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RETHINKING THE SIXTH AMENDMENT FOR THE INDIGENT CRIMINAL DEFENDANT: DO REIMBURSEMENT STATUTES SUPPORT RECOGNITION OF A RIGHT TO COUNSEL OF CHOICE FOR THE INDIGENT?*

Wayne D. Holly[†]

The survival of our system of criminal justice and the values which it advances depends upon a constant, searching, and creative questioning of official decisions and assertions of authority at all stages of the process.¹

INTRODUCTION

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."² In *Gideon v. Wainwright*, this Sixth Amendment right was extended to state criminal defendants through the Due Process Clause of the Fourteenth Amendment.³ Within certain limitations, primarily de-

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¹ 1963 ATT'Y GEN. ANN. REP. 10-11. (Report of Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice).

² U.S. CONST. amend. VI. Unless otherwise noted, the "right to counsel" referred to throughout this Article is that right guaranteed by the Sixth Amendment as opposed to the nonconstitutional *Miranda* right associated with the Fifth Amendment. See *Edwards v. Arizona*, 451 U.S. 477 (1981); *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ 372 U.S. 335 (1963); see U.S. CONST. amend. XIV. The Sixth Amendment was

signed to preserve judicial integrity and efficiency,⁴ criminal defendants with sufficient resources have a constitutionally protected right to retain counsel of their own choosing.⁵ The right of an accused to retain counsel of his choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding."⁶ That right of choice, however, does not extend to the indigent. Indeed, the familiar adage that "beggars can't be choosers" has uniformly been incorporated into Sixth Amendment jurisprudence. Thus, it has been regularly held that while an indigent accused is assured an attorney, he is not entitled to the attorney whom he prefers.⁷ This rule may superficial-

held to require counsel in all federal criminal proceedings twenty-five years before *Gideon* was decided. See *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Criminal Justice Act of 1964 provides that an indigent charged with a federal crime may obtain representation from a court-appointed attorney. 18 U.S.C. § 3006A (1994); see also FED. R. CRIM. P. 44(a) (providing that indigent defendant is entitled to appointed counsel from initial appearance through first appeal).

⁴ See *infra* Part II.B.

⁵ See *infra* Part II.

⁶ *Flanagan v. United States*, 465 U.S. 259, 268 (1984).

⁷ *Miller v. Smith*, 115 F.3d 1136, 1143 (4th Cir. 1997) ("[A]n indigent criminal defendant has no constitutional right to have a particular lawyer represent him."); *United States v. Graham*, 91 F.3d 213, 217 (D.C. Cir. 1996) ("Although [the petitioner] disputes the point vigorously, an indigent defendant who seeks court-appointed representation has no constitutional right to counsel of his choice"); *cert. denied*, 117 S. Ct. 1003 (1997); *Green v. Abrams*, 984 F.2d 41, 47 (2d Cir. 1993) (stating that "indigent defendant has no right to choose the particular counsel appointed"); *United States v. Bradley*, 892 F.2d 634, 635 (7th Cir. 1990) (indigent defendants "cannot pick and choose among members of the district court's bar"); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 11.4, at 546-47 (2d ed. 1996) ("Courts generally hold that the initial selection of counsel to represent an indigent is a matter resting within the sound discretion of the trial court The indigent has no right to counsel of his choice"). See *infra* Part III. Pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(a) (1984), each United States district court, with the approval of the circuit's judicial council, has implemented a plan for furnishing indigent criminal defendants with counsel. Each of the 91 district plans thus adopted uniformly includes a provision making selection and appointment of counsel the exclusive province of the district court. *Davis v. Stevens*, 326 F. Supp. 1182, 1183-84 (S.D.N.Y. 1971) (stating that each of the federal district plans includes a provision stating that a defendant shall not select his own attorney). See, e.g., D.C. CT. R. ANN. tit. IV (1996) (enacted pursuant to the D.C. Criminal Justice Act of 1974) (defendant shall not have the right to select appointed counsel from the panel of attorneys or otherwise); *United States v. Bissell*, 954 F. Supp. 903, 920-21 (D.N.J. 1997) (describing similar provision in plan adopted by the District of New Jersey); *United States v. White*, 451 F.2d 1225, 1226 (6th Cir. 1971) (describing provision in plan adopted by the Northern District of Ohio); see also N.Y. COUNTY LAW § 722 (McKinney 1991) (making appointment of "Article 18-b" attorneys on rotational basis without affording defendant's choice in selection of counsel). As is more fully discussed *infra* note 118, these local provisions are neither mandated by the

ly be explained by the notion that defendants receiving legal services at the expense of the public coffer should not be heard to complain that they were not permitted to select their own counsel.⁸ However, both federal and state governments rely widely on "reimbursement statutes," which enable governments to recover legal defense costs from indigent defendants as a way to reduce the fiscal burden of complying with *Gideon's* mandate.⁹ This reliance warrants reconsideration of whether indigent criminal defendants have a right to counsel of their choice.¹⁰

Part I of this Article provides an overview of the Sixth and Fourteenth Amendment rights to counsel. Part II analyzes the discrete corollary right to retain counsel of one's choosing, the constitutional values underlying that right, and the judicially imposed exceptions which have limited its extent. Part III examines the current state of the indigent criminal defendant's "right" to choose his own counsel and examines the reasons which have traditionally been cited against recognition of such a "right." Part IV discusses the wide variety of "recoupment statutes" now in effect under federal and state law and considers the governmental interests sought to be achieved by such statutes. Part V.A then considers whether the repayment obligations imposed by recoupment statutes, when considered in light of the constitutional values underlying the right to retain counsel of choice, militate in favor of recognizing a limited right of indigent criminal defendants to select which attorney is assigned to defend them.¹¹ After concluding that such a right

Criminal Justice Act of 1964 nor a basis for rejecting an indigent's constitutional claim of right to some choice in the selection of his attorney.

⁸ See, e.g., *Smith v. Superior Court*, 440 P.2d 65, 74 (Cal. 1968) (hypothecating and rejecting this argument in slightly different context where defendant attempted to enforce court's indigent appointment of counsel); cf. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (stating that a litigant could not defensibly "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.").

⁹ See *infra* Part IV. These statutes have also been described as "recoupment statutes." This Article uses the terms interchangeably.

¹⁰ This Article does not enter the debate over the advisability or constitutionality of recoupment statutes but only considers whether their widespread implementation suggests the appropriateness of reconsidering the infrequently challenged principle that indigent criminal defendants have no right to counsel of their choice.

¹¹ Commentary on this issue is scarce. To my knowledge, the only published law review devoted to the issue is Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974).

should be recognized, Parts V.B and V.C, respectively, propose a methodological framework within which to analyze claims based on the newly recognized right and suggest guidelines for the functional operation of the proposed framework.

I. THE SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO COUNSEL

Despite the Sixth Amendment's broad language, the Amendment has been held to guarantee counsel only to those defendants who are actually imprisoned as a result of a criminal conviction.¹² The Amendment, therefore, does not guarantee that an indigent criminal defendant will not be tried without an attorney. Instead, it guarantees only that such defendant will not be sentenced to a term of imprisonment unless the government has afforded appointed counsel for his defense.¹³ Unlike the *Miranda* right to counsel,¹⁴ the Sixth Amendment right does not depend upon a request by the accused.¹⁵ It attaches automatically at the initiation of adversarial judicial proceedings, "whether by way of formal charge, preliminary hearing, indictment, information or arraignment."¹⁶ The right applies throughout the trial¹⁷ and continues through the preparation and prosecution of a defendant's first appeal.¹⁸ Following the first appeal, Sixth Amendment rights come to an end unless and until the accused is to be retried¹⁹ because there is no federal constitu-

¹² *Scott v. Illinois*, 440 U.S. 367 (1979); see also *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹³ *Argersinger*, 407 U.S. at 37.

¹⁴ See *Edwards v. Arizona*, 451 U.S. 477, 481-82 (1981); *Miranda v. Arizona*, 384 U.S. 436, 469-75 (1966).

¹⁵ See *Brewer v. Williams*, 430 U.S. 387, 401 (1977) (right to counsel attached to post-arraignment interrogation).

¹⁶ *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality).

¹⁷ See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Argersinger*, 407 U.S. at 25. Cf. *United States v. Wade*, 388 U.S. 218, 226 (1967) (right to counsel applies at every critical stage of prosecution).

¹⁸ *Evitts v. Lucey*, 469 U.S. 387, 396 (1985); see also *Douglas v. California*, 372 U.S. 353, 355-57 (1963).

¹⁹ The Sixth Amendment states in full:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

tional right to counsel during discretionary appeals²⁰ or post-conviction proceedings,²¹ including petitions by death row inmates.²² Because an attorney's assistance is among the "raw materials integral to the building of an effective defense,"²³ the right to counsel is the right to the "effective assistance of counsel;"²⁴ and effective assistance is guaranteed whether counsel is retained or appointed.²⁵

II. THE RIGHT TO RETAIN COUNSEL OF CHOICE

A central component of the Sixth Amendment right to counsel is the right of the accused to retain counsel of his own choosing.²⁶

U.S. CONST. amend. VI.

²⁰ *Ross v. Moffitt*, 417 U.S. 600, 612-16 (1974).

²¹ *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

²² *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (plurality). Because there is no constitutional right to counsel during discretionary appeals and post-conviction proceedings, constitutional claims premised upon the ineffective assistance of counsel during such review are not cognizable. See *Wainwright v. Toma*, 455 U.S. 586, 587-88 (1982) (per curiam).

²³ *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985).

²⁴ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); see also *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁵ *Cuyler v. Sullivan*, 446 U.S. 335, 344-45 (1980).

²⁶ See, e.g., *Flanagan v. United States*, 465 U.S. 259, 268 (1984) (stating that the right to counsel of choice "reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding . . ."); *Chandler v. Fretag*, 348 U.S. 3, 10 (1954) (stating that "a defendant must be given a reasonable opportunity to employ . . . counsel . . ."); *Glasser v. United States*, 315 U.S. 60, 75 (1942) ("Glasser wished the benefit of the undivided assistance of counsel of his own choice. We think that such a desire on the part of an accused should be respected."); *Powell v. Alabama*, 287 U.S. 45, 53 (1932) ("It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice."); *United States v. Mullen*, 32 F.3d 891, 895 (4th Cir. 1994) ("A defendant's right to have a lawyer of his or her own choosing is an essential element of the Sixth Amendment right to assistance of counsel."); *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986) ("The sixth amendment right to assistance of counsel encompasses a defendant's qualified right to be represented in a criminal prosecution by counsel of his or her own choice."); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986) (quoting *United States v. Ray*, 731 F.2d 1361, 1365 (9th Cir. 1984)) ("It is settled law that under the Sixth Amendment criminal defendants 'who can afford to retain counsel have a qualified right to obtain counsel of their choice.'"); *Wilson v. Mintzes*, 761 F.2d 275, 279 (6th Cir. 1985) ("[O]ur court has long recognized the accused's right to retain counsel of his choice."); *Birt v. Montgomery*, 725 F.2d 587, 592 (11th Cir. 1984) (en banc) (stating that "[w]hen a court unreasonably denies defendant counsel of choice, the denial can rise to the level of a constitutional violation."); *United States v. Curcio*, 694 F.2d 14, 22 (2d Cir. 1982) ("The right to be represented by counsel of one's choosing has long been regarded as part and parcel of

Indeed, an unreasonable denial of this right "may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process."²⁷ The significance of the right adheres in the remedy for its violation. Thus, it has been held that "[e]vidence of unreasonable or arbitrary interference with an accused's right to counsel of choice ordinarily mandates reversal without a showing of prejudice."²⁸ The criminal defendant's personal right to choose his attorney has unquestionably firm constitutional moorings,²⁹ and its continued vitality serves compelling systemic and individual interests.

the 'fundamental' right to be heard through counsel."); *United States v. Laura*, 607 F.2d 52, 55-56 (3d Cir. 1979) ("[T]he sixth amendment generally protects a defendant's decision to select a particular attorney to aid him in his efforts to cope with what would otherwise be an incomprehensible and overpowering governmental authority."); *United States v. Burton*, 584 F.2d 485, 488-89 (D.C. Cir. 1978).

²⁷ *Glasser*, 315 U.S. at 70.

²⁸ *Mintzes*, 761 F.2d at 281. The nearly uniform rule among the Courts of Appeals which have considered the question is that a defendant who has been denied the right to counsel of choice need not show prejudice as a condition precedent to appellate relief. See *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1478 (9th Cir. 1994) (holding that "harmless error analysis does not apply when a defendant has been denied the right to substitute counsel"); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1015 (10th Cir. 1992) (quoting *United States v. Collins*, 920 F.2d 619, 625 (10th Cir. 1990)) ("A conviction attained when a court 'unreasonably or arbitrarily interferes with an accused[s] right to retain counsel of choice . . . cannot stand, irrespective of whether the defendant has been prejudiced.") (alterations in original); *Fuller v. Diesslin*, 868 F.2d 604, 608 (3d Cir. 1989) ("[A] trial court's arbitrary denial of defendant's request for counsel of choice requires per se reversal."); *United States v. Panzardi Alvarez*, 816 F.2d 813, 818 (1st Cir. 1987) ("A defendant's choice of counsel cannot be reduced to a mere procedural formality whose deprivation may be allowed absent a showing of prejudice. The right to choose one's counsel is an end in itself; its deprivation cannot be harmless."); *Washington*, 797 F.2d at 1467 ("[D]enial of a criminal defendant's qualified right to retain counsel of his choice is reversible error regardless whether prejudice is shown."); *Burton*, 584 F.2d at 491 n.19 (stating that "harmless error tests do not apply" in the right to counsel of choice context); see also *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 443 (1985) (Stevens, J., dissenting on other grounds) ("[I]n a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal."). But see *Tolliver v. Dallman*, No. 94-3491, 1995 U.S. App. LEXIS 15398, at *8 (6th Cir. June 16, 1995) (applying harmless error analysis to denial of request for substitute counsel). The Supreme Court has not ruled on the issue. See *Koller*, 472 U.S. at 438 ("This Court has never held that prejudice is a prerequisite to reversal of a judgment following erroneous disqualification of counsel in either criminal or civil cases. As in *Flanagan*, we need not today decide this question."); *Flanagan*, 465 U.S. at 268.

²⁹ See cases cited *supra* note 26.

A. Counsel's Role and the Significance of Choice

Our system of criminal justice is premised upon the notion that "partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free."³⁰ Indeed, the survival of the adversarial system is dependent upon counsel's ability to subject the prosecution's case to "meaningful adversarial testing"³¹ without which there can be little confidence in trial outcomes.³² To that end, fulfillment of counsel's role as an advocate largely depends upon a basic trust between attorney and client.³³ Because an accused's selection of his attorney pro-

³⁰ *Herring v. New York*, 422 U.S. 853, 862 (1975); see *United States v. Cronin*, 466 U.S. 648, 655-56 (1984) (articulating similar role of counsel in criminal justice system); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) ("The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.").

³¹ *Cronin*, 466 U.S. at 656.

³² See *Powell*, 287 U.S. at 68-69, in which Justice Sutherland wrote:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge to adequately prepare his defense, even though he have [sic] a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

See also *Strickland v. Washington*, 466 U.S. 668, 691-92 ("The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.").

³³ This basic trust is the fundamental principal underlying the attorney-client privilege. See *Hadix v. Johnson*, 1989 WL 27984, at *2 (6th Cir. Mar. 30, 1989) (recognizing that "trust [is] at the heart of the attorney-client privilege"); *Linton v. Perini*, 656 F.2d 207, 212 (6th Cir. 1981) (recognizing that "[b]asic trust between counsel and defendant is the cornerstone of the adversary system and effective assistance of counsel"); *Mead Data Cent., Inc. v. United States Dep't of the Air Force*, 566 F.2d 242, 253 n.20 (D.C. Cir. 1977) (commenting that "traditionally the attorney-client privilege has rested on the need to foster a relationship of trust and free discussion between a lawyer and a private client"); see also *In re Sealed Case*, 124 F.3d 230, 237 (D.C. Cir. 1997) (Tatel, J., dissenting), *rev'd*, *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998) ("[T]he attorney-client privilege is 'rooted in the imperative need for confidence and trust.'" (citations omitted); *Drumgo v. Superior Court*, 506 P.2d 1007, 1012 (Cal. 1973) (Mosk, J., dissenting) ("Effective advocacy involves more than vigor, experience and familiarity with the law. The attorney-client relationship contemplates trust and mutual cooperation, particularly when the attorney is defending the client's liberty."); *In re Mandell*, 69 F.2d 830, 831 (2d Cir. 1934) ("The relationship between attorney and client is highly confidential,

motes the development of that basic trust,³⁴ which is essential to counsel's effectiveness,³⁵ the right to retain counsel of choice serves the systemic interest of maintaining a healthy adversarial system.³⁶

In addition to the systemic interest in promoting the adversarial system of criminal justice, recognition of the right to counsel of choice also implicates the accused's personal interest in autonomy. In Sixth Amendment terms, this interest translates into the personal right to control one's own defense.³⁷ In this regard, much of the rationale of *Faretta v. California*,³⁸ which recognized the Sixth Amendment right of self-representation, pertains equally to the right to counsel of choice.³⁹ Similar to the right of self-representation,

demanding personal faith and confidence in order that they may work together harmoniously."). The Supreme Court's rejection of the notion that the Sixth Amendment encompasses the right to a "meaningful attorney-client relationship," does not diminish the well-established proposition that an absence of trust between attorney and client diminishes counsel's ability to act as the effective advocate envisioned by the adversarial system. See *Morris v. Slappy*, 461 U.S. 1, 14 (1983) (holding rapport between attorney and client is not a Sixth Amendment right).

³⁴ See *United States v. Panzardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987) (quoting *Wilson v. Mintzes*, 761 F.2d 275, 279 (6th Cir. 1985)) ("The denial of a defendant's right to choose his own counsel jeopardizes his sixth amendment guarantees because 'a substantial risk [arises] that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut.'") (brackets in original).

³⁵ See *Mintzes*, 761 F.2d at 279 (recognizing that right to select attorney of choice is "necessary to maintaining a vigorous adversary system . . ."); *United States v. Upjohn Co.*, 600 F.2d 1223, 1226 (6th Cir. 1979), *rev'd*, *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (recognizing that trust promoted by attorney-client privilege encourages full disclosure which in turn "serves to implement the notion . . . that finding the truth and achieving justice in an adversary system are best served by fully-informed advocates loyal to their client's interests . . .").

³⁶ See *Mintzes*, 761 F.2d at 279; *Upjohn Co.*, 600 F.2d at 1226.

³⁷ See *Mintzes*, 761 F.2d at 279; *United States v. Curcio*, 694 F.2d 14, 24 (2d Cir. 1982) (recognizing that defendants who sought joint representation by single chosen attorney through whom they had previously been represented were asserting their "right to present their defense in what they have reasonably concluded to be the most effective fashion . . ."); *Smith v. Superior Court*, 440 P.2d 65, 73 (Cal. 1968) (recognizing that the value protected by the right to counsel of choice is "'the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command.'") (citation omitted); see also cases cited *infra* note 40.

³⁸ 422 U.S. 806, 819 (1975) (recognizing that "[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense.").

³⁹ See *United States v. Burton*, 584 F.2d 485, 506 n.35 (D.C. Cir. 1978) (recognizing that the reasoning of the *Faretta* decision "is quite relevant" to the analysis of the right to counsel of choice); Michael E. Lubowitz, Note, *The Right to Counsel of Choice After Wheat v. United States: Whose Choice Is It?*, 39 AM. U. L. REV. 437, 464-65

selection of an attorney is a personal decision which helps determine the manner in which an accused's defense will be conducted.⁴⁰ In fact, this choice has been described as "the most important decision a defendant makes in shaping his defense."⁴¹ Thus, "[d]ictating who shall act as counsel for the accused, like dictating that an accused shall be represented by counsel, essentially interposes an organ of the state between an unwilling accused and his right to choose his defense, and violates the logic of the sixth amendment."⁴² The right to retain an attorney personally selected by the accused thus serves both institutional and individual interests, the fundamental natures of which are suggested by their inclusion within the Sixth Amendment.

B. *Limitations on Right to Choose*

While the Sixth Amendment right to counsel is absolute,⁴³ the right to retain counsel of choice is often not.⁴⁴ Even for those with sufficient resources to retain an attorney of their choosing, their

(1990) (analogizing right to self-representation and right to select attorney of choice); see also *infra* notes 39-41 and accompanying text. But see *Wheat v. United States*, 486 U.S. 153, 159 n.3 (1988) (observing that *Faretta* "does not encompass the right to choose any advocate if the defendant wishes to be represented by counsel.").

⁴⁰ See *United States v. Nichols*, 841 F.2d 1485, 1502 (10th Cir. 1988) ("A defendant's right to choose an attorney is a corollary of the right to decide what type of defense the accused will present."); see also *United States v. Laura*, 607 F.2d 52, 56 (3d Cir. 1979) (recognizing that right to select particular attorney is an aspect of Sixth Amendment "conviction that a defendant has the right to decide, within limits, the type of defense he wishes to mount . . .").

⁴¹ *Laura*, 607 F.2d at 56.

⁴² *Mintzes*, 761 F.2d at 279 n.6; see *Faretta*, 422 U.S. at 821 ("An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not his defense.").

⁴³ See *United States v. Peak*, 992 F.2d 39, 42 (4th Cir. 1993); *Heath v. United States Parole Comm'n*, 788 F.2d 85, 88 (2d Cir. 1986); *United States v. Chatman*, 584 F.2d 1358, 1360 (4th Cir. 1978); *Gilbert v. California*, 388 U.S. 263, 279 (1967) (Douglas, J., concurring in part and dissenting in part).

⁴⁴ See *Wheat*, 486 U.S. at 159 ("The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects."); *Ficker v. Curran*, 119 F.3d 1150, 1156 (4th Cir. 1997) (observing that right to counsel of choice is not absolute); *Nichols*, 841 F.2d at 1502 (same); *United States v. Panzardi Alvarez*, 816 F.2d 813, 816 (1st Cir. 1987) (same); *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986) (same); *United States v. DiTommaso*, 817 F.2d 201, 219 (2d Cir. 1986) (same); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986) (same); *Burton*, 584 F.2d at 498 (same); see also *infra* Parts II.B.1-3.

decision may be limited by a number of familiar qualifications designed primarily to ensure the integrity of the judicial process.⁴⁵ Thus, regardless of ability to pay, a criminal defendant may be denied representation by an attorney who is unwilling to represent him;⁴⁶ by counsel not admitted to the bar of the jurisdiction in which representation is sought,⁴⁷ or by a former attorney who has been disbarred.⁴⁸ Likewise, a defendant is not entitled to insist on representation by a lay person.⁴⁹

In addition to these seemingly well-defined limitations, consistent with the analytical approach to constitutional adjudication in other areas of the law, courts have employed a "balancing test"⁵⁰ to further limit the right to retain counsel of choice in factual circumstances falling outside of these categorical contexts.⁵¹ Typical-

⁴⁵ See *infra* notes 46-49 and accompanying text.

⁴⁶ *Wheat*, 486 U.S. at 159; see *United States v. Hallock*, 941 F.2d 36, 44-45 (1st Cir. 1991) (no constitutional violation where defendant's chosen counsel withdrew when government sought to introduce evidence implicating counsel in the trial where no challenge made in lower court).

⁴⁷ See *Nichols*, 841 F.2d at 1503; *Williams v. Nix*, 751 F.2d 956, 959-60 (8th Cir. 1985); *Ford v. Israel*, 701 F.2d 689, 692 (7th Cir. 1983). But see *United States v. Ries*, 100 F.3d 1469, 1471 (1st Cir. 1996) ("A defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*." (quoting *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993))).

⁴⁸ See *United States v. Jordan*, 508 F.2d 750, 753 (7th Cir. 1975) (denying request for representation by disbarred attorney); see also *Nichols*, 841 F.2d at 1503; *United States v. Afflerbach*, 547 F.2d 522 (10th Cir. 1976).

⁴⁹ *United States v. Turnbull*, 888 F.2d 636, 638 (9th Cir. 1989); *Nichols*, 841 F.2d at 1503; *United States v. Schmitt*, 784 F.2d 880, 882 (8th Cir. 1986); *United States v. Wright*, 568 F.2d 142, 143 (9th Cir. 1978). A criminal defendant, whether an attorney or not, has a Sixth Amendment right to represent himself, however. See *Faretta v. California*, 422 U.S. 806, 807 (1975).

⁵⁰ See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); see also Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1184-1207 (1988) (discussing "balancing" in Fourth Amendment context).

⁵¹ See *United States v. Leavitt*, 608 F.2d 1290, 1293 (9th Cir. 1979) ("When sixth amendment rights to counsel come into conflict with the trial judge's discretionary power to deny continuances, courts apply a balancing of several factors to determine if the trial judge's action was fair and reasonable."); *United States v. Burton*, 584 F.2d 485, 489 (D.C. Cir. 1978) (stating that when defendant seeks continuance in order to retain counsel of choice "the right to select counsel must be carefully balanced against the public's interest in the orderly administration of justice . . ."). The government bears the burden of proving that the right to retain counsel of choice should be compromised or denied. See, e.g., *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986). The burden has been characterized as a "heavy" one. *Washington*, 797 F.2d at 1465.

ly, the requisite balance is styled as a conflict between the individual defendant's constitutional right to retain an attorney of his choice and a governmental or systemic interest in the need for "efficiency" or "effective administration" in the criminal justice system.⁵² Perhaps predictably, in light of the tendency to understate the rights side and overstate the government-interests side of the balance—a criticism frequently made of balancing in general—⁵³limitations on the right to retain counsel of choice are not confined to a defendant's selection of an unwilling, unqualified or unlicensed attorney.⁵⁴

1. Effective Administration

The most commonly litigated limitation on the right to retain an attorney of choice arises from the trial court's authority to control its own docket.⁵⁵ In the exercise of this inherent authority, a trial court has wide discretion to make decisions affecting the administration of cases pending before it.⁵⁶ This discretion most frequently comes into conflict with the right to retain counsel of choice

⁵² See, e.g., *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214 (3d Cir. 1969) (characterizing competing interest as a "desirable public need for the efficient and effective administration of criminal justice."); *United States v. Jennings*, 83 F.3d 145, 148 (6th Cir. 1996) (citing *United States v. Iles*, 906 F.2d 1122, 1130 n.8 (6th Cir. 1990)) (same); *United States v. Diaz-Martinez*, 71 F.3d 946, 950 (1st Cir. 1995) (balancing "defendant's interest in choosing his counsel and the court's trial management needs."); *United States v. Rankin*, 779 F.2d 956, 958-59 (3d Cir. 1986) (applying similar balancing approach). See generally cases cited *infra* notes 55-62.

⁵³ See *Strossen*, *supra* note 50, at 1204. See generally *Aleinikoff*, *supra* note 50.

⁵⁴ See *infra* Parts II.B.1-3.

⁵⁵ The governmental interest said to be at stake in this context is frequently characterized as an interest in economy or efficiency. See, e.g., *Burton*, 584 F.2d at 489 (discussing right to retain counsel of choice and stating that "[t]he public has a strong interest in the prompt, effective, and efficient administration of justice."); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) (same).

⁵⁶ See *Linton*, 656 F.2d at 209 ("A court must always keep control of its own docket, but in doing so it must be reasonable and consider the constitutional right of a defendant to have retained counsel of his choice."); *Burton*, 584 F.2d at 489 ("It is firmly established that the granting or refusal of a continuance is a matter within the discretion of the judge who hears the application, and is not subject to review absent a clear abuse."); *United States v. Correia*, 531 F.2d 1095, 1098 (1st Cir. 1976) ("It is axiomatic that the district court has inherent power to control its own docket to ensure that cases proceed before it in a timely and orderly fashion."); *United States v. Inman*, 483 F.2d 738, 740 (4th Cir. 1973) (recognizing accused's right to retain counsel of choice and stating, "[b]ut the court also has the right to control its own docket to require that cases proceed in an orderly and timely fashion, and to that end to deny motions for continuances.").

through the decision to grant or deny a continuance requested by the defense.⁵⁷ While a continuance may be requested for myriad reasons, in this context, such requests are most commonly made either to (i) accommodate a defendant's chosen counsel's scheduling conflict or illness,⁵⁸ or (ii) to provide a defendant with additional time to obtain new counsel.⁵⁹

⁵⁷ See, e.g., *United States v. Kelm*, 827 F.2d 1319, 1320-21 (9th Cir. 1987) (trial rescheduled where defendant had not obtained counsel by the time of trial); *United States v. Leavitt*, 608 F.2d 1290, 1293-94 (9th Cir. 1979) (same); *Sampley v. Attorney Gen. of N.C.*, 786 F.2d 610, 611-12 (4th Cir. 1986) (continuance requested due to chosen counsel's scheduling conflict); *United States v. La Monte*, 684 F.2d 672 (10th Cir. 1982) (defendant asserted that counsel of choice did not have adequate preparation time); *Birt v. Montgomery*, 725 F.2d 587, 591-92 (11th Cir. 1984) (en banc) (same); *Giacalone v. Lucas*, 445 F.2d 1238, 1241-42 (6th Cir. 1971) (continuance requested due to chosen counsel's medical condition). The grant or denial of a request for continuance is a matter within the sound discretion of the trial court. See *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964); see also *United States v. Mendoza-Salgado*, 964 F.2d 993, 1016 (10th Cir. 1992) ("Because the factors influencing a particular case often vary, the district court enjoys broad discretion on matters of continuances, even when the parties implicate Sixth Amendment issues."). The Fifth Circuit has identified the following nonexhaustive six factors to be considered by the trial judge in passing on such a request:

- (1) the length of the requested delay; (2) whether the lead counsel has an associate who is adequately prepared to try the case; (3) whether other continuances have been requested or granted; (4) the balanced convenience or inconvenience to litigants, witnesses, opposing counsel and the court; (5) whether the requested delay is for a legitimate reason, or whether it is dilatory and contrived; (6) whether there are other unique factors present.

Gandy v. Alabama, 569 F.2d 1318, 1324 (5th Cir. 1978). See generally cases cited *infra* notes 58-59.

⁵⁸ See, e.g., *Mendoza-Salgado*, 964 F.2d at 1013-14 (following denial of motion for continuance, joint motion for reconsideration by filed government and defendant on ground that defendant's chosen counsel was hospitalized); *Sampley*, 786 F.2d at 611-12 (continuance requested due to chosen counsel's scheduling conflict); *Rankin*, 779 F.2d at 956-57 (denial of continuance necessitated by defense counsel's scheduling conflict violated defendant's right to counsel of choice); *United States v. Mitchell*, 777 F.2d 248, 256-58 (5th Cir. 1985) (upholding trial court's denial of continuance motion premised upon counsel's scheduling conflict even though defendant was tried in absence of attorney as a result); *Giacalone*, 445 F.2d at 1241-42 (continuance requested due to chosen counsel's medical condition); *Releford v. United States*, 288 F.2d 298, 299-300 (9th Cir. 1961) (defendant denied right to counsel of choice by trial court's refusal to grant continuance during which chosen counsel could recover from hospital stay).

⁵⁹ See, e.g., *United States v. Coughlan*, No. 93-50283, 1994 U.S. App. LEXIS 20720, at *3-4 (9th Cir. Aug. 3, 1994) (defendant requested one-week continuance on order to obtain counsel of his choice); *United States v. Freeman*, 816 F.2d 558, 564 (10th Cir. 1987) (continuance requested on morning of trial to permit defendant to retain, with newly obtained funds, an attorney other than appointed counsel); *Urquhart v. Lockhart*, 726 F.2d 1316, 1319 (8th Cir. 1984) (continuance requested to enable defendant to obtain new counsel immediately prior to trial); *United States v. Lowe*, 569 F.2d 1113, 1116 (10th Cir. 1978) (same except request made during trial). See generally cases cited

In passing on such a request, the trial court properly exercises its discretion by striking "a delicate balance between the defendant's . . . right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice."⁶⁰ Therefore, the trial judge, acting in the name of calendar control, must not arbitrarily and unreasonably interfere with the right to retain counsel of choice, and the defendant must not "assume that the right to choose counsel affords the right to obtain a delay at his whim or caprice."⁶¹

In sum, while defendants have a constitutional right to retain counsel of their choice, that right is limited by a significant interest in maintaining effective administration of court calendars. While this fundamental conflict requires a "careful balancing" of competing considerations, a trial court's traditionally broad discretion to manage its own docket provides the flexibility and creativity necessary to accommodate a defendant's choice, while not crippling the progress of its own calendar.⁶²

infra note 62.

⁶⁰ *Gandy*, 569 F.2d at 1323; see *United States v. Sandersfield*, No. 95-6444, 1997 U.S. App. LEXIS 14749, at *6 (10th Cir. June 18, 1997); see also *supra* note 52 and accompanying text.

⁶¹ *Gandy*, 569 F.2d at 1323 (quoting *United States v. Grow*, 394 F.2d 182, 210 (4th Cir. 1968)); see also *United States v. Gallop*, 838 F.2d 105, 108 (4th Cir. 1988) ("A request for change in counsel cannot be considered justifiable if it proceeds from a transparent plot to bring about delay."); *Linton v. Perini*, 656 F.2d 207, 209 (6th Cir. 1981) ("[T]he right to counsel of choice may not be used to unreasonably delay trial."); *Leavitt*, 608 F.2d at 1293 (observing that when a continuance is denied resulting in accused's trial without representation it is usually because the defendant has "engage[d] in a course of conduct which is dilatory and hinders the efficient administration of justice."); *Burton*, 584 F.2d at 489 (quoting *Lee v. United States*, 235 F.2d 219, 221 (D.C. Cir. 1956) (stating that right to retain counsel of choice "cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same."); see also cases cited *infra* note 62.

⁶² This flexible approach is also taken in response to motions for substitution of counsel where trial court decisions are also reviewed for abuse of discretion. See, e.g., *United States v. Brown*, 79 F.3d 1499, 1502, 1505-07 (7th Cir. 1996), *cert. denied*, *Brown v. United States*, 117 S. Ct. 196 (1996) (no abuse of discretion by trial judge's denial of motion for substitution of counsel although made two months in advance of trial in which court left open possibility of renewing the motion and inference that attorney-client relationship was thereafter mended); *United States v. Jennings*, 83 F.3d 145, 148-49 (6th Cir. 1996) (no abuse of discretion by denial of request for substitution of counsel one day before trial in which there was not a total lack of communication between attorney and client); *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996) (trial court acted within its discretion in denying request for substitution of attorney made on last day of trial and grounded in allegation unrelated to relationship with

2. Conflicts of Interest

A second area in which a criminal defendant's right to retain counsel of his choice has been limited is where chosen counsel has been disqualified, over a defendant's objection, on the ground that counsel is laboring under an actual or potential conflict of interest.⁶³ In contrast to the "effective administration" limitation,⁶⁴ the governmental or societal interest implicated in the conflict of interest context is the systemic interest in the integrity of the judicial system.⁶⁵

The leading case on the extent to which a criminal defendant's right to his chosen attorney may be limited by his often competing right to conflict-free representation is *Wheat v. United States*.⁶⁶ In *Wheat*, the petitioner, one of several co-defendants charged with, *inter alia*, participating in an alleged drug distribution conspiracy, moved to substitute as his counsel, attorney Iredale who was already representing two other co-defendants charged in the same conspiracy, Juvenal Gomez-Barajas and Javier Bravo.⁶⁷ Gomez-Barajas' negotiated plea agreement had not yet been approved by the trial court; he therefore retained the option of withdrawing the plea and proceeding to trial.⁶⁸ Bravo pleaded guilty to a single count of transporting 2,400 pounds of marijuana. His plea proceed-

current counsel); *United States v. Diaz-Martinez*, 71 F.3d 946, 949-50 (1st Cir. 1995) (no abuse of discretion where trial court refused to permit defendant's additional interviews of potential substitute attorneys); *United States v. Mullen*, 32 F.3d 891, 893-95 (4th Cir. 1994) (finding abuse of discretion in denying defendant's motion to have attorney retained by her family replaced with appointed counsel); *United States v. Roston*, 986 F.2d 1287, 1292-93 (9th Cir. 1993) (trial court did not abuse its discretion in denying pre-trial motion for continuance in order to substitute attorney of choice).

⁶³ In these cases, the defendant asserting his right to retain counsel of his choosing is aware of the actual or potential conflict and is willing to waive his right to "conflict-free counsel." See, e.g., *Wheat v. United States*, 486 U.S. 153, 156-57 (1988).

⁶⁴ See *supra* Part II.B.1.

⁶⁵ See *Wheat*, 486 U.S. at 160 (stating that "the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation.").

⁶⁶ 486 U.S. 153 (1988).

⁶⁷ *Id.* at 154-55. The motion was made two days before trial was scheduled to commence. *Id.* at 155, 157.

⁶⁸ *Id.* at 155. Gomez-Barajas had been acquitted at an earlier trial of drug-related charges common to those against the petitioner. *Id.*

ings had been completed.⁶⁹ Each of the co-defendants consented to Iredale's joint representation and expressly waived their rights to conflict-free counsel.⁷⁰

The government objected to the petitioner's proposed substitution of attorney Iredale on two theories of conflict of interest. First, in the event that Gomez-Barajas' plea was withdrawn or declined by the court, the petitioner would likely be called to testify for the government at Gomez-Barajas' subsequent trial. Iredale would then be prevented from cross-examining the petitioner and thereby hampered in his ability effectively to represent Gomez-Barajas.⁷¹ Second, because the government had offered to modify its position with regard to Bravo's sentence if Bravo would testify against the petitioner, a similar inability effectively to cross-examine Bravo would arise in the likely event that Bravo was called by the government to testify against the petitioner.⁷² In response, the petitioner characterized the government's theories as speculative, relied on his right to counsel of choice, and emphasized each defendant's waiver of his right to conflict-free representation.⁷³

The Supreme Court in *Wheat* first characterized the Sixth Amendment as designed to ensure the right to a fair trial, with an ultimate concern for preserving the adversarial system.⁷⁴ The Court then observed that while the Amendment comprehends the right to counsel of choice, that right has traditionally been limited by competing societal and institutional interests which focus on the integrity of the judicial system.⁷⁵ In this context, the majority observed that the danger of joint representation adheres in its potential to dampen the ardor of counsel and hinder his ability to zealously pursue the interests of each of his clients.⁷⁶ Because such hindered

⁶⁹ *Id.*

⁷⁰ *Id.* at 157.

⁷¹ 486 U.S. at 155-56.

⁷² *Id.* at 156. The government's theory was that a portion of the marijuana distributed by Bravo reached the petitioner. *Id.*

⁷³ *Id.* at 156-57.

⁷⁴ *Id.* at 158-59.

⁷⁵ *Id.* at 159-60. See also *supra* Part II.B.1.

⁷⁶ 486 U.S. at 160. Quoting *Holloway v. Arkansas*, 435 U.S. 475, 489-90 (1978), the Court commented:

Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing [A] conflict may . . . prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the sentencing hearing the relative involvement and culpability of his clients in order to minimize the

representation effects "[n]ot only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases," a defendant's waiver of the right to conflict-free counsel does not automatically warrant approval of his choice of counsel.⁷⁷ Thus, a trial court which discovers an actual conflict of interest may properly decline a defendant's proffered waiver and require separate representation over the defendant's choice of retained counsel.⁷⁸ A trial court has broad discretion in passing on proffered waivers and will not be overturned absent an abuse of that discretion.⁷⁹

Moreover, in order to guide appellate review of trial court decisions to accept or decline a defendant's waiver in such circumstances, courts "must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists. . . ." ⁸⁰ In sum, while there is a presumption in favor of a defendant's chosen counsel, that presumption may be overcome by facts demonstrating either an actual, or serious potential for, conflict of interest.⁸¹

culpability of one by emphasizing that of another.

Wheat, 486 U.S. at 160 (brackets and ellipses in original).

⁷⁷ *Id.*

⁷⁸ *Id.* at 161-62; see also *United States v. Stites*, 56 F.3d 1020, 1025 (9th Cir. 1995) (declining proffer of waiver by former client of right to confidentiality where attorney who earlier represented former client sought to represent co-defendant in same case). The *Wheat* court also reasoned that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Wheat*, 486 U.S. at 160.

⁷⁹ See *Williams*, 81 F.3d at 1325 (applying abuse of discretion standard on review of trial court's disqualification of defendant's chosen counsel due to conflict of interest); *United States v. Voigt*, 89 F.3d 1050, 1078-79 (3rd Cir. 1996) (trial court did not abuse discretion by declining defendant's proffered waiver where serious potential for conflict of interest existed); *United States v. Reeves*, 892 F.2d 1223, 1227 (5th Cir. 1990) (no abuse of discretion by trial court's refusal to effectuate defendant's waiver and disqualification of defense counsel who was subject of related investigation); *United States v. Arrington*, 867 F.2d 122, 128-29 (2d Cir. 1989) (district court did not abuse its discretion in refusing defendant's waiver of defense counsel's conflict of interest likely to arise from government witness' testimony implicating counsel in criminal conduct).

⁸⁰ *Id.* at 163.

⁸¹ *Id.* at 164; see also *United States v. Williams*, 81 F.3d 1321, 1324-25 (4th Cir. 1996) (no denial of right to counsel of choice by disqualification of chosen counsel who earlier represented likely government witness); *United States v. DiTommaso*, 817 F.2d 201, 219 (2d Cir. 1987) (defendant's chosen counsel, who previously represented current co-defendants in trial on similar charges, was properly disqualified).

3. Civil and Criminal Forfeiture

The third significant limitation upon the right to retain counsel of choice is found in the operation of "forfeiture statutes," which authorize the seizure and forfeiture to the government of instrumentalities and proceeds of criminal activity.⁸² In this context, a defendant's right to counsel of choice may be compromised or denied by either a pre-trial⁸³ or post-trial⁸⁴ seizure and forfeiture of assets needed to retain a particular attorney. In contrast to the "effective administration" and "conflicts" limitations, which invoke the vindication of some important "governmental interest" in circumscribing the right to counsel of choice, the forfeiture limitations rest largely on the rationale that there is "no Sixth Amendment right to spend another person's money for services rendered by an attorney."⁸⁵ This rationale reflects the fictional legal principle of retroac-

⁸² See, for example, 21 U.S.C. § 881(h) (1994) which provides in part: "[a]ll right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." See also 21 U.S.C. § 881(a)(6) (subjects to forfeiture "all moneys . . . furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys . . . used or intended to be used to facilitate any violation of this subchapter."); 21 U.S.C. §§ 853(a), (c) (1994).

⁸³ See *United States v. Monsanto*, 491 U.S. 600, 614 (1989).

⁸⁴ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 632 (1989).

⁸⁵ *Id.* at 626. Forfeiture is said to vindicate three governmental interests, which may roughly be characterized as pecuniary, restitutionary and economic. The pecuniary interest is served by the government's distribution of forfeited assets to various agencies in support of law enforcement efforts. *Id.* at 629. See generally 28 U.S.C. § 524(c) (1994) (creating Department of Justice Assets Forfeiture Fund). The restitutionary interest is sought to be served by statutory provisions permitting "rightful owners" to recover forfeited assets before such assets become permanently retained by the government. *Caplin & Drysdale*, 491 U.S. at 629-30. The economic interest is vindicated by "the desire to lessen the economic power of organized crime and drug enterprises . . . includ[ing] the use of such economic power to retain private counsel." *Id.* at 630. While each of these governmental interests might plausibly be characterized as sufficiently important to "balance" against a defendant's right to retain counsel of his choosing, the forfeiture cases do not take this analytic approach. *Id.* at 626-29 (discussing government interests in context of "petitioner's 'balancing analysis'" but only to show lack of merit in petitioner's approach). Rather, the primary rationale of the case law recognizing and applying the forfeiture limitation is that the assets proposed to be used by a defendant to retain his chosen counsel are not his property, and, therefore, he has no right to use them to retain an attorney. *Id.* at 626 (analogizing defendant's claim of right to use forfeitable assets to bank robber's claim of right to spend stolen money); *United States v. Sammons*, 918 F.2d 592, 598 (6th Cir. 1990) (rejecting contention that pre-trial seizure of \$9,020 denied defendant's right to retain chosen counsel because as a result of forfeiture statute, the defendant "never had a legal right to the money [and] had no right

tive vesting of title in which it is said that title to the forfeitable asset(s) passes to the government upon commission of the acts declared to be unlawful.⁸⁶ Since the U.S. Supreme Court's companion decisions in *Caplin & Drysdale, Chartered v. United States*⁸⁷ and *United States v. Monsanto*⁸⁸ upholding seizure and forfeiture of assets needed by criminal defendants to retain the attorney of their choice, lower courts have consistently applied this limitation without significant divergence of opinion.

This Part has considered the limited right of an accused with sufficient resources to retain an attorney of his choice and made clear that this right is firmly rooted in the Sixth Amendment. The following Part will review the current state of the indigent accused's "right" to secure counsel of choice and discuss the reasons which have traditionally been cited against recognition of this "right" even in qualified form.

III. CHOICE OF COUNSEL AND INDIGENCY

A. *Inequity of Choice*

The Sixth Amendment protects the right of an accused to secure, through his own financial resources (or any other lawful source), an attorney whom he personally chooses and prefers to represent him.⁸⁹ This right is but a corollary to the fundamentally personal right of a criminal defendant to conduct his own defense,

to spend it on legal counsel.").

⁸⁶ See generally *United States v. 92 Buena Vista Avenue*, 507 U.S. 111 (1993) (extensively discussing operation of forfeiture at common law and more modern statutory forfeiture provisions). At least since *United States v. Stowell*, 133 U.S. 1 (1890), the courts have held that:

whenever a statute enacts that upon commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.

Stowell, 133 U.S. at 16-17.

⁸⁷ 491 U.S. 617 (1989).

⁸⁸ 491 U.S. 600 (1989).

⁸⁹ See *supra* Part II.A.

"for it is he who suffers the consequences if the defense fails."⁹⁰ While the Sixth Amendment's vindication of personal choice might plausibly be argued to apply with equal vigor and dimension to criminal defendants without regard to their financial condition, such is not reality. A trial court's authority to appoint competent counsel to an indigent accused without considering the defendant's preference for a particular attorney is well settled—indigent criminal defendants have no recognized right to counsel of their choosing.⁹¹

It may, however, be argued that the Sixth Amendment right is simply the right to "retain" counsel of choice, and this right so described, applies equally without regard to one's financial ability to exercise it. Thus, according to this view, it is not that the constitutional right does not extend to the indigent but simply that a collateral condition for which the government is not accountable, i.e., indigency, prevents some persons from exercising their right to retain the attorney they prefer.⁹² Yet, if the Constitution protects the right to some (unspecified) degree of choice in the selection of one's counsel, and it is well settled that it does,⁹³ then that constitutionally protected interest must be broader than merely the right to "retain" counsel of one's choosing because, in its simplest form, the right to "retain" an attorney with one's own money is merely a recognition of basic property rights—a person may lawfully dispose

⁹⁰ *Faretta v. California*, 422 U.S. 806, 820 (1975).

⁹¹ See, e.g., *United States v. Iles*, 906 F.2d 1122, 1130 (6th Cir. 1990) ("An indigent defendant has no right to have a particular attorney represent him"); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) ("Petitioner does not, nor could it defensibly do so, assert that impecunious defendants have a Sixth Amendment right to choose their counsel."); *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("[A] defendant may not insist on representation by an attorney he cannot afford."); *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979) ("[A]n indigent has no absolute right to counsel of his choice."); *United States v. Dolan*, 570 F.2d 1177, 1183 (3d Cir. 1978) (stating that "an indigent defendant does not have an absolute right to the assignment of counsel of his or her own choice; rather, the appointment is left to the sound discretion of the court."); *United States v. Smith*, 464 F.2d 194, 197 (10th Cir. 1972) ("Selection of counsel [for indigent defendants] 'rests in the sound discretion of the court.'") (citation omitted); see also authorities cited *supra* note 7.

⁹² See generally *United States v. Ely*, 719 F.2d 902, 905 (7th Cir. 1983) (rejecting indigent's claimed right to counsel of choice and reasoning in part that "the government is not responsible for [the defendant's] poverty, and could not, under any reasonable system for the appointment of counsel, rectify all the consequences of the inequality of wealth among criminal defendants."); *Douglas v. California*, 372 U.S. 353, 360-63 (1963) (Harlan, J., dissenting) (articulating analogous view in context of indigent's right to counsel on appeal); *Griffin v. Illinois*, 351 U.S. 12, 34-35 (1956) (Harlan, J., dissenting) (articulating analogous view in context of indigent's right to free transcript on appeal).

⁹³ See cases cited *supra* note 26.

of his property (i.e., spend it) as he desires. If this is the sum of the constitutionally protectable interest recognized by the "right to retain an attorney of choice," this "property right" seems an odd candidate for inclusion in the Sixth Amendment which exclusively addresses trial and trial-related rights of criminal defendants.⁹⁴

More significantly, however, if this were the sum of the constitutional interests implicated by the counsel of choice "right," then we should expect this "property-based" rationale to appear in the case law, which it uniformly does not.⁹⁵ Rather, the cases speak of much broader interests such as "maintaining a vigorous adversary system,"⁹⁶ recognizing an accused's "free choice,"⁹⁷ and "respect for the individual"⁹⁸ as forming the basis of the counsel of choice "right."⁹⁹ The interest in personal choice protected by the Sixth Amendment, while inclusive of, is, therefore, much broader than, the simple right to expend one's own resources to "retain" an attorney of choice.

Thus, the indigent's complete lack of choice in the selection of his attorney is not merely an unfortunate side effect of the indigent's impecuniousness but rather a governmental denial to the accused of recognized constitutional interests having nothing to do with a person's financial condition.¹⁰⁰ In a very real sense, the breadth of the constitutional guarantee depends on the fiscal health of the accused.¹⁰¹ In fact, the principle that an indigent accused enjoys

⁹⁴ See *supra* note 19; see also *Argersinger v. Hamlin*, 407 U.S. 25, 27-28 (1972) (discussing trial nature of various Sixth Amendment rights); *Estes v. Texas*, 381 U.S. 532, 560 (1965) (same).

⁹⁵ See *infra* notes 96-99 and accompanying text; see also cases cited *supra* note 26.

⁹⁶ *Wilson v. Mintzes*, 761 F.2d 275, 279 (6th Cir. 1985).

⁹⁷ *Id.*; see also *United States v. Urbana*, 770 F. Supp. 1552, 1555 (S.D. Fla. 1991) ("Like the sixth amendment right to self-representation, the right to counsel of choice, 'reflects constitutional protection of the defendant's free choice independent of concern for the objective fairness of the proceeding.'") (quoting *Flanagan v. United States*, 465 U.S. 259, 268 (1984)) (citation omitted).

⁹⁸ *United States v. Mullen*, 32 F.3d 891, 895 (4th Cir. 1994); see also *Miller v. Smith*, 115 F.3d 1136, 1149 (4th Cir. 1997) (Mumaghan, J., dissenting).

⁹⁹ See also *supra* Part II.A.

¹⁰⁰ See *supra* Part II.A (discussing values underlying the Sixth Amendment right to retain counsel of one's choosing).

¹⁰¹ This unsettling conclusion is not merely a reflection of "the harsh reality that the quality of a criminal defendant's representation frequently may turn on his ability to retain the best counsel money can buy." *Morris v. Slappy*, 461 U.S. 1, 23 (1983) (Brennan, J., concurring). That "harsh reality" is only constitutionally tolerable if the accused has been afforded the full panoply of rights to which he is entitled by the Constitution. If, however, a criminal defendant is not afforded such rights, a constitution-

no "right" to choose his attorney has become so well settled that case law reveals few challenges to its basic operation, notwithstanding the suspect bases from which the principle's continued vitality derive.¹⁰²

B. Rationales for Inequity of Choice

An indigent defendant's claim of right to be represented by an attorney of his choosing is frequently rejected with little explanation beyond rote citation to prior cases, which themselves articulate no rationale.¹⁰³ Nonetheless, three primary reasons for denying the indigent's right of choice have emerged.¹⁰⁴ The rationales may broadly be characterized as sounding in three flexible tools of the judicial trade—governmental paternalism, administrative efficiency, and administrative convenience.¹⁰⁵

1. Paternalism

The paternalistic approach is best exemplified by *People v. Fuller*.¹⁰⁶ In *Fuller*, the court denied an indigent accused's *ex parte*

al deprivation cannot be justified by reference to "harsh realities." The Sixth Amendment interests implicated by the counsel of choice right go beyond the mere right of an accused to spend his own money to obtain an attorney of his choosing; therefore, denying an indigent accused such a choice is a wrongdoing of constitutional magnitude and "harsh realities" are no defense. See *supra* notes 96-99 and accompanying text.

¹⁰² In one early federal case in which an indigent asserted a "choice of counsel" claim, the court wrote:

When I first read the question [for review] I rather assumed that it would have been so universally conceded that a prisoner did not have the right to tell the court who the court should appoint to represent him that I did not expect to find any authority on the point.

Wilson v. United States, 215 F. Supp. 661, 663 (W.D. Va. 1963).

¹⁰³ See, e.g., cases cited *supra* note 7; see also Tague, *supra* note 11, at 79 (commenting that the rule denying indigent's a right to counsel of choice usually "has been announced by fiat"). See generally Ronald A. Case, Annotation, *Indigent Accused's Right to Choose Particular Counsel Appointed to Represent Him*, 66 A.L.R. 3d 996 (1975).

¹⁰⁴ See generally Case, *supra* note 103. See also *infra* Parts III.B.1-3.

¹⁰⁵ See LAFAYE & ISRAEL, *supra* note 7, § 11.4 (synthesizing the case law and articulating three predominant rationales); Melinda Hardy, *Supreme Court Review: Sixth Amendment—Applicability of Right to Counsel of Choice to Forfeiture of Attorneys' Fees*, 80 J. CRIM. L. & CRIMINOLOGY 1154, 1173 n.135 (1990) (relying on LAFAYE & ISRAEL and also stating three rationales); see also *infra* Parts III.B.1-3.

¹⁰⁶ 35 Misc. 189, 71 N.Y.S. 487 (N.Y. Gen. Sess. 1901). *Fuller* is dated; yet, in light of the failure of more recent case law to articulate a rationale for refusing to recognize

application for assignment of an attorney of his choosing on the ground that the defendant did not possess the requisite familiarity with the bar intelligently to choose his own attorney.¹⁰⁷ According to this view, given trial judges' greater knowledge of the local bar, they are in a better position than criminal defendants to assess the skills and experience of attorneys; thus, they are the preferred persons to appoint attorneys to represent the indigent.¹⁰⁸

While governmental paternalism has been recognized as a legitimate state interest,¹⁰⁹ the context in which that approval has developed provides no support for judicial invocation of such an interest as a means to deny a claim of an indigent accused of an asserted constitutional right.¹¹⁰ The legitimacy of paternalism as a governmental interest developed as a judicially recognized philosophical limitation upon the federal courts' power to invalidate "protective" legislative goals,¹¹¹ not as a doctrine which courts, themselves, could invoke to justify rejection of constitutional claims of criminal defendants.¹¹² In the years following the "*Lochner*-era,"¹¹³ during which the Court invalidated numerous federal statutes¹¹⁴ whose protective purposes were viewed as mere "meddlesome interferences,"¹¹⁵ the notion of "substantive due process," in whose name such statutory enactments were set aside, slowly became a constitutional relic as the Court's philosophy shifted toward

the indigent's choice interests, see *supra* note 102 and accompanying text and *infra* note 119, completeness requires discussion of all the rationales which have traditionally, if only rarely, been articulated.

¹⁰⁷ *Id.*

¹⁰⁸ See *id.*; Tague, *supra* note 11, at 79; see also LAFAYETTE & ISRAEL, *supra* note 7, § 11.4 (articulating similar rationale from the case law). Significantly, this rationale does not purport to hold the indigent incapable of making an intelligent choice but only less capable than someone else who presumably is more informed. The reasoning thus ignores the fact that "[p]ersonal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction." *Faretta v. California*, 422 U.S. 806, 834 (1975).

¹⁰⁹ See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 323 (1985) (discussing role of paternalism in substantive due process context and stating "[t]hat day is fortunately long gone, and with it the condemnation of rational paternalism as a legitimate legislative goal").

¹¹⁰ See *infra* notes 111-18 and accompanying text.

¹¹¹ See *infra* notes 112-18 and accompanying text.

¹¹² GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 804-09 (2d ed. 1991).

¹¹³ See *Lochner v. New York*, 198 U.S. 45 (1905).

¹¹⁴ Between 1905 and 1934, the Court struck down approximately 200 statutory economic regulations. STONE ET AL., *supra* note 112, at 802.

¹¹⁵ See *Lochner*, 198 U.S. at 61.

greater deference toward legislative "meddling."¹¹⁶ The more modern judicial loathe to reject paternalistic legislative goals is thus a reflection of the Court's "refus[al] to sit as a 'superlegislature' to weigh the wisdom of legislation"¹¹⁷ and, thus, provides no support for a *Fuller*-based rationale in rejecting assertions of a right to counsel of choice where there has been no contrary decision by a coordinate branch of the government.¹¹⁸

In light of more modern pronouncements, particularly in the criminal law and procedure area, *Fuller* and similar rationales reflect only the outmoded reasoning of a bygone era.¹¹⁹ Since the height

¹¹⁶ STONE ET AL., *supra* note 112, at 804-09.

¹¹⁷ *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963).

¹¹⁸ The Criminal Justice Act of 1964, which provides for appointment of counsel to indigent criminal defendants in federal courts, states in part that "[r]epresentation shall be provided for any financially eligible person who . . . is entitled to appointment of counsel under the sixth amendment to the Constitution" 18 U.S.C. § 3006A(a)(1)(H) (1994). The Act further provides that, unless the defendant waives his right to counsel, "the United States magistrate or the court, if satisfied after appropriate inquiry that the [defendant] is financially unable to obtain counsel, shall appoint counsel to represent him." *Id.* § 3006A(b). While the statute may be read to foreclose the possibility of a defendant's choice in the selection of which attorney is appointed to represent him, its text does not require such a conclusion. Indeed, far from revealing a clear Congressional intent to abrogate an indigent's choice in the selection of appointed counsel, the "appointment" language of the statute may be read as requiring only that the government (through the court) make available to the accused an attorney, while simply not addressing the issue of whether a defendant has some right to select which attorney will be appointed from among those made available under the Act.

It is not at all clear that the Act reflects a decision by Congress that the Sixth Amendment does not comprehend some limited right of indigent criminal defendants to have a voice in the selection of counsel appointed to represent them. This conclusion is bolstered by the fact that, at the time of the statute's passage in 1964, no federal court had held in a reported decision that indigent criminal defendants have a constitutional right to select the attorney appointed to represent them. Search of LEXIS Genfed and States Libraries, February 15, 1998. See *Tague*, *supra* note 11, at 73 (recognizing that not until 1972 had an appellate court required a trial court to appoint an attorney requested by a defendant. That decision was overruled. See *Drumgo v. Superior Court of Marin County*, 506 P.2d 1007 (Cal. 1973), cert. denied, 414 U.S. 979 (1973)). Indeed, judicial discussion of the issue is rare. See *supra* note 102. It thus seems highly implausible that Congress even considered the constitutional issue. There having been no congressional determination of the constitutionality of denying indigents a choice of counsel, the statute is not entitled to the deference which may otherwise effect the Court's judicial review of a decision of a coordinate branch of the federal government. See Kenneth L. Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 87 ("[W]hen there is no judgment by a legislature at all . . . there is little justification for any presumption of constitutionality.").

¹¹⁹ Courts frequently repeat, though rarely explain, the principal that indigent defendants have no right to counsel of their choice. See *supra* notes 7 and 91 and accompanying text. The "well-settled" nature of the question has apparently obviated the need to

of the protectionist approach, which traditionally justified denial of an indigent's right to chosen counsel, the Supreme Court has more recently "rejected any paternalistic rule protecting a defendant from his intelligent and voluntary decisions about his own criminal case."¹²⁰ If the government's interest in safeguarding an accused from his own perceived ignorance in deciding who should represent him is sufficiently compelling to warrant denial of his claim of constitutional entitlement to a voice in choosing his own counsel, there is no rational basis for resisting other governmental encroachments upon a defendant's decisions regarding his own defense.¹²¹ Followed too far, such a road could lead to the intolerable requirement that criminal defendants demonstrate the wisdom of their defense strategies to the court for approval.¹²² As the Court stated

articulate its justification. See, e.g., *supra* note 102. The difficulty, however, with this judicial approach, is its tendency to elevate the comfort which flows from what is familiar over the justice which may be achieved through what is not. Thus, while modern criminal law has increasingly recognized the individual's interest in making personal choices regarding his defense, the traditional rule denying indigents a choice in selecting appointed counsel has remained immune from even slight change. See, e.g., *Faretta v. California*, 422 U.S. 806, 806 (1975); see also cases cited *infra* note 120.

¹²⁰ *Michigan v. Mosley*, 423 U.S. 96, 109 (1975) (White, J., concurring) (quoting *Faretta v. California*, 422 U.S. 806 (1975), which rejected the notion that suspects in police custody cannot voluntarily and intelligently decide to waive *Miranda* rights. See *Miranda v. Arizona*, 384 U.S. 436 (1966)); see also *Davis v. United States*, 512 U.S. 452, 476 (1994) (Souter, J., concurring) (quoting *Mosley*, 423 U.S. at 109); *Edward v. Arizona*, 451 U.S. 477, 490-91 (1981) (Powell, J., concurring) (same). While a defendant's incompetency would provide a ground for refusing to give effect to his decisions regarding the conduct of his case, the *Fuller* rationale is not premised upon such concerns. See *supra* note 108.

¹²¹ Indeed the practice of weighing governmental interests seems to resemble an implicit analytical balancing approach toward resolving the claim of right. Yet, while "balancing" has increasingly been employed to resolve conflicts between individual rights and governmental interests, see generally Aleinikoff, *supra* note 50, *passim*, it seems at best questionable whether "balancing" should be employed to determine the existence of the claimed constitutional right in the first instance. Moreover, even assuming that "balancing" is appropriate, noticeably absent from the court's consideration of the competing interests are the weighty systemic and individual interests served by the right to counsel of choice which apply without regard to indigency. See *supra* Part II.A.

¹²² Such an evidentiary requirement would be inconsistent with the fundamental premise of the "choice-interests" recognized by the Sixth Amendment—respect for the individual. See *United States ex rel. Maldonado v. Denno*, 348 F.2d 12, 15 (2d Cir. 1965) (stating that "even in cases where the accused is harming himself by insisting on conducting his own defense, respect for individual autonomy requires that he be allowed to go to jail under his own banner if he so desires and if he makes the choice 'with open eyes.'"); accord *Amaker v. Lacy*, 941 F. Supp. 1340, 1352 (E.D.N.Y. 1996) (quoting *Maldonado* in response to defendant's election to testify on his own behalf in spite of counsel's advice); *Johnstone v. Kelly*, 633 F. Supp. 1245, 1248 (S.D.N.Y. 1986),

in *Faretta*, while recognizing the right of a defendant to dispense with counsel and proceed *pro se*, irrespective of his lawyering skills:

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of the accused's position before the law. . . . What were contrived as protections for the accused should not be turned into fetters. . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

...

When the administration of the criminal law . . . is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . is to imprison a man in his privileges and call it the Constitution.¹²³

Thus, neither misplaced notions of paternalism, nor an indigent accused's supposed inability to assess the quality of available counsel as accurately as a trial judge, warrant the conclusion that the Sixth Amendment does not encompass at least a limited voice for the indigent defendant in the selection of his appointed counsel.¹²⁴

2. Administrative Efficiency

A second primary rationale for refusing indigents a constitutional right to choose counsel appointed to them is that allowance of choice will "disrupt the even handed distribution of assignments" by burdening the more experienced attorneys and giving advantage to repeat offenders who will monopolize the best attorneys.¹²⁵ This

rev'd, 808 F.2d 214 (2d Cir. 1986) ("When a criminal defendant elects to stand at the Bar in his own defense, and he does so knowingly, voluntarily and unequivocally, a court is bound by the Constitution to honor that election, however suicidal it may appear to be."). See generally *supra* notes 96-99 and accompanying text.

¹²³ 422 U.S. at 815 (quoting *Adams v. United States ex rel. McMann*, 317 U.S. 269, 279-80 (1942)).

¹²⁴ This conclusion is bolstered by consideration of both the breadth of the Sixth Amendment interests being asserted (which exist independently of the mere ability to pay for an attorney, see *supra* Part II.A) and the repayment obligations imposed upon the indigent by uniformly applicable recoupment statutes. See *infra* Part IV.

¹²⁵ See, e.g., *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979) (stating that "[p]ermitt[ing] the defendant to select the lawyer he wishes to represent him . . . [would cause] serious disruption to the even-handed distribution of assignments" and afford a

"efficiency rationale" for rejecting the constitutional claim of indigents to choice of counsel has also been stated in alternative formulations. In *United States v. Thompson*,¹²⁶ for example, the court reasoned that permitting an indigent to select his own counsel could raise the concern of "placing too many burdens on any one lawyer" and ultimately invite reluctance on the part of attorneys to accept appointments.¹²⁷ In addition, the right of choice has been said to "give hostile or disruptive defendants an incentive to make impossible demands upon the court [such as] requests for unavailable lawyers or lawyers unqualified to handle a particular matter."¹²⁸ While governmental efficiency is never a particularly persuasive reason for rejecting a constitutional claim,¹²⁹ each of these

measure of advantage of access to habitual offenders); see also *United States v. Ely*, 719 F.2d 902, 905 (7th Cir. 1983) (rejecting claimed right of indigent to counsel of choice and reasoning in part that "indigent defendants cannot be allowed to paralyze the system by all flocking to one lawyer."); *United States ex rel. Mitchell v. Thompson*, 56 F. Supp. 683, 688 (S.D.N.Y. 1944) (reasoning that permitting right of choice would, among other things, create risk of "imposing too many burdens on any one lawyer"); *People v. Manchetti*, 175 P.2d 533, 537 (Cal. 1946) (recognition of choice "would allow a popular attorney to have the courts marking time to serve his convenience."); *People v. Fitzgerald*, 105 Cal. Rptr. 458, 466 (Cal. Ct. App. 1972) (recognition of indigent's choice of counsel could "give hostile or disruptive defendants an incentive to make impossible demands upon the court [such as] requests for unavailable lawyers or lawyers unqualified to handle a particular matter."); see also LAFAVE & ISRAEL, *supra* note 7, § 11.4 (articulating similar rationales from the case law).

¹²⁶ 56 F. Supp. 683 (S.D.N.Y. 1944).

¹²⁷ *Id.* at 688-89.

¹²⁸ *Fitzgerald*, 105 Cal. Rptr. at 466; see also *Manchetti*, 175 P.2d at 537 (recognition of choice "would allow a popular attorney to have the courts marking time to serve his convenience.").

¹²⁹ The suspect nature of administrative convenience as a justification for constitutional infringements was articulated in *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), which said:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Id. (rejecting administrative convenience rationale for statutory scheme which automatically declared children of unwed fathers wards of the state upon the death of their mother); see also *Bowen v. Gilliard*, 483 U.S. 587, 628 (1987) (Brennan, J., dissenting) (referring to the Aid to Families with Dependent Children program and stating "program efficiency . . . cannot in itself . . . provide a purpose sufficiently important to justify an infringement on fundamental constitutional rights. If it could, its reach would be limitless [because] it is probably more efficient in most cases for Government to operate without

rationales is subject to the following more fundamental criticisms.

a. *Inadequate Evaluation of Competing Interests*

In each case in which the claim of choice has been rejected in favor of an efficiency-based governmental interest, the deciding court has failed to adequately consider the competing interests at stake in recognizing some limited choice in the selection of one's counsel.¹³⁰ The right to select an attorney of choice serves the systemic and individual interests of maintaining the health of our adversarial system of criminal justice and promoting individual autonomy in controlling one's own defense.¹³¹ Permitting an indigent some voice in the selection of his counsel will, furthermore, promote a defendant's confidence in his lawyer and respect for the law which, in terms of the communication, trust and disclosure essential to a healthy attorney-client relationship, will contribute to a greater quality of legal representation.¹³²

Moreover, it can be expected that a greater stability and trust between counsel and client will cause a proportional decline in the need for pre-trial motions for continuances and post-conviction claims of ineffective assistance.¹³³ Each of these predictable effects is particularly important in this context. They each tend to increase

regard to the obstacles of the Constitution than to attend to them."); *Sherbert v. Verner*, 374 U.S. 398, 408-09 (1963) (recognizing that administrative inconvenience will not justify burdening free exercise of religion absent showing that it presents substantial difficulty).

¹³⁰ See cases cited *supra* notes 125-26. See generally *supra* Part II.A. See also *Case*, *supra* note 103. One notable exception is *United States v. Davis* which did consider a defendant's increased confidence in his attorney in the context of governmental efficiency concerns while nonetheless denying the defendant's claim of choice. 604 F.2d 474, 478 (7th Cir. 1979).

¹³¹ See *supra* Part II.A.

¹³² See *supra* notes 30-36 and accompanying text; see also *In re Sealed Case*, 124 F.3d 230, 233 (D.C. Cir. 1997), *rev'd*, *Swidler & Berlin v. United States*, 118 S. Ct. 2081 (1998) (recognizing that limitations upon attorney-client privilege, which itself is founded upon trust, would deter disclosure and thereby "clearly impair the provision of legal services."); *Drumgo v. Superior Court*, 506 P.2d 1007, 1012 (Cal. 1973) (Mosk, J., dissenting) (stating that recognizing a defendant's choice of counsel "is one method for increasing his confidence that he is being provided competent counsel"); *United States v. Davis*, 604 F.2d 474, 478 (7th Cir. 1979) (same).

¹³³ See, e.g., *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (recognizing link between "proliferation of ineffectiveness challenges" and relationship of trust between attorney and client). Many pre-trial motions for continuances arise from defendants' requests to substitute counsel with whom they are dissatisfied. See cases *supra* note 62.

administrative efficiency, the concern for which has been cited as a justification for denying an accused's claimed right of choice.¹³⁴

Yet, despite the substantial benefits to be realized from according an accused some voice in the selection of his counsel, the wealth of case law denying such claims fails nearly uniformly to take these interests into account.¹³⁵ In light of this methodological weakness, when coupled with a consideration of the repayment obligations discussed *infra* which are now uniformly imposed upon indigents, there is little to suggest that, properly considered, the indigent's claim of right to a voice in the selection of his attorney is not considerably more significant than the law has previously recognized.

b. *Inaccurate Characterization of Claimed Right*

A second method by which the courts have elevated the governmental interests in efficiency over an indigent accused's voice in the selection of appointed counsel has been artificially to inflate the breadth of the holding allegedly required to give effect to such choice and then to criticize the flaws of establishing such a broad-based legal proposition.¹³⁶ For example, in *People v. Fitzgerald*,¹³⁷ the court denied the defendant's claimed "inchoate constitutional right to nominate the counsel assigned to him" on the ground that vesting less than ultimate and exclusive authority in the trial court to appoint counsel could invite "impossible demands upon the court" from "hostile or disruptive defendants" including requests for unavailable or unqualified lawyers.¹³⁸

Recognizing a Sixth Amendment right of an accused to counsel of his choice, however, need not be so broad as to license defendants to resort to abusive or dilatory tactics. Indeed, the potential for abuse should rarely countenance denying an otherwise justifi-

¹³⁴ See cases cited *supra* note 125.

¹³⁵ See *supra* note 130 and accompanying text.

¹³⁶ See, e.g., *People v. Fitzgerald*, 105 Cal. Rptr. 458, 466 (Cal. Ct. App. 1972) (reasoning that recognizing right of choice could open door to "impossible demands" from "hostile or disruptive defendants"); *United States ex rel. Mitchell v. Thompson*, 56 F. Supp. 683, 688-89 (S.D.N.Y. 1944) (stating that "defendant may not name the lawyer whom the court must appoint" and refusing to "confer upon every indigent defendant the power of 'senatorial courtesy' with respect to the court's appointee"); *Wilson v. United States*, 215 F. Supp. 661, 663 (W.D. Va. 1963) (same).

¹³⁷ 105 Cal. Rptr. at 466.

¹³⁸ *Id.*

able rule of law.¹³⁹ This principle is perhaps most compelling where, as here, there is a substantial constitutional basis for the right being asserted. There is nothing to suggest that if the right to choice were recognized, courts would be unable adequately to respond to occasional attempted abuses of the type hypothesized by the *Fitzgerald* court.¹⁴⁰

In fact, in the case of a defendant with sufficient resources to retain his own counsel, where the Sixth Amendment right to choice is settled,¹⁴¹ trial courts have demonstrated little difficulty in utilizing their traditionally broad discretionary authority to flexibly respond to perceived abuses of the constitutional right.¹⁴² In the context of motions for continuance, for example, courts have invoked an analogous interest in the "effective administration of court calendars"¹⁴³ and applied "a delicate balance between the defendant's . . . right to adequate representation by counsel of his choice and the general interest in the prompt and efficient administration of justice."¹⁴⁴ This test has proved workable without afford-

¹³⁹ Courts have repeatedly refused to accept the argument that the potential for abuse provides a sufficient ground for rejecting otherwise permissible laws. See, e.g., *United States v. Mezzanatto*, 115 S. Ct. 797, 806 (1995) ("The mere potential for abuse of prosecutorial bargaining power is an insufficient basis for foreclosing [plea] negotiation altogether."); *Associated Indus. v. Lohman*, 511 U.S. 641, 654 (1994) (rejecting challenge to Missouri's use tax scheme by characterizing petitioner's claim as resting on "the potential for abuse" and noting that "we have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands."); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 216 (1994) ("The potential for abuse of [a position created by the Mine Act] appears limited" and "petitioner has failed to demonstrate that such abuse . . . cannot be remedied on an individual basis."); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 634 (1989) (rejecting challenge to federal statute on the ground of potential abuse and reasoning "[e]very criminal law carries with it the potential for abuse, but a potential for abuse does not require a finding of facial invalidity.") (quoting lower court opinion); *Wheat v. United States*, 486 U.S. 153, 163 (1988) (responding to litigant's argument that government motions to disqualify defense counsel carry with them the potential for abuse and noting that "trial courts are undoubtedly aware of [the] possibility" and would have to "take it into consideration" when deciding such motions).

¹⁴⁰ See *infra* notes 142-53 and accompanying text. For a discussion of this Article's response to these and other concerns raised by the recognition of an indigent's limited right to counsel of choice, see *infra* Parts V.B-C.

¹⁴¹ See cases cited *supra* note 26.

¹⁴² See generally *supra* Part II.B.1.

¹⁴³ See generally *supra* Part II.B.

¹⁴⁴ *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978); see *United States v. Sandersfield*, 1997 U.S. App. LEXIS 14749, at *5 (10th Cir. June 18, 1997); *United States ex rel. Carey v. Rundle*, 409 F.2d 1210, 1214 (3d Cir. 1969); see also *supra* Part II.B.1.

ing defendants "the right to obtain delay at [their] whim or caprice."¹⁴⁵ Neither the *Fitzgerald* court, nor others articulating similar rationales, have adequately explained why such an approach would be unworkable in the present context.¹⁴⁶

Recognition of a carefully limited right of the indigent to a voice in the appointment of his attorney could vindicate Sixth Amendment interests without diminishing the courts' power to respond to abusive tactics.¹⁴⁷ As with the right to retain counsel of choice, the constitutional interest of the indigent need not be absolute. Indeed, the carefully tailored limitations developed in that context, pertaining to lay representation, disbarred former attorneys, and conflicts of interest,¹⁴⁸ may each equally limit the indigent's right to an appointed attorney of his choosing.¹⁴⁹ In addition, further limitations could be developed to ease any disruption to "the even-handed distribution of assignments."¹⁵⁰ While the precise contours of the right would best be developed in the context of actual cases and controversies,¹⁵¹ the perceived dangers of recog-

¹⁴⁵ *Candy*, 569 F.2d at 1323; see also *supra* Part II.B.1.

¹⁴⁶ Indeed, courts usually do not explain their rationale at all in this area. See *supra* notes 102 and 119 and accompanying text. Those courts that do articulate this justification effectively reach their decision by simply presuming that indigent defendants will so frequently be disruptive that the right of choice should be denied uniformly without resort to individualized determination. Because courts have never recognized a right of indigent defendants to select which attorney will be appointed to represent them, there is no factual basis at all for this conclusion. As recognized elsewhere, "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972). Yet the "ease with which [such decisions are] reached suggests the worthlessness of the achievement." *United States v. Salerno*, 481 U.S. 739, 759 (1987) (Marshall, J., dissenting).

¹⁴⁷ See *infra* Parts IV.B-C.

¹⁴⁸ See *supra* Part II.B (discussing limitations on Sixth Amendment right to retain counsel of choice).

¹⁴⁹ The interests sought to be achieved through such limitations are no less applicable in the context of indigent representation. See *infra* Part V.C.

¹⁵⁰ For a discussion regarding the proposal made by this Article, see *infra* Part V.

¹⁵¹ Like the legislative process, the difficulty of attempting to predict in advance all of the possible effects and contingencies of a new rule of law is daunting. See H.L.A. HART, *THE CONCEPT OF LAW* 125-136, 128 (1961) (discussing the "open texture" of law and stating that "[i]t is a feature of the human predicament (and so of the legislative one) that we labour under . . . handicaps whenever we seek to regulate, unambiguously and in advance, some sphere of conduct by means of general standards to be used without further official direction on particular occasions."). Once implemented, however, experience thereunder will predictably highlight its subtle weaknesses which may then be "fleshed out" by further interstitial judicial decisionmaking. As noted in ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 115-16 (1965), this role is particularly appropriate for the judiciary:

nizing a right of choice for the indigent could be addressed by a flexible approach similar to that followed in addressing continuance motions.¹⁵²

As the Supreme Court has recognized elsewhere, viewing people "one-dimensionally" (as potential abusive litigants), when a finer perception could readily be achieved by assessment on an individualized basis, is undoubtedly efficient, but possesses an unsettling potential for overbroad deprivations of substantial rights.¹⁵³ Indigent criminal defendants are individuals. They are not just members of a group whose distinguishing characteristic may conclusively be presumed to be a tendency toward abusive litigation tactics. Denying such individuals a voice in appointing their counsel cannot, therefore, be justified by trial courts' largely unanchored anxieties over administrative efficiency.

3. Administrative Convenience

Closely aligned with the efficiency rationale for denying indigent accused's claims of choice in the selection of appointed counsel, the third leading justification sounds in administrative convenience. According to this rationale, the convenience of an appointment system that ignores choice may be preferred because the Sixth Amendment guarantees only competent counsel.¹⁵⁴ As

One of the chief faculties of the judiciary, which is lacking in the legislature and which fits the courts for the function of evolving and applying constitutional principles, is that the judgment of courts can come later, after the hopes and prophecies expressed in legislation have been tested in the actual workings of our society; the judgment of courts may be had in concrete cases that exemplify the actual consequences of legislative or executive actions. . . . [I]t may be added that the opportunity to relate a legislative policy to the flesh-and-blood facts of an actual case . . . to observe and describe in being what the legislature may or may not have foreseen as probable—this opportunity as much as, or more than, anything else enables the [c]ourt[s] to appeal to the nation's second thought.

Id.

¹⁵² See generally *supra* Part II.B.1; see also *infra* discussion Part V.

¹⁵³ *Stanley v. Illinois*, 405 U.S. 645, 655 (1972) (invalidating Illinois statute pursuant to which children of unwed father were automatically declared state wards upon death of mother based upon presumption that father was unfit single parent).

¹⁵⁴ See *LAFAVE & ISRAEL*, *supra* note 7, § 11.4 (articulating similar rationale from the case law); *Tague*, *supra* note 11, at 86; see also *Greene v. Coughlin*, 1995 U.S. Dist. LEXIS 1691, at *41-42 (S.D.N.Y. Feb. 8, 1995) (observing that indigent criminal defendants have no right to choose counsel because "authorities may reasonably value an even distribution of assignments and the convenience of an appointment system that

with the paternalistic and efficiency justifications, the courts' convenience-based rejection of the indigent's claimed right to counsel of choice is fundamentally flawed. It both improperly collapses discrete constitutional interests and fails to explain the basis for its disparate definition of Sixth Amendment rights for the indigent.

a. *Collapsed Rights*

The right to counsel guaranteed by the Sixth Amendment requires that an accused be represented by an attorney "acting in the role of an advocate."¹⁵⁵ Thus, the right to counsel is the right to the "effective assistance of counsel,"¹⁵⁶ which requires at a minimum, that the prosecution's case be made to survive "the crucible of meaningful adversarial testing."¹⁵⁷ Yet, effective advocacy is not the whole of the Sixth Amendment guarantee. A criminal defendant has a settled, albeit limited, constitutional right to be represented by an attorney whom she personally prefers and has chosen to represent her.¹⁵⁸ While both are encompassed within the Sixth Amendment's guarantee, the right to counsel of choice and the right to effective assistance are distinct, and enjoyment of one will not excuse a deprivation of the other.¹⁵⁹ Blurring this distinction, the convenience rationale "conveniently" subsumes the defendant's independent right of choice within the right to competent assistance and then purports to indicate that if an accused has received competent assistance, he should not be heard to complain of being deprived of the right to counsel of choice. Yet, "constitutional rights

ignores [such] preferences").

¹⁵⁵ *Anders v. California*, 386 U.S. 738, 743 (1967).

¹⁵⁶ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970); see generally *United States v. Cronin*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁵⁷ *Cronin*, 466 U.S. at 656.

¹⁵⁸ See generally *supra* Part II.

¹⁵⁹ See *United States v. Burton*, 584 F.2d 485, 489 n.10 (D.C. Cir. 1978) (stating that "[w]hile . . . related, as they all are within the parameters of the Sixth Amendment's right to the assistance of counsel, the right to choice of counsel is distinct from the right to adequate assistance of counsel. The fact that one is infringed does not indicate one way or the other whether the other is infringed."); *Gandy v. Alabama*, 569 F.2d 1318, 1326 (5th Cir. 1978) (noting that whether the effective assistance of counsel was rendered was irrelevant because "[t]he claimed deprivation is an arbitrary encroachment on the right to counsel of choice not a claim of ineffective assistance"); *United States v. Johnston*, 318 F.2d 288, 290 (6th Cir. 1963) (reversing conviction where defendant was denied right to counsel of choice, even though imposed counsel was "extremely competent" throughout the trial).

are not fungible goods,"¹⁶⁰ which can easily be replaced. Rather, they "come to th[e] Court with a momentum for respect"¹⁶¹ which less compelling interests like governmental efficiency simply do not command.

Besides improperly collapsing distinct constitutional rights into a general right to "competency," the administrative convenience rationale suffers from the additional fundamental flaw that it lacks any principled basis from which to prevent it from abrogating the right to choice entirely.¹⁶² If receiving the effective assistance of counsel at trial was sufficient to remedy a violation of the right to counsel of choice, then the defendant's right to choose his attorney would be an "empty exhortation."¹⁶³ Only where a defendant's imposed attorney rendered constitutionally inadequate assistance would an avenue of relief lie for deprivations of the right to counsel of choice.¹⁶⁴ This framework would not only inevitably result in greater incidents of meritless appellate claims of ineffective assistance (as the only way to obtain review of counsel of choice claims) but also contravene settled law.¹⁶⁵

A claim of ineffective assistance of counsel requires a convicted defendant to demonstrate that counsel performed deficiently, and such deficient representation was prejudicial.¹⁶⁶ Unprofessional

¹⁶⁰ *Chapman v. California*, 386 U.S. 18, 44 (1967) (Stewart, J., concurring).

¹⁶¹ *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring).

¹⁶² See *infra* notes 164-65 and accompanying text.

¹⁶³ *Wilson v. Mintzes*, 761 F.2d 275, 286 (6th Cir. 1985) (by shifting analysis away from defendant's right to make choice, "requiring a showing of prejudice would obliterate the heretofore recognized right of the accused to counsel of his choice . . ."); *Burton*, 584 F.2d at 517 (Spottswood, J., dissenting) (arguing that "if proficiency [of counsel] were the lone predicate of harmlessness the constitutional guarantee of freedom to select one's paid counsel would be an empty exhortation."); see also *Gandy*, 569 F.2d at 1326; *Johnston*, 318 F.2d at 290 (reversing conviction where defendant denied right to counsel of choice, even though imposed counsel was "extremely competent" throughout the trial).

¹⁶⁴ This state of the law would improperly shift the focus of the right to counsel of choice from "respect for the individual" to the result obtained by substituted counsel and thereby ignore the very basis for the right to counsel of choice by "lock[ing] the accused into his first selection of counsel unless he can prove conduct rising to the level of constitutional ineffectiveness." See *Mintzes*, 761 F.2d at 286; see also *Bland v. California Dep't of Corrections*, 20 F.3d 1469, 1478-79 (9th Cir. 1994) (adopting similar reasoning).

¹⁶⁵ See *infra* notes 167-69 and accompanying text; see also cases cited *supra* note 28.

¹⁶⁶ *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984) (counsel's performance is deficient when it falls below an objective standard of reasonable professional competence). Deficient representation is prejudicial when "there is a reasonable probability

errors not material to the result of the proceeding do not warrant relief.¹⁶⁷ Yet, where an accused is denied the right to be represented by counsel of his choice, courts have held that prejudice is not a prerequisite to relief.¹⁶⁸ Thus, the framework resulting from the administrative convenience rationale not only promotes inefficiency through imposing extraordinary pleading requirements as a condition to appellate relief, but also effectively creates a prejudice requirement which contradicts the majority of the case law on the issue.

b. *Unjustified Definitional Distinctions*

The convenience justification, however, could alternatively be read more narrowly. Perhaps the rationale is not that the breadth of the Sixth Amendment guarantee to *all* criminal defendants is competent counsel, but only that such is the full extent of the Amendment's guarantee to *indigent* criminal defendants, and therefore, the indigent accused's preference for choice may be sacrificed in the interest of efficiency in an appointment system.¹⁶⁹ Indeed, this formulation would avoid the criticism of improperly blurring the Sixth Amendment distinction between "competency" and "choice," and all of the difficulties flowing from such analytical and constitutional impropriety.¹⁷⁰ Yet, while eluding those objections, this alternative view is no more persuasive. By defining the breadth of Sixth Amendment rights for indigents more narrowly than for non-indigents, and only then considering the governmental interest in the convenient operation of an appointment system, the convenience rationale employs a definitional discrimination of an invidious kind.¹⁷¹

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A "reasonable probability" is one "sufficient to undermine confidence in the outcome." *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ See cases cited *supra* note 28 and accompanying text.

¹⁶⁹ See Tague, *supra* note 11, at 85-86 (recognizing this rationale from the case law).

¹⁷⁰ See *supra* Part III.B.3.a.

¹⁷¹ Within the efficiency-based context, denying indigents some limited right in the selection of their appointed counsel arguably implicates two methods of discriminatory governmental action. The first, as noted in Part III.B.3.b., is a "definitional" discrimination which initially defines the extent of Sixth Amendment rights with reference to the economic status of the accused; the second, and more obvious, is a "treatment" discrimination which gives legal effect to the interests of non-indigents in choice of counsel while simultaneously denying legal effect to the choice interests of indigents. The dis-

If indeed there is justification in *beginning* the analysis by disparately defining the scope of Sixth Amendment rights, the convenience justification does not reveal it. Discrimination on the basis of wealth is a constitutional violation of the first magnitude.¹⁷² While "[t]he Constitution does not require things which are different in fact . . . to be treated in law as though they were the same,"¹⁷³ the government may not, consistent with the Due Process and Equal Protection Clauses, engage in definitional discrimination with regard to constitutional rights based solely on the wealth of the ac-

tion is most clearly revealed by comparing the method of reasoning in the "limitations" cases discussed *supra* Part II.B with the approach of the cases in the immediate Parts II.B.1-3. In the former group, courts employ a balancing approach which explicitly accords weight to the non-indigent's constitutional interests in selection of her own attorney and then metaphorically "balances" those interests against countervailing governmental interests. In the latter group, however, the same constitutional interests in choice are in fact implicated but are defined away and, therefore, given no weight in relation to the asserted government interest in appointment system efficiency. The instant discussion addresses only the "definitional" discrimination.

Indeed, it is doubtful that indigents and non-indigents are sufficiently similarly situated to implicate equal protection scrutiny of the "treatment" discrimination. The Equal Protection Clause is concerned only with disparate treatment of "similarly situated" individuals. *Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 439 (1985) (stating that the Equal Protection Clause "is essentially a direction that all persons similarly situated should be treated alike."); see also *Plyler v. Doe*, 457 U.S. 202, 216 (1982) ("The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.'") (quoting *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)). Because individuals may possess innumerable differences, the search for differences is a search for "relevant" differences. That inquiry is determined with reference to the government purposes sought to be achieved by the challenged action. See *STONE ET AL.*, *supra* note 112, at 536-37. Thus, in the "treatment" discrimination context, the factual economic differences between indigents, who require court appointments, and non-indigents, who do not require the court's intervention, are arguably sufficiently related to the government's interest in promoting appointment system efficiency (a subject which bears little relation to the non-indigent) to warrant the conclusion that the two groups are not "similarly situated" for purposes of equal protection jurisprudence. The different treatment of indigents and non-indigents is, therefore, arguably justified by the relevant differences between the two groups. For an equal protection discussion of what this Article has denominated "treatment" discrimination, see *Tague*, *supra* note 11, at 87-89 (arguing in favor of equal protection analysis and observing that the argument has "considerable merit"). The argument in *Tague's* article has correctly been characterized as "not very convincing." Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9, 54 n.235 (1986).

¹⁷² See *Douglas v. California*, 372 U.S. 353, 355-57 (1963) (both due process and equal protection require that counsel be appointed to indigents during their first appeal as a matter of right); *Griffin v. Illinois*, 351 U.S. 12, 17-19 (1956) (both due process and equal protection require that an indigent defendant be provided with a transcript, free of charge, when necessary to make first appeal as of right meaningful).

¹⁷³ *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

cused.¹⁷⁴ When it attempts to do so, "an unconstitutional line has been drawn between rich and poor."¹⁷⁵

The primary objection to the efficiency justification is the character of the government's *a priori* discrimination between indigents and non-indigents in defining the scope of Sixth Amendment rights. By approaching the relevant inquiry, i.e., whether administrative convenience in appointments is sufficient justification for denying an indigent's claim to counsel of choice, having already defined away the constitutional interests being asserted, the rationale "decide[s] the question in advance in [the] very way of putting it."¹⁷⁶ Indeed, the underlying premise of the efficiency justification is that the indigent is entitled only to a "watered-down version"¹⁷⁷ of the Sixth Amendment rights extended to the non-indigent. It is not surprising, therefore, that given this manner of approaching the question, the government's asserted interest in efficiency is held sufficient to justify ignoring an indigent's claim to his choice of counsel.¹⁷⁸

¹⁷⁴ See cases cited *supra* note 173. The Fourteenth Amendment provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. The Fifth Amendment's Due Process Clause encompasses the core equal protection guarantee applicable to the federal government. *Bolling v. Sharpe*, 347 U.S. 497, 499-50 (1954). The judicial underpinnings of the Supreme Court's pronouncements on discrimination against the indigent may be found in both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See *Douglas*, 372 U.S. at 355-58; *Griffin*, 351 U.S. at 17-19; see also *M.L.B. v. S.L.J.*, 117 S. Ct. 555, 566 (1996) (observing that the *Griffin* line of cases "reflect[s] both equal protection and due process concerns"); *Ross v. Moffitt*, 417 U.S. 600, 608-09 (1974) ("The precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment."). Because due process and equal protection principles shade subtly into each other in this area, judicial inquiry should "inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other". *M.L.B.*, 117 S. Ct. at 566.

¹⁷⁵ *Douglas*, 372 U.S. at 357.

¹⁷⁶ Roscoe Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1, 2 (1943) (criticizing the tendency of "balancing" tests on this basis which compare rights and interests at disparate levels of abstraction).

¹⁷⁷ *Gideon v. Wainwright*, 372 U.S. 335, 347 (1963) ("[R]ights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.") (*Douglas, J.*, supplemental opinion).

¹⁷⁸ "The starting point of a decision," Justice Douglas once observed, "usually indicates the result." *EPA v. Mink*, 410 U.S. 73, 105 (1973) (*Douglas, J.*, dissenting). This point is perhaps most clearly demonstrated by the Court's "strict scrutiny" jurisprudence in the equal protection context which has been described as "strict in theory, but fatal

While it may be argued that the factual disparity in economic status between indigents and non-indigents is sufficient to remove them from the class of "similarly situated"¹⁷⁹ individuals with which the equal protection guarantee is concerned,¹⁸⁰ this argument overlooks the point that the discrimination at issue—defining the relevant constitutional interests of indigents more narrowly than for non-indigents—¹⁸¹has no legitimate governmental purpose in relation to which the relevance of this factual disparity may be analyzed.¹⁸² The definitional discrimination is not justified by a relevant difference between indigents and non-indigents. Because the discrimination is wholly unrelated to the economic disparity between the two groups, the factual disparity thus raised is a distinction without an equal protection difference.¹⁸³ Even assuming, however, that the financial condition of an accused is relevant to values underlying the right to choice in the selection of an attorney, as Part IV discusses, the increased prevalence of reimbursement statutes, which impose repayment obligations upon defendants who receive appointed counsel legal services, justifies an attempt to align more closely the defense services for indigents with those of non-indigents.¹⁸⁴ This alignment should commence by rethinking the Sixth Amendment interests implicated by an indigent's claim to choice in his appointed counsel.

in fact." *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment).

¹⁷⁹ See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); see also *supra* note 171.

¹⁸⁰ See *supra* note 171 (making this argument in the context of "treatment" as opposed to "definitional" discrimination).

¹⁸¹ See *supra* notes 96-99 and accompanying text (discussing constitutional values underlying right to counsel of choice).

¹⁸² See discussion *supra* note 172 (explaining that in determining whether individuals or groups are similarly situated for purposes of equal protection, the analysis focuses on differences which are relevant to the governmental purpose sought to be achieved by the complained of action).

¹⁸³ Compare this conclusion with the discussion pertaining to "treatment" discrimination in *supra* note 172.

¹⁸⁴ See *infra* Part IV.

IV. RECOUPMENT STATUTES

A. Effect

While *Gideon v. Wainwright* extended the right to counsel to state criminal defendants, it did not address whether, and under what circumstances, states could recover the costs of providing counsel to such defendants.¹⁸⁵ Currently, every state and the federal government has enacted a statutory recovery system designed to recoup all or some of the costs associated with the government's constitutional obligation to provide counsel to indigent criminal defendants.¹⁸⁶ While these statutory recovery systems vary widely, they generally operate to require criminal defendants who are indigent at the time of their criminal proceedings, and who are appointed an attorney to represent them, to repay all or a portion of the costs of their legal defense when they subsequently obtain the means to do so.¹⁸⁷ Despite the uniform implementation of such statutory repayment obligations, which conscript defendants' assets through seizures, liens and other security devices,¹⁸⁸ to pay for

¹⁸⁵ See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁸⁶ *State v. Albert*, 899 P.2d 103, 104 (Alaska 1995) (citations omitted). See generally Francis M. Dougherty, Annotation, *Validity, Construction and Application of State Recoupment Statutes Permitting State to Recover Counsel Fees Expended for Benefit of Indigent Criminal Defendants*, 39 A.L.R. 4TH 597 (1985).

¹⁸⁷ Definitions of indigency, like property exemptions, vary widely from state to state. For instance, some statutes require repayment only in the event of conviction, while others impose repayment obligations regardless of the outcome of the proceedings. Compare FLORIDA STAT. ANN. § 27.56 (renumbered as 938.29) (West 1997) (assessing attorney fees and costs only upon convicted defendants) with OR. REV. STAT. § 135.055(6) (1997) (providing recoupment provisions applicable to all defendants for whom counsel has been appointed). See *State v. Arms*, 653 P.2d 1004, 1005 (Or. Ct. App. 1982) (holding that Section 135.055(6) "applies to all individuals for whom counsel is appointed, regardless of the outcome of the prosecution."). The Supreme Court in *Fuller v. Oregon*, 417 U.S. 40 (1974), upheld this distinction against an equal protection challenge.

¹⁸⁸ Lien provisions are common in state recoupment statutes. See, e.g., CAL. PENAL CODE § 987.8(f) (West 1997); FLORIDA STAT. ANN. § 27.56 (renumbered as 938.29) (West 1997); N.C. GEN. STAT. § 7A-455(b) (1997); S.C. CODE ANN. § 17-3-40 (Law. Co-op. 1998); S.D. CODIFIED LAWS § 23A-40-11 (Michie 1988). The use of lien provisions as enforcement mechanisms in such statutes has generally been approved. See, e.g., *State v. Williams*, 343 So. 2d 35 (Fla. 1977) (upholding state recoupment statute which sought recovery of expended resources by creating lien against indigent defendant's real and personal property); *Stroinski v. Office of Pub. Defender*, 338 A.2d 202 (N.J. Super. Ct. App. Div. 1975) (upholding provision of recoupment statute which required that a lien be filed against indigent defendant's property where value of public defender services appeared to exceed \$150).

legal defense costs, indigent criminal defendants have not been extended a corresponding voice in choosing which attorney is appointed to represent them.

If indigent criminal defendants possess a constitutional basis for their claim to a voice in the selection of their appointed counsel in the absence of considering their repayment obligations, and it certainly appears that they do,¹⁸⁹ reimbursement statutes should only improve their constitutional footing. To begin determining the merits of this view, the following section will consider the governmental interests legislatures seek to further through statutory reimbursement schemes and discuss whether such interests impact the analytical framework for considering indigent claims to a right to counsel of choice.

B. Governmental Interests

In a series of cases, the U.S. Supreme Court has given general approval to the primary purpose sought to be achieved through recoupment statutes—replenishment of public treasuries.¹⁹⁰ In the 1960's and 1970's, as Supreme Court decisions expanded the classes of cases to which the right to counsel applied¹⁹¹ and continued to define the point in an investigation at which a suspect became entitled to an attorney,¹⁹² the fiscal burden of complying with con-

¹⁸⁹ See *supra* Parts II and III.

¹⁹⁰ See *Fuller*, 417 U.S. at 53-54 (upholding Oregon recoupment statute and broadly endorsing concept in general); *James v. Strange*, 407 U.S. 128, 140-41 (1972) (invalidating Kansas recoupment statute which denied indigent defendants many of the exemptions available to other civil judgment debtors but broadly approving variety of legitimate interests served by recoupment in general); *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966) (invalidating New Jersey reimbursement provision applicable only to incarcerated defendants but stating "[w]e may assume that a legislature could validly provide for replenishing a county treasury from the pockets of those who have directly benefited from county expenditures."); see also *State v. Albert*, 899 P.2d 103, 124 (Alaska 1995) (Bryner, J. pro tempore, dissenting) ("A recoupment plan's only legitimate purpose lies in reimbursing the state for actual costs incurred for legal services . . ."). At least one's state's statutory recoupment provisions have been said to serve rehabilitative purposes. See N.C. GEN. STAT. § 148-57.1 (1997); *Alexander v. Johnson*, 742 F.2d 117, 122, 125 (4th Cir. 1984).

¹⁹¹ See, e.g., *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (Sixth Amendment right to counsel attaches upon initiation of adversary judicial proceedings); *Douglas v. California*, 372 U.S. 353 (1963) (indigent defendant entitled to counsel on first appeal as of right); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (applying Sixth Amendment right to counsel to state criminal prosecutions).

¹⁹² See, e.g., *Coleman v. Alabama*, 399 U.S. 1 (1970) (remanded to determine wheth-

stitutional mandates increased substantially.¹⁹³ More recently, statistics reveal that approximately seventy-five to eighty percent of criminal defendants are indigent.¹⁹⁴ Therefore, they may be entitled to appointed counsel, indicating that indigent legal defense costs continue to be a significant element of state budgets.¹⁹⁵ The states, of course, maintain a substantial interest in recovering a portion of the funds thus expended.¹⁹⁶ Yet, regardless of the degree of importance attributed to the government's interest in cost-recovery, because recognition of an indigent accused's choice in the selection of his counsel neither advances nor inhibits this interest, it has no place in an analysis of whether and to what extent an indigent defendant should be afforded some voice in the selection of his appointed counsel.¹⁹⁷

er the denial of the right to counsel in preliminary hearing stage of criminal prosecution constitutes harmless error); *Mempa v. Rhay*, 389 U.S. 128 (1967) (right to counsel extended to felony defendants' probation revocation proceeding where deferred sentencing to be imposed); *United States v. Wade*, 388 U.S. 218 (1967) (right to counsel extended to post-indictment lineups); *Miranda v. Arizona*, 384 U.S. 436 (1966) (suspect in custody and subject to police interrogation entitled to counsel).

¹⁹³ See *James*, 407 U.S. at 141 (recognizing that expansion of right to counsel has "heightened the burden on public revenues").

¹⁹⁴ Pamela S. Karlan, Symposium, *Fee Shifting in Criminal Cases*, 71 CHI-KENT L. REV. 583 n.3 (1995).

¹⁹⁵ In New York, New York City alone annually contributes approximately \$60 million to the Legal Aid Society, the primary organization providing indigent criminal defense representation. Matthew Goldstein, *Private Defenders Could Outearn Legal Aid*, N.Y.L.J., Mar. 27, 1997, at 1. In addition, the City could spend an additional \$63.8 million in fiscal year 1997 on non-Legal Aid indigent criminal defense services. *Id.* Comparatively, the Georgia General Assembly approved a fiscal year 1998 indigent defense budget in the amount of \$4.28 million. Lolita Browning, *43% Hike for Indigent Defense; \$1.2 Million to Add Death-Case Lawyer, Aid Counties*, FULTON COUNTY DAILY REPORT, April 4, 1997.

¹⁹⁶ *Cf. James*, 407 U.S. at 141 (stating that "state interests represented by recoupment law may prove important ones . . .").

¹⁹⁷ As noted *supra* note 10, this Article assumes, without discussing, the validity of the primary thrust of recoupment statutes—repayment to the government of all or some portion of legal defense costs. Given this posture of the issue, an indigent criminal defendant who is otherwise covered by the jurisdiction's applicable reimbursement statute will be required to meet his reimbursement obligation whether he has had a voice in the selection of his appointed counsel or not. Thus, the government's interest in recouping costs associated with indigent criminal defense, however compelling it may be, is simply not implicated by the accused's selection of his appointed attorney. Therefore, it is irrelevant to a consideration of whether such a right of choice should be recognized.

V. RETHINKING THE SIXTH AMENDMENT

A. *Recognizing a Right of Choice*

The significance of recoupment statutes to the indigent defendant's asserted right to choose his counsel lies solely in their tendency to advance the indigent's standing to assert his preference by imposing statutory financial obligations which more closely align him with his non-indigent counterpart who unquestionably retains a Sixth Amendment interest in counsel of choice.¹⁹⁸ Viewed in this light, the operation of recoupment statutes bolsters the indigent's claim to a right of choice while adding nothing to the governmental interests which have traditionally been asserted against recognition of such a right.¹⁹⁹

It may, however, be argued that recoupment statutes only enhance the claims of right of those defendants who, while indigent at the time of counsel's appointment, later discharge their statutory obligation by actually repaying the costs associated with their legal defense. According to this view, only those defendants who actually repay such costs should have a voice in the selection of their attorney. Since repayment will likely occur, if at all, at some point after counsel has been appointed, and more likely after an adjudication of guilt or innocence,²⁰⁰ courts will have no way of knowing at the time when the right to choice would be exercised whether the defendant will have satisfied the repayment condition precedent, triggering the existence of the right.

While the above argument is not without plausibility, the gravamen of its reasoning is its assumption that repayment alone is the sole factor supporting the indigent's constitutional claim to a right to counsel of choice. The indigent criminal defendant's Sixth Amend

¹⁹⁸ See *supra* Part II (discussing constitutional right to counsel of choice for non-indigent).

¹⁹⁹ See generally *supra* Part III.B (critically discussing asserted government interests in denying right to choice of counsel to indigents).

²⁰⁰ See *Bull v. State*, 548 So. 2d 1103, 1105 (Fla. 1989) (recognizing that "any repayment by a formerly indigent defendant . . . normally occurs well after the [legal] services are performed."); *People v. Cozad*, 511 N.E.2d 211, 216-17 (Ill. App. Ct. 1987) (commenting that trial court erred in assessing attorney fees for purposes of reimbursement prior to services having been rendered).

ment interests in choosing his own counsel are compelling even absent consideration of the repayment obligations imposed by recoupment statutes and warrant recognition.²⁰¹

Moreover, even if it were impossible to determine with precision at the time counsel is appointed whether a particular defendant would subsequently develop the financial ability to discharge his repayment obligations, this imprecision only alerts us to the unremarkable fact that any system which considers repayment as a factor relevant to the right to choose an attorney will be incapable of maintaining a mathematically precise correspondence between instances of actual repayment and extensions of the right to choice. Indeed, constitutional law has never required such synergy. In the speedy trial context, for example, a right unquestionably guaranteed by the Sixth Amendment,²⁰² it has never been held that all of the constitutionally significant interests underlying the right must be implicated in an individual case, if each particular criminal defendant is to be guaranteed the right to a speedy trial.²⁰³ Repayment is simply another factor militating in favor of recognizing the constitutional nature of the indigent accused's interest in selecting his own counsel. The mere fact that in any particular case, this factor is not implicated by the facts of the case no more requires the conclusion that the "right" does not exist than does the absence of a

²⁰¹ See *supra* Parts II and III.

²⁰² The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ." U.S. CONST. amend. VI. The right has been extended to state criminal prosecutions through the Due Process Clause of the Fourteenth Amendment. *Klopfer v. North Carolina*, 386 U.S. 213, 222-23 (1967).

²⁰³ The right to a speedy trial is premised upon an accused's interest in (i) avoiding prolonged detention prior to trial, (ii) avoiding the intense anxiety and public suspicion attendant to pending criminal charges, and (iii) litigating the issue of guilt or innocence before evidence disappears and with it the ability to defend oneself. See *United States v. Marion*, 404 U.S. 307, 320-21 (1971); *United States v. Ewell*, 383 U.S. 116, 120 (1966). Any one of these interests is sufficient to trigger the speedy trial right. See, e.g., *Klopfer*, 386 U.S. at 214, 218-22 (prosecutor's "nolle prosequi with leave" following trial which ended in hung jury and pursuant to which prosecutor could reinstate charges without further court order implicated defendant's interest in avoiding anxiety and public suspicion attendant to pending charges and thus violated speedy trial right). Likewise, the mere fact that one of the interests is not implicated on the facts of the case does not preclude applicability of the speedy trial right. See, e.g., *Dickey v. Florida*, 398 U.S. 30, 36-38 (1970) (prosecution dismissed on speedy trial grounds where, in seven years following armed robbery charge during which defendant was not imprisoned but possible defense witnesses either died or could no longer be located, defendant had not been brought to trial despite speedy trial requests).

particular defendant's pre-trial confinement, for example, in the speedy trial context require the conclusion that that right should not exist.²⁰⁴ The relevant inquiry, therefore, is whether the right to counsel of choice should be recognized, despite the potential to overinclusively benefit some defendants who will eventually default, or denied, despite the potential to underinclusively detriment some defendants who will eventually repay.²⁰⁵

Ultimately, in light of the individual and systemic values underlying the Sixth Amendment's vindication of personal choice, which apply irrespective of repayment,²⁰⁶ the recoupment obligations uniformly imposed on indigent criminal defendants, and the inadequacy of the governmental interests traditionally asserted against the indigent's right of choice, a system which occasionally extends a choice of counsel to defendants who do not repay must be preferred over one which uniformly denies a choice to those who do.²⁰⁷ The Sixth Amendment should be interpreted to recognize

²⁰⁴ If the answer is that the speedy trial right is textually explicit in the Sixth Amendment and that the indigent accused's "right" to counsel of choice is not, the real challenge is then revealed not as one concerned with the relevance of reimbursement supporting recognition of the claimed "right," but rather one which is concerned with whether the claimed "right" is textually supported by the Sixth Amendment. Yet, if this is the basis for rejecting the claimed "right," it likewise provides the basis for rejecting the well-settled right of the non-indigent to counsel of choice. Neither right is explicitly found in the text of the Amendment. See *supra* note 19. The right of the non-indigent to retain counsel of choice, however, is not seriously questioned. See case cited *supra* note 26.

²⁰⁵ As noted, the issue immediately *sub judice* is whether a constitutional right, in some necessarily limited form, and as an aspect of the Sixth Amendment right to counsel, should be recognized in favor of indigent criminal defendants to choose which attorney is appointed to represent them. Assuming such a right is recognized, whether in any particular case, it has been violated—a question which indeed might consider the constitutional interests implicated in the individual case in the context of any contrary societal or governmental interests also at stake—is the subject of the discussion *infra* Part V.C. Current law, by refusing to recognize such a right, even in limited form, resembles the "underinclusive" paradigm.

²⁰⁶ See *supra* notes 96-99 and accompanying text; see also *supra* Part II.A (discussing values underlying Sixth Amendment right to retain counsel of choice).

²⁰⁷ Because, as noted, the right to choice in the selection of one's counsel serves the systemic interest in maintaining a healthy adversarial system and contributes to a greater quality of legal representation, see *supra* Part II.A, *supra* note 132 and accompanying text, this right, like other Sixth Amendment rights, implicates interests beyond individual defendants and particular cases. The right to a speedy trial, for example, has been held to implicate various "societal interests." Prompt disposition (i) furthers society's interest in promoting rehabilitative concerns, which might otherwise be eroded by lengthy delays between arrest and punishment, (ii) limits society's exposure to potentially dangerous defendants on bail who may commit additional crimes before trial on pending charges, and (iii) decreases the opportunities for defendants to flee the jurisdiction before a trial

the indigent criminal defendant's interest in being represented by an attorney of his choosing.

B. *Methodological Framework for Analyzing Right to Choice Claims*

Because of the well-settled state of the law that indigent criminal defendants do not enjoy a right to counsel of their choosing and the tendency of courts to mechanically reject the relatively few challenges which are made to that principle,²⁰⁸ judicial discussion of how that question should be approached (as opposed to how it should be resolved) has been sparse. In light of the emergence of "balancing" as perhaps the primary method for adjudicating constitutional claims and its role in the case law addressing limitations on the right to retain counsel of choice,²⁰⁹ this Article adopts the "balancing" methodology as the analytical framework within which to decide the breadth of the right which has been advanced.²¹⁰ Considering the demonstrated ability of trial courts to accommodate the right of non-indigent defendants to choose their own counsel,²¹¹ the proposed approach borrows from both the substantive and procedural law which has developed in that area. In doing so,

is conducted. *Barker v. Wingo*, 407 U.S. 514, 519-21 (1972). Similarly, the Sixth Amendment right to "conflict-free representation" also implicates societal and systemic concerns which transcend individual defendants in particular cases. See generally *supra* Part II.B.2. Given the broad implications of the right to counsel of choice, it is appropriate, therefore, when considering the breadth of its application, to consider interests which extend beyond any individual defendant or particular case. Certainly, if societal and institutional concerns may limit constitutional interests, as the discussion in *supra* Part II.B illustrates, they may also justify extending constitutional interests as *Barker* demonstrates.

²⁰⁸ See *supra* notes 102 and 119 and accompanying text.

²⁰⁹ See *supra* Part II.A. But see *supra* note 85 and accompanying text.

²¹⁰ This approach is undertaken with full cognizance of the criticisms which have been leveled against "balancing" in constitutional adjudication. See *supra* note 116. See generally Aleinikoff, *supra* note 50; Strossen, *supra* note 50, at 1184-1207 (identifying general problems with "balancing" and identifying specific problems in Fourth Amendment context); Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531, 554-562 (1997) (arguing that Fourth Amendment balancing dilutes the protection that the Amendment was intended to provide). The approach is adopted here as a reflection of the unlikely prospect that courts will break from the "balancing" trend.

²¹¹ See generally *supra* Part II.

this approach reaps the benefit of the experience which has given rise to that substantial body of case law, while providing a measure of predictability to a developing parallel jurisprudence.

In passing on an indigent's request for particular counsel, exercise of the trial court's discretion should reflect a delicate balance between the defendant's right to adequate representation by counsel of his choice and the interest in prompt, ethical and efficient administration of justice.²¹² Because the indigent's choice is of constitutional dimension, there should be a presumption in favor of accommodating the defendant's preference.²¹³ A defendant should not presume, however, that his right to counsel of choice includes the right to unduly frustrate the effective administration of the court's calendar.²¹⁴ Thus, a defendant's unreasonable delay in selecting an attorney, or requests for substitution once counsel has been appointed, would be afforded no presumption of legitimacy.²¹⁵ A trial court would have broad discretion in fashioning an appropriate response to abusive or dilatory tactics.²¹⁶ The right to counsel of

²¹² This formulation of the balancing test resembles the approach taken in the non-indigent context and incorporates the more recent admonition of *Wheat v. United States* that federal courts have an independent obligation to ensure the criminal proceedings "are conducted within the ethical standards of the profession" 486 U.S. 153, 160 (1988); see also *supra* note 78 and accompanying text.

²¹³ See *Wheat*, 486 U.S. at 164 (recognizing presumption in favor of non-indigent's choice of attorney). A defendant would not have to justify his initial choice of a particular attorney. If the government should seek to disqualify a defendant's choice, it would bear the burden of demonstrating the necessity of granting the requested relief. This evidentiary framework reflects current law in the non-indigent context. See *United States v. Diozzi*, 807 F.2d 10, 12 (1st Cir. 1986); *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir. 1986). Following the initial appointment of defendant's chosen counsel, however, the defendant would bear the burden of justifying a subsequent request for substitution.

²¹⁴ See *supra* notes 60-61 and accompanying text.

²¹⁵ See *supra* note 213.

²¹⁶ See *supra* notes 56 and 62 and accompanying text. Where the right to self-representation is concerned, the Supreme Court has recognized its prominent place within the Sixth Amendment, but nonetheless said that "the trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. . . . The right of self-representation is not a license to abuse the dignity of the courtroom." *Faretta v. California*, 422 U.S. 806, 834-35 n.46 (1975); see also *Illinois v. Allen*, 397 U.S. 337 (1970) (holding that a defendant may lose his right to be present in the courtroom during his trial by disruptive and obstreperous conduct and stating that a trial judge has discretion sufficient to meet the circumstances of the case). There fails to exist anything to suggest that a different approach should not apply in the right to chosen counsel context. Indeed, recognition of the right to choice within these parameters would be directly responsive to one of the primary concerns raised by the courts which have traditionally refused the right to counsel of choice for the indigent. See *gen-*

choice should not be used as a weapon against the legitimate interest in avoiding unnecessary delay.²¹⁷

C. *Guidelines and Operation of Methodological Framework*

Because balancing approaches, by their nature, require courts to decide cases on an individual basis, each of the facts and circumstances which may be considered in passing on requests for particular attorneys cannot reasonably be foreseen. Yet, while it is impossible to parse in advance all of the factors which a trial court should consider,²¹⁸ some considerations are readily apparent from the few decisions which have articulated rationales for denying recognition of an indigent's right to chosen counsel—(1) the trial court's need for efficiency, and (2) the reasons for the defendant's choice.²¹⁹ In addition to these relevant considerations, the proposed approach incorporates the limitations developed in the non-indigent choice-of-counsel cases pertaining to lay representation, disbarred former attorneys and conflicts of interest.²²⁰

erally *supra* Part III.B.2.b.

²¹⁷ See *Gandy v. Alabama*, 569 F.2d 1318, 1323 (5th Cir. 1978) (cautioning that the right to select attorney is not to be used "as a manipulative monkey wrench."); see also cases cited *supra* note 60. Trial courts are under tremendous pressure to keep burgeoning criminal dockets moving. See The Speedy Trial Act § 208, 18 U.S.C. § 3161 (1994); FED. R. CRIM. P. 48(b) (authorizing district courts to dismiss indictment for "unnecessary delay" in presenting charges to grand jury or bringing a defendant to trial); FED. R. CRIM. P. 50(b) (requiring district courts to conduct a continuing study of criminal justice administration and to prepare plans for the prompt disposition of criminal cases). However, the courts do not maintain a monopoly over the concerns raised by pre-trial delay. Such delay may frequently benefit a defendant, as the threat of fading memories and disappearing evidence erodes the government's ability to prove its case. The defendant's interests in minimizing pre-trial detention, avoiding the anxiety of rising public suspicion due to the pending criminal charges, and marshalling defense evidence over time indicate that many defendants share courts' concern for avoiding unnecessary pre-trial delay. See *Barker v. Wingo*, 407 U.S. 514, 521 (1972); *United States v. Marion*, 404 U.S. 307, 320 (1971) (recognizing that "[i]nordinate delay between arrest, indictment, and trial may impair a defendant's ability to present an effective defense."); *United States v. Ewell*, 383 U.S. 116, 120 (1966) (articulating similar concern).

²¹⁸ See *supra* note 151.

²¹⁹ See *supra* III.B.1-3.

²²⁰ See *supra* notes 47-49 and accompanying text; *supra* Part II.B.2.

1. Administrative Concerns

The most significant limitation on the indigent's choice of counsel would require the defendant to make his selection from among the panel of available attorneys rendering public defender assistance in the jurisdiction.²²¹ Thus, indigent defendants would not be at liberty to "pick and choose" among members of the local bar.²²² In order properly to assess the likely effect of the indigent's choice on the administration of the court's calendar, courts should consider the general availability of the selected attorney, including both his current case load and, where reasonably possible, the attorney's own assessment of whether he can provide representation without undue delay or excessive requests for continuances.²²³ Absent a clear demonstration that the defendant's choice will occasion *substantial* delay, that choice may not be denied on the ground of either "administrative efficiency" or "overburdening" a particular attorney.²²⁴ Because this analysis must necessarily be conducted on the basis of probabilities and the good faith assessments of both attorneys and trial judges, however, courts should be afforded wide discretion in making these determinations.²²⁵ A court's refusal to

²²¹ This limitation recognizes the practical and legal reality that attorneys in private practice are not likely to be compelled to render legal assistance to a person who, by definition, is too poor to pay for the services. See U.S. CONST. amend. XIII (prohibiting involuntary servitude). But see Brenda Sapino Jeffreys, *A Lonely Crusade Against El Paso's Mandatory Pro Bono Plan*, TEXAS LAWYER, April 7, 1997, at 28 (describing unique mandatory pro bono criminal appointment system in Texas which requires attorneys either to accept appointments or pay \$600 to be excused).

²²² See *United States v. Bradley*, 892 F.2d 634, 634-35 (7th Cir. 1990) (stating that indigent defendants "cannot pick and choose among members of the district court's bar").

²²³ By considering the impact of a defendant's choice on selected attorneys' case-loads, the proposed paradigm not only recognizes trial courts' administrative concerns but also directly responds to the argument that indigent defendant's should not be permitted to overburden particularly "popular" attorneys. See cases cited *supra* notes 125-28.

²²⁴ Each of these concerns has been raised as a reason for refusing even to recognize the indigent's right of choice. See *supra* Part III.B.2. In light of this Article's conclusion that such a right should be recognized, the proposed approach more appropriately postulates these legitimate concerns as factors to be considered in individual cases. In each case these factors' relevance should be raised rather than presumed in all cases. See *supra* note 146 (criticizing unnecessary resort to overly broad presumptions to resolve legal issues).

²²⁵ Recognition of the trial court's broad discretion in this regard is not intended to dilute the proposed approach's requirement that any undue delay be *substantial* and *clearly* shown as a condition precedent to denying the indigent's choice. See *supra* text

appoint a defendant's first choice of counsel on either of these basis, should not be reversed absent an abuse of discretion.²²⁶

2. Reasons for Choice

The second readily apparent factor which trial courts should examine in passing on an indigent's choice of particular counsel is any reason proffered by a defendant in support of his personal selection. While this factor may seem to be an inappropriate consideration under circumstances in which the defendant is exercising a constitutionally protected right,²²⁷ it would not only preserve the defendant's right to be heard but his reasons may be helpful or persuasive to the court. Regardless of how "unwise" his explanation may seem, however, absent an independent basis for declining the appointment of chosen counsel, the defendant's choice should be given effect.²²⁸ fact, a trial court should not *sua sponte* request that a defendant state any reason at all for his initial selection. Any reasons considered must be tendered voluntarily by an unprompted defendant.²²⁹

The trial court's responsibility in this regard is a delicate one. In entertaining a defendant's proffer, a high degree of respect must be given to the accused's free choice. Because personal choice is the essence of the right,²³⁰ its exercise defies application of any litmus paper test. Thus, courts must be careful to avoid substituting their judgment for that of the defendant.²³¹

accompanying note 225.

²²⁶ Under current law, in light of trial courts' traditionally broad power to govern the conduct of cases before them, the abuse of discretion standard predominates appellate review of counsel of choice cases. See *supra* notes 56, 62 and 81 and accompanying text.

²²⁷ See *United States v. Burton*, 584 F.2d 485, 491 (D.C. Cir. 1978) (admonishing that a court should not inquire into a defendant's reasons for his choice of counsel); *Chapman v. United States*, 553 F.2d 886, 893-95 (5th Cir. 1977) (indicating that, in right to self-representation context, the court may not pass on the validity of a defendant's reasons for wanting to proceed *pro se*).

²²⁸ In the absence of stated reasons for his choice, the presumption in favor of appointing chosen counsel should speak for the defendant.

²²⁹ See *Burton*, 584 F.2d at 491.

²³⁰ See *Flanagan v. United States*, 465 U.S. 259, 268 (1984) (recognizing that the right to counsel of choice reflects constitutional protection of a defendant's free choice apart from its tendency to promote the adversarial system); see also *supra* notes 96-99 and accompanying text.

²³¹ Cf. *Chapman*, 553 F.2d at 893-95 (indicating that court should not judge the validity of a defendant's reasons for invoking his right to self-representation).

Furthermore, though they may not be articulated in terms as eloquent as their effect may be profound, certain reasons should resonate with the trial court.²³² Thus, special consideration should be given if chosen counsel was selected because of a prior relationship or other developed rapport with the defendant exists which will contribute measurably to the quality of the representation.²³³ Heightened deference to the indigent's choice in such circumstances reflects the reality that lawyers are neither a "homogeneous group" nor "fungible" and that a defendant's selection of an attorney whom he knows may not only contribute to the preservation of the adversary system, but also form a part of his trial strategy.²³⁴ Under such circumstances, the defendant's reasons should be accorded the highest deference.²³⁵

²³² See *infra* notes 234-36 and accompanying text.

²³³ The Supreme Court has recognized that counsel's performance is so intimately linked to the compelling interest in preservation of the adversarial system that a defendant's choice of counsel may be compromised in circumstances where his attorney's effectiveness may be diminished. See *Wheat v. United States*, 486 U.S. 153, 158-60 (1988). See generally *supra* Part II.B.2. Thus, where counsel's performance may be enhanced because of a prior relationship or other established rapport with a defendant, the resultant incremental benefit to the adversarial system justifies special consideration of the defendant's choice.

²³⁴ See *United States v. Laura*, 607 F.2d 52, 56 (3rd Cir. 1979) (recognizing importance of choice of particular attorney in light of defendant's right to direct his defense).

²³⁵ Indigent criminal defendants' mistrust and lack of confidence in appointed attorneys (usually public defenders) is well documented. See *Jones v. Barnes*, 463 U.S. 745, 761 (Brennan, J., dissenting) ("It is no secret that indigent clients often mistrust the lawyers appointed to represent them."); Berger, *supra* note 171, at 53-54; Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1241-42 (1975). This mistrust can have a corrosive effect on counsel's ability to render effective assistance and may thereby weaken the adversarial system. See *supra* Part II.A. An indigent's request for appointed counsel with whom he has a prior relationship, therefore, deserves heightened consideration, if only to promote effective advocacy. In fact, defendants' requests frequently reflect this rationale. See, e.g., *United States v. Ely*, 719 F.2d 902, 904 (7th Cir. 1983) (requesting appointment of other attorney who was present in the courtroom, defendant explained "[the other attorney] had represented business of mine at one time and I have — I feel a more closer relationship with [him] in understanding what is before me. . . ."); *Drumgo v. Superior Court*, 506 P.2d 1007, 1008 (Cal. 1973) (defendant explaining "I know Attorney Hodge, and I have consulted with him concerning this case; I respect the competence and ability of Attorney Hodge and have confidence in him as my attorney; because of the foregoing, I will cooperate with Attorney Hodge. . . . I do not want Attorney Breiner to represent me since I do not know him; I do not have the confidence in him as is vital in a capital case").

CONCLUSION

Mr. Justice Jackson once observed that "the mere fact that a path is a beaten one is a persuasive reason for following it."²³⁶ Denial of the indigent criminal defendant's choice in the selection of counsel is indeed a well-worn path. Yet the danger in continuing to navigate a familiar road lies in the tendency to hinder the search for better ways to the destination and to instill a reluctance to entertain suggested alternatives.

This Article has discussed the constitutional interests which underlie the right to counsel of choice and explained how those interests apply irrespective of a criminal defendant's financial condition. The rationales which have traditionally, if only infrequently, been cited as justification for denying the right to indigents are either outmoded or illusory. Judicial experience with, and the law which has developed in the context of, the right of non-indigents to retain counsel of choice requires rethinking the Sixth Amendment for the indigent accused. In addition, the repayment obligations imposed by recoupment statutes only further the indigent's standing to assert his preference of attorney. By requiring indigent defendants, who obtain the financial means to do so, to repay all or a portion of the costs of their criminal defense, while simultaneously denying to the accused any choice in the selection of his attorney, current law unjustifiably requires the indigent to pay the piper without extending any real authority to call the tune. The proposed approach provides a starting point for recognizing and administering the indigent accused's right to counsel of choice and thus extends to the indigent a limited playlist in exchange for his obligation to pay for the selection.

²³⁶ Robert H. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 26 (1945).