choice should increase pressure to improve representation. Those improvements should trickle up to raise the Court's abysmal constitutional standards for attorney performance. Better defense representation can also help to counterbalance the concentrated government power that transforms criminal legal systems into plea mills and debtor prisons. That recalibration may shore up diminishing cognate rights, such as rights to discovery and to jury trial. Thus, in the aggregate and over the long term, inclusive counsel choice can be a mode of grassroots lawmaking that reshapes the meaning of core constitutional guarantees and strengthens

439. *Id.* at 1287. The movement subsequently updated that number and celebrated 2,570 years of time saved. ALBERT COBARRUBIAS JUSTICE PROJECT, *2,570 Years of Time Saved from Incarceration! (End of 2015 Total)* (Dec. 29, 2015), http://acjusticeproject.org/2015/12/29/2570-years-of-time-saved-from-incarceration-end-of-2015-total/ [https://perma.cc/M32V-UKZ8].

440. Moore et al., *supra* note 64, at 1288.

system quality, fairness, and legitimacy to the point that the term "criminal justice" is neither oxymoronic nor utopian.