
RETHINKING THE BOUNDARIES
OF THE SIXTH AMENDMENT RIGHT
TO CHOICE OF COUNSEL

I. INTRODUCTION

Criminal defense is personal business. For this reason, the Constitution's ample procedural protections for criminal defendants are written not just to provide a fair trial, but also to put the *defendant* in control of his own defense. Courts and commentators alike have recognized that the constitutional vision of liberty requires not only protection for the accused, but also the right of the accused to speak and act for himself.¹ The Sixth Amendment also reflects the common understanding that the assistance of counsel can be crucial — even necessary — to effective defense,² but its language and structure nevertheless make clear that the rights and their exercise belong to the defendant himself, not his lawyer.³

The right to the assistance of counsel has many facets, but its most ancient and fundamental element is the defendant's right to counsel of his own choosing. Indeed, the Supreme Court has identified choice of counsel as "the root meaning of the constitutional guarantee."⁴ Yet actual choice-of-counsel doctrine gives the state broad authority to interfere with the exercise of this right. For example, a defendant may not choose an advocate whose representation creates a potential conflict of interest for the defendant, even if the defendant knowingly and intelligently waives any objection to the potential conflict,⁵ and a defendant has no right to be represented by an advocate who is not a current member of a state bar association.⁶ The *remedy* for a choice-of-

¹ See, e.g., *Faretta v. California*, 422 U.S. 806, 819 (1975) ("The 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."); Erica J. Hashimoto, *Resurrecting Autonomy: The Criminal Defendant's Right to Control the Case*, 90 B.U. L. REV. 1147, 1148–49 (2010) ("The Sixth Amendment . . . reflects the Framers' understanding that the defendant . . . was to be in charge of the defense.").

² See, e.g., *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932) ("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.").

³ See *Faretta*, 422 U.S. at 819 ("It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" (quoting U.S. CONST. amend. VI)).

⁴ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006); see also *Andersen v. Treat*, 172 U.S. 24, 29 (1898) (identifying "the assistance of counsel for [one's] defense" as "the assistance of counsel of [one's] own selection" (internal quotation marks omitted)).

⁵ See *Wheat v. United States*, 486 U.S. 153, 162 (1988).

⁶ See *Gonzalez-Lopez*, 548 U.S. at 151–52.

counsel violation is quite dramatic,⁷ but courts have substantial discretion to determine what conditions actually effect a violation.⁸

This Note argues that the Sixth Amendment's text, history, and relevant Supreme Court jurisprudence demand reconsideration of the current limits on a defendant's choice of counsel. In particular, the Court's recognition that choice of counsel implies a robust right to *self*-representation,⁹ notwithstanding competing paternalist and institutional concerns, suggests that actual choice of counsel should receive equally robust substantive protection. Of course, to say that this right deserves expansion is not to say that it has no bounds — all constitutional rights have a limited scope. But the relevant question is whether judges and state bar associations should have such broad discretion to interfere with a right uncontroversially recognized as central to the Sixth Amendment.

This Note proceeds as follows. Part II describes the relevant choice-of-counsel doctrine with regard to conflicts of interest, representation by non-bar advocates, and self-representation, and criticizes this doctrine as reflecting inconsistent understandings of the right and its boundaries. Part III discusses revised boundaries in a few key areas and general implications for reconsidering the right to choice of counsel. Part IV concludes.

II. MODERN CHOICE-OF-COUNSEL DOCTRINE

The Court has never questioned the centrality of the right to choice of counsel in the Sixth Amendment, and the seriousness of this right finds some expression in the constitutional remedy for its violation. In *United States v. Gonzalez-Lopez*,¹⁰ the Court held that erroneous deprivation of choice of counsel requires automatic reversal without any need for harmless error analysis¹¹ — that is, violation of choice of counsel is “complete” whenever a defendant's chosen advocate is improperly disqualified.¹²

While the issue of remedy is not itself central to this Note, there are still two important points to draw from the Court's discussion in *Gonzalez-Lopez*. First, the core historical component of the Sixth Amend-

⁷ See *id.* at 152 (holding that improper disqualification of defendant's choice of counsel is a structural violation subject to automatic reversal, without any need to conduct harmless error analysis).

⁸ See *id.* at 150–51.

⁹ See *Faretta v. California*, 422 U.S. 806, 819–21 (1975).

¹⁰ 548 U.S. 140.

¹¹ See *id.* at 152.

¹² *Id.* at 146 (“[The Sixth Amendment] commands, not that a trial be fair, but that a particular guarantee of fairness be provided . . . , that the accused be defended by the counsel he believes to be best.”); *cf.* *Strickland v. Washington*, 466 U.S. 668, 693 (1984) (holding that an ineffective assistance of counsel claim is not complete without a showing of actual prejudice).

ment right to assistance of counsel was the right to be assisted by counsel of one's own choosing.¹³ And second, while choice of counsel is a structural right of fundamental importance, its substantive scope is subject to the substantial discretion of states and judges.¹⁴ This Part will discuss in greater detail the three most important issues related to the *substantive* component of the right to choice of counsel: (1) conflicts of interest, (2) representation by non-bar advocates, and (3) self-representation.

A. *Conflicts of Interest and the Sixth Amendment*

The Sixth Amendment right to counsel has been interpreted as a right to conflict-free counsel. In *Holloway v. Arkansas*,¹⁵ the Court held that if a trial court fails to consider a defendant's ex ante objection to his representation based on a conflict of interest, then the defendant's conviction is automatically reversed, without any need to show prejudice.¹⁶ In *Cuyler v. Sullivan*,¹⁷ the Court held that even in a post-conviction challenge, a defendant seeking reversal need only show that a conflict of interest had an adverse impact on his representation.¹⁸ This standard is relatively easy to meet, as it is not outcome determinative — the defendant need not show that he would actually have been *acquitted*, but merely that the conflict negatively affected his counsel's performance.¹⁹

Assuming the right to conflict-free representation, the Court in *Wheat v. United States*²⁰ held that a trial court need not accept a defendant's *waiver* of this right.²¹ Mark Wheat had been charged with participation in a drug distribution conspiracy, along with Juvenal Gomez-Barajas and Javier Bravo.²² Eugene Iredale was already representing Gomez-Barajas and Bravo and had secured them favor-

¹³ See *Gonzalez-Lopez*, 548 U.S. at 147–48 (stating that choice of counsel is “the root meaning of the constitutional guarantee”). Even Justice Alito, dissenting on the question of whether deprivation of counsel of choice required any harmless error analysis, acknowledged that choice of counsel was fundamental to the Sixth Amendment. See *id.* at 154 (Alito, J., dissenting) (stating that in the Founding era, “[a] defendant’s right to have the assistance of counsel necessarily meant the right to have the assistance of whatever counsel the defendant was able to secure”).

¹⁴ See *id.* at 151–52 (majority opinion) (cataloguing the various limits on the right to choice of counsel).

¹⁵ 435 U.S. 475 (1978).

¹⁶ See *id.* at 484, 489–91.

¹⁷ 446 U.S. 335 (1980).

¹⁸ See *id.* at 339, 349–50.

¹⁹ Cf. *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (holding that reversal for basic ineffective assistance is not required unless the defendant shows “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different”).

²⁰ 486 U.S. 153 (1988).

²¹ See *id.* at 162.

²² See *id.* at 154–55.

able plea bargains.²³ Wheat requested that Iredale also handle his representation, but the government objected on the grounds that the multiple representation would create conflicts of interest among the defendants.²⁴ Wheat responded that the alleged conflicts were unlikely to arise, that all three defendants had waived their right to conflict-free representation, and that he had the right to counsel of choice.²⁵ Nevertheless, the district court refused to allow Wheat to waive what it saw as an “irreconcilable conflict of interest.”²⁶

The Supreme Court affirmed, holding that the “presumption in favor of [defendant’s] counsel of choice . . . may be overcome . . . by a showing of a serious potential for conflict,” notwithstanding a defendant’s waiver.²⁷ The Court determined that even if a defendant waives objection to a conflict, courts nevertheless 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.”²⁸ Multiple representation threatens not only the defendant, but also the court’s “institutional interest in the rendition of just verdicts in criminal cases.”²⁹ The Court also seemed particularly concerned with the possibility of “whipsaw” arising from review of conflicts under *Cuyler* — that is, defendants might initially assert a Sixth Amendment right to waive conflict-free counsel but then argue post-conviction that the conflict had an adverse impact on their representation.³⁰

B. Right to Be Represented by a Non-Bar Advocate

The authority of state bars to prohibit nonmembers from practicing law is closely related to the inherent powers doctrine, which holds that courts have the inherent and nearly exclusive authority to regulate the

²³ See *id.* at 155. Gomez-Barajas was first tried and acquitted on drug charges but later pleaded guilty to avoid subsequent charges, though the court had not yet accepted his plea. See *id.*

²⁴ See *id.* In particular, the government argued that if Gomez-Barajas withdrew his plea and proceeded to trial, then Iredale might be unable to cross-examine Wheat (who would likely be called as a witness by the government). See *id.* at 155–56. Additionally, part of Bravo’s plea involved an agreement to testify against Wheat, so Iredale would have been limited in his ability to cross-examine Bravo. See *id.*

²⁵ See *id.* at 156–57.

²⁶ *Id.* at 157 (quoting Brief for the Petitioner, *Wheat*, 486 U.S. 153 (No. 87-4), 1987 WL 880487, at *20–21) (internal quotation marks omitted).

²⁷ *Id.* at 164.

²⁸ *Id.* at 160.

²⁹ *Id.*

³⁰ See *id.* at 161. Waiver would not fully address this concern because some courts of appeals had seemed willing to grant *Cuyler* claims even where defendants had waived their *Cuyler* right. See *id.* at 161–62 (citing *United States ex rel. Tonaldi v. Elrod*, 716 F.2d 431, 436–37 (7th Cir. 1983); *United States v. Vowteras*, 500 F.2d 1210, 1211 (2d Cir. 1974)).

practice of lawyers who appear before them.³¹ The standard practice in most states today is for state supreme courts to maintain primary and often exclusive regulation of the legal profession.³² But while the inherent powers doctrine itself is ancient, bar associations did not begin to come into existence until the 1870s,³³ and the organized move to exclude non-bar members did not begin until the 1920s.³⁴

State bars' powers to prohibit the unauthorized practice of law have been challenged under many different constitutional provisions, usually with little success.³⁵ But the Sixth Amendment choice-of-counsel argument differs from other challenges to exclusionary bar practices on two main grounds: first, the challenge comes from the right of the constitutional *defendant*, not the practicing lawyer; and second, the issue has thus far been resolved with surprisingly little explanation. No Supreme Court case has turned directly on the question of whether choice of counsel may be limited entirely to current members of the bar, but the Court has clearly asserted as much in dicta.³⁶ Yet despite the Court's apparent clarity on this point, its legal authority has been surprisingly lacking. The *Gonzalez-Lopez* Court cited *Wheat* for this proposition,³⁷ but the *Wheat* Court noted only that prior precedent recognizing the right to *self*-representation did not itself stand for the proposition that defendants have an unlimited right to choose whomever they wish as counsel.³⁸

The general presumption in the lower courts has been that exclusionary bar practices do not violate the Sixth Amendment right to

³¹ See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) ("Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . [O]ur Courts no doubt possess powers not immediately derived from statute"); *State ex rel. Fiedler v. Wis. Senate*, 454 N.W.2d 770, 773-74 (Wis. 1990) ("[A]n attorney . . . determined to have met the legislative and judicial threshold requirements and . . . admitted to practice law . . . is subject to the judiciary's inherent and exclusive authority to regulate the practice of law."); STEPHEN GILLERS, *REGULATION OF LAWYERS* 7-9 (8th ed. 2009).

³² See Charles W. Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 636-37 (1978).

³³ See *id.* at 619 & n.3, 620.

³⁴ See Laurel A. Rigertas, *Lobbying and Litigating Against "Legal Bootleggers" — The Role of the Organized Bar in the Expansion of the Courts' Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65, 92-102 (2009).

³⁵ See, e.g., *LeClerc v. Webb*, 419 F.3d 405, 410 (5th Cir. 2005) (upholding against equal protection challenge a Louisiana rule excluding nonimmigrant aliens from admission to the bar); *Scariano v. Justices of the Sup. Ct. of Ind.*, 38 F.3d 920, 923, 925, 928 (7th Cir. 1994) (upholding against Equal Protection Clause and dormant commerce clause challenges an Indiana rule admitting out-of-state lawyers only if they practice predominantly in Indiana for five years).

³⁶ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151-52 (2006) ("Nor may a defendant insist on representation by a person who is not a member of the bar"); *Wheat v. United States*, 486 U.S. 153, 159 (1988) ("Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court.").

³⁷ See *Gonzalez-Lopez*, 548 U.S. at 151-52.

³⁸ See *Wheat*, 486 U.S. at 159 n.3.

choice of counsel.³⁹ But a handful of lower courts have nevertheless held (without reversal) that “counsel” for Sixth Amendment purposes need not be interpreted as coextensive with current bar membership. In *United States v. Whitesel*,⁴⁰ for example, the Sixth Circuit faced the question of whether a defendant had the constitutional right to be represented by his accountant in a criminal tax case.⁴¹ The court observed that the Fifth, Seventh, and D.C. Circuits had all concluded that the Sixth Amendment did not contemplate representation by a layperson untrained in the practice of law but that the Supreme Court had not addressed this question directly.⁴²

The Sixth Circuit relied heavily on the Judiciary Act of 1789,⁴³ as the Act was passed “almost contemporaneously” with the Sixth Amendment and is generally taken as instructive in guiding the Amendment’s interpretation.⁴⁴ Section 35 of the Act provided that defendants in federal court may rely on “the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein.”⁴⁵ The court concluded that because the statute referred to “counsel” *or* “attorneys at law,” it was therefore likely that “the proposers of the Sixth Amendment did not mean to limit representation exclusively to ‘attorneys at law.’”⁴⁶ But even if Sixth Amendment counsel could include some unlicensed representation, any such advocate would need to be “sufficiently learned in the law to be able adequately to represent his client in court.”⁴⁷ Finding that an accountant without legal training did not meet this standard, the court held that the defendant had not been denied his Sixth Amendment right.⁴⁸ *Whitesel* has never been overruled and has in fact been cited as good law for its interpretation of the Sixth Amendment as recently as 1995⁴⁹ — seven years after the Supreme Court’s assertion in *Wheat* that defendants had no right to be represented by advocates who were not members of the bar.⁵⁰

³⁹ See, e.g., *United States v. Cooper*, 493 F.2d 473, 474 (5th Cir. 1974) (per curiam); cf. *Harrison v. United States*, 387 F.2d 203, 212 (D.C. Cir. 1967) (holding that Sixth Amendment “counsel” cannot include unlicensed attorneys), *rev’d on other grounds*, 392 U.S. 219 (1968).

⁴⁰ 543 F.2d 1176 (6th Cir. 1976).

⁴¹ See *id.* at 1177.

⁴² See *id.* at 1178.

⁴³ Ch. 20, § 35, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1654 (2006)).

⁴⁴ *Whitesel*, 543 F.2d at 1179.

⁴⁵ Ch. 20, § 35, 1 Stat. 73, 92.

⁴⁶ *Whitesel*, 543 F.2d at 1179.

⁴⁷ *Id.* at 1180.

⁴⁸ See *id.*

⁴⁹ See *Blanton v. United States*, 896 F. Supp. 1451, 1459–61 (M.D. Tenn. 1995).

⁵⁰ See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (“Regardless of his persuasive powers, an advocate who is not a member of the bar may not represent clients (other than himself) in court.”).

Another interesting but perplexing example comes from *United States v. Stockheimer*,⁵¹ where a defendant asked to be represented by two disbarred attorneys.⁵² The court here defined “counsel” under the Sixth Amendment as “a person who is legally trained and qualified to perform the function of an attorney for a defendant in a criminal case.”⁵³ The judge then wrote that he was “not prepared to hold that the term ‘counsel’ . . . includes only persons licensed by some state to practice law, and that the federal constitutional provision is thus limited by what the various states may choose to do about licensing.”⁵⁴ Nevertheless, the judge decided that the specific disbarred attorneys the defendant requested were not themselves “counsel” under the Sixth Amendment.⁵⁵

C. Self-Representation

The previous two sections establish that while choice of counsel is a fundamental component of the Sixth Amendment, states and trial courts substantially limit its substantive scope. Perhaps surprisingly then, in *Faretta v. California*,⁵⁶ the Court held that the Sixth Amendment nevertheless guarantees a robust right to *self*-representation in a criminal trial. Even though the text does not expressly mention such a right, the Court held that self-representation was implicit in the very structure of the Sixth Amendment.⁵⁷ The Court further noted that the right had been protected throughout the nation’s history⁵⁸ and recognized in prior federal case law,⁵⁹ and it emphasized that constitutional protections could not be turned on a defendant to restrict his ability to conduct his own defense.⁶⁰

⁵¹ 385 F. Supp. 979 (W.D. Wis. 1974).

⁵² *See id.* at 982.

⁵³ *Id.* at 983.

⁵⁴ *Id.*

⁵⁵ *See id.* The judge provided surprisingly little reasoning for this conclusion, moving directly from the statement that Sixth Amendment “counsel” might be broader than licensed attorneys to the conclusion that neither of the disbarred attorneys were “counsel” under the Sixth Amendment. *See id.*

⁵⁶ 422 U.S. 806 (1975).

⁵⁷ *See id.* at 819 (noting that the Sixth Amendment grants procedural protections to the accused himself, not to his lawyer).

⁵⁸ *See id.* at 812–14 (discussing recognition of self-representation in the Judiciary Act of 1789 and in most state constitutions).

⁵⁹ *See id.* at 814–17.

⁶⁰ *See id.* at 815 (“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.” (alterations in original) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942))).

Notwithstanding these arguments in favor of a self-representation right, *Faretta* was decided by a slim 5–4 margin,⁶¹ and even the majority recognized the case as difficult.⁶² The major problem stemmed from the reasoning of the cases establishing the right to *appointed* counsel, as these cases rested on the premise that most criminal defendants would be incapable of mounting an effective defense without the assistance of counsel.⁶³ Thus, a right of self-representation would seem to cut against the notion that fair trials could generally be secured only with the help of a lawyer. Related to this concern was the argument that courts and prosecutors themselves have an interest not just in winning cases, but also in ensuring justice (and in being *perceived* as doing so) — thus, ineffective self-representation might hurt not only the defendant, but also the judicial process itself.⁶⁴

In response, the Court acknowledged that most defendants would fare better with counsel but responded that counsel was less likely to be effective where a defendant is unwilling to accept assistance.⁶⁵ More importantly, the Court emphasized that Sixth Amendment guarantees are personal to an individual defendant and not to be proscribed by generalities.⁶⁶ The Court therefore held that a defendant has the inherent right to determine how best to conduct his defense, even if his decisions ultimately work to his detriment.⁶⁷

Of course, self-representation has its limits. *Faretta* itself recognized that trial judges would retain discretion to “terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct.”⁶⁸ Furthermore, the Court has since made clear that the right to self-representation does not extend beyond trial into a criminal appeal⁶⁹ and that mentally ill defendants may be limited in their ability to represent themselves.⁷⁰ Whether these decisions illustrate the Court’s skepticism of *Faretta* or simply follow logically from the initial principle is a matter of dispute.⁷¹ But at least doctrin-

⁶¹ See *id.* at 806.

⁶² See *id.* at 807 (acknowledging that the issue was “not an easy question”).

⁶³ See *id.* at 832–33.

⁶⁴ This concern was emphasized in particular in Chief Justice Burger’s dissent. See *id.* at 839–40 (Burger, C.J., dissenting).

⁶⁵ See *id.* at 834 (majority opinion).

⁶⁶ See *id.* (“Personal liberties are not rooted in the law of averages. The right to defend is personal.”).

⁶⁷ See *id.*

⁶⁸ *Id.* at 834 n.46 (citing *Illinois v. Allen*, 397 U.S. 337 (1970)).

⁶⁹ See *Martinez v. Court of Appeals of Cal.*, 528 U.S. 152, 154 (2000).

⁷⁰ See *Indiana v. Edwards*, 128 S. Ct. 2379, 2381 (2008) (holding that states may insist upon representation for defendants who are competent to stand trial but who suffer from mental illness such that they would not be competent to represent themselves).

⁷¹ The majority in *Martinez v. Court of Appeals of California*, 528 U.S. 152, did not directly express concern with *Faretta*, but Justices Kennedy, *id.* at 164 (Kennedy, J., concurring), Breyer,

ally, the Court has seemed capable of maintaining a robust right to self-representation that nevertheless has meaningful and intelligible boundaries.

D. Criticism of Present Doctrine

The preceding review of choice-of-counsel jurisprudence reveals substantial internal tension. Choice of counsel is a central component of the Sixth Amendment, and its violation guarantees automatic reversal, but trial judges and state bars have wide authority to define when those violations occur. Defendants have substantial freedom, implicit in the choice-of-counsel right, to represent themselves despite strong state interests to the contrary, but for actual selection of counsel, the substantive right does almost no work whatsoever. Most courts assume with easy certainty — but little authority — that the right does not limit state bar exclusionary practices, despite suggestion from some lower courts that it does. Closer examination of the case law will make these contradictions more obvious.

The *Faretta* Court considered and rejected the two central arguments that undergird most substantive limitations on a defendant's choice of counsel: first, that assistance of (state-approved) counsel is necessary for effective defense and thus necessary to ensure the defendant a fair trial;⁷² and second, that the state may limit choice of counsel to secure its independent interest in ensuring justice and being perceived as fair and professional⁷³ (hereinafter the “paternalist” and “institutional” concerns, respectively). Acknowledging these concerns, the Court nevertheless held that the inherently personal nature of criminal defense trumped the state's arguments for restricting the right.⁷⁴

Yet the paternalist and institutional concerns were the *exact* reasons the *Wheat* majority relied upon to justify its restrictions on actual choice of counsel.⁷⁵ It also seems reasonable to assume that the same concerns underlay the presumptions in *Wheat* and *Gonzalez-Lopez* that

id. at 164–65 (Breyer, J., concurring), and Scalia, *id.* at 165 (Scalia, J., concurring in the judgment), all concurred to emphasize *Faretta*'s continuing validity. See also *Edwards*, 128 S. Ct. at 2390–91 (Scalia, J., dissenting) (arguing that *Faretta* protects the right of a mentally ill defendant to waive the assistance of counsel); Hashimoto, *supra* note 1, at 1149–50 (describing *Martinez* as “signal[ing] discomfort with the reasoning of *Faretta* itself”).

⁷² See *Faretta*, 422 U.S. at 832–34.

⁷³ The *Faretta* majority did not discuss this issue expressly, but the dissenting opinions emphasized it. See *id.* at 839–40 (Burger, C.J., dissenting); *id.* at 849 (Blackmun, J., dissenting).

⁷⁴ See *id.* at 834 (majority opinion).

⁷⁵ See *Wheat v. United States*, 486 U.S. 153, 159–60 (1988) (citing *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and *Holloway v. Arkansas*, 435 U.S. 475, 482 (1978), to emphasize the inherent risks to defendants of being represented by conflicted counsel); *id.* at 160 (discussing the institutional interests of the court).

a defendant may not select counsel from outside the bar. Though it might be argued that the inherent power of courts to regulate lawyers practicing before them provides independent authority to limit choice of counsel to members of the bar, this response simply restates the question in a different form — why does the inherent powers doctrine extend to actual choice of counsel but not to self-representation?

One possible response would be to argue that self-representation is just *different* from representation by non-bar members or waiver of conflict-free representation, and that there is no reason to assume that the substance of the rights would be the same. Indeed, one justification of the present doctrine might come from the inherently personal or intimate nature of self-representation. After all, self-representation does appear “closer” to the defendant than the other issues discussed — silencing the defendant himself might infringe autonomy, dignity, or “fundamental fairness” in a way that restricting choice of counsel does not. Further examination, however, reveals that this explanation is inadequate.

First, an imbalance giving more substantive protection to self-representation than actual choice of counsel is difficult to square with the text and history of the Sixth Amendment itself. After all, one of the issues discussed in *Faretta* was that the text of the Amendment did not expressly provide for the right to self-representation — rather, the Court found it *implicit* in the structure of the Amendment.⁷⁶ By contrast, choice of counsel gains support from the text itself. Of course, the actual words of the Sixth Amendment are “Assistance of Counsel,” not “choice of counsel.” But the uncontroversial historical understanding of “assistance of counsel” was the right to be assisted by counsel of one’s own choosing. The *Gonzalez-Lopez* Court identified choice of counsel as “the root meaning of the constitutional guarantee,”⁷⁷ and even the dissent acknowledged that “assistance of counsel necessarily mean[s] the right to have the assistance of whatever counsel the defendant was able to secure.”⁷⁸

Today, the phrase “assistance of counsel” may refer more commonly to the right of appointed counsel for indigent defendants, but this understanding was decidedly *not* the meaning originally contemplated by the Amendment’s text.⁷⁹ To be sure, the right to choice of counsel

⁷⁶ See *Faretta*, 422 U.S. at 819; see also *id.* at 837 (Burger, C.J., dissenting) (arguing that the “assertion that [self-representation] is tucked between the lines of the Sixth Amendment is contradicted by the Amendment’s language”); *id.* at 847 (Blackmun, J., dissenting) (“It is self-evident that the [Sixth] Amendment makes no direct reference to self-representation.”).

⁷⁷ *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147–48 (2006).

⁷⁸ *Id.* at 154 (Alito, J., dissenting).

⁷⁹ This observation is not meant as criticism of the cases providing for the right to appointed counsel. It is merely meant to clarify what otherwise might seem confusing in the language of the Amendment.

rests on historical understanding as well as text, but its legal basis is nevertheless at least as strong as the basis for self-representation. To give decidedly more substantive protection for self-representation than actual choice of counsel would privilege an implicit right far above the textual right from which it is derived.

Second, to the extent that self-representation and choice of counsel differ, the paternalist and institutional concerns are actually more problematic for self-representation. One could reasonably argue that most defendants will be unable to decide for themselves whether to waive conflict-free representation or to forego representation by an advocate who is a member of the bar. But if the defendant cannot be trusted to make these decisions, then surely he cannot be trusted to make the much more fundamental decision to dispense with counsel entirely.⁸⁰ Similarly, it might be true that the integrity and public perception of courts could be threatened by defense lawyers with potential conflicts of interest, or by the participation of non-bar advocates. But then the potentially disruptive spectacle of pro se defendants struggling through their defense would surely be a much greater threat.

Finally, the argument that choice of counsel is simply a different issue misstates what makes self-representation personal and intimate in the first place. *Faretta* did not rely on a right to address a jury, make opening statements, or introduce evidence — rather, it relied on the right of the defendant to conduct his defense according to his own best judgment.⁸¹ Self-representation is an obvious manifestation of that right, but choice of counsel is no less central to how to conduct a defense. While a defendant who has accepted counsel may not have complete control over every tactical decision in his case,⁸² he does retain control over fundamental decisions “regarding the exercise or waiver of basic trial rights.”⁸³ Such decisions include the authority to decide “whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.”⁸⁴

⁸⁰ Indeed, even outside of the *Faretta* dissents, some commentators have argued this point. See Martin Sabelli & Stacey Leyton, *Train Wrecks and Freeway Crashes: An Argument for Fairness and Against Self Representation in the Criminal Justice System*, 91 J. CRIM. L. & CRIMINOLOGY 161, 228–29 (2000); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621, 621 (2005). Of course, even accepting disagreement over the relative skill of defendants who proceed pro se, the basic point remains: insofar as defendants are capable of conducting their own defense, they should be at least as capable of choosing advocates to conduct the defense for them.

⁸¹ See *Faretta*, 422 U.S. at 816–17.

⁸² See *Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (holding that, absent ineffective assistance, a defendant must accept counsel’s decisions on which witnesses to call and whether to forgo cross-examination); *United States v. Boyd*, 86 F.3d 719, 724 (7th Cir. 1996) (holding that counsel may decide which jurors to challenge).

⁸³ *Florida v. Nixon*, 543 U.S. 175, 187 (2004).

⁸⁴ *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

The initial choice of counsel is surely among such fundamental decisions.⁸⁵ Indeed, the fact that counsel has authority to *overrule* the defendant on so many individual strategic questions is all the more reason for giving substantive protection to choice of counsel in the first place.⁸⁶ Without counsel whom the defendant can trust to take seriously his own interests and preferences, the defendant risks losing control of his defense almost entirely.⁸⁷ Of course, the proper doctrinal framework for giving substantive protection to the choice-of-counsel right is still an open question and is taken up in the following section. But one preliminary conclusion seems clear: if the Sixth Amendment commands robust substantive protection for self-representation, it must command the same substantive protection for choice of counsel.

Of course, even accepting this inconsistency, one could argue that *Wheat* struck the appropriate balance and thus that *Faretta* and self-representation, not choice of counsel, are what should be reconsidered. Indeed, some courts and commentators have argued that the Court's recent self-representation cases have expressed underlying skepticism of *Faretta*.⁸⁸ But there are several reasons why this "leveling down" option is neither likely nor wise. First, many of the so-called "limitations" on self-representation (like withholding the right from mentally ill defendants) could be understood not as restrictions but simply as regulations designed to facilitate the exercise of the right.⁸⁹ Second, *Faretta* is closer to our legal system's general presumption that informed consent is sufficient to cure most legal conflicts — it would be perverse to give criminal defendants *less* protection than other litigants in this regard. Finally, revoking the *Faretta* right would effectively reduce substantive protection for choice of counsel to nothing and would put the scope of the right entirely in the hands of the government, not the accused.⁹⁰

⁸⁵ See *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150 (2006) (characterizing violation of choice of counsel as "structural error" because of its effect on the very "framework within which the trial proceeds" (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)) (internal quotation marks omitted)).

⁸⁶ See Hashimoto, *supra* note 1, at 1150 (noting that counsel often has the authority to pursue a guilt-based defense, or even to concede guilt to a lesser included offense, over a client's wishes).

⁸⁷ See *id.* at 1178 (explaining how defendants with differing interests, particularly with regard to risk preferences, will often be served poorly by even skilled attorneys using common defense practices contrary to the defendants' wishes).

⁸⁸ See, e.g., *Martinez v. Court of Appeals of Cal.*, 528 U.S. 152, 165 (2000) (Scalia, J., concurring in the judgment) (stating that he "do[es] not share the apparent skepticism of today's opinion concerning the judgment of the Court . . . in *Faretta*"); Hashimoto, *supra* note 1, at 1149–50.

⁸⁹ See *infra* pp. 1570–71 (discussing in greater detail the difference between regulations and restrictions in this context).

⁹⁰ While this point may be more *reductio ad absurdum* than pure legal argument, courts are highly skeptical of legal positions that amount to judicial abdication of enumerated constitutional protections. Cf. *United States v. Lopez*, 514 U.S. 549, 564–66 (1995) (expressing concern that al-

III. DEFINING THE PROPER SCOPE OF THE RIGHT TO COUNSEL OF CHOICE

Assuming choice-of-counsel doctrine needs revision, the next task is to identify judicially manageable standards that provide the needed substantive protection but still keep the right in its proper scope. This Part addresses conflicts of interest and exclusionary bar practices in particular and discusses more general considerations and implications that this analysis entails.

A. *Conflicts of Interest*

Conflicts of interest undoubtedly present serious risks to defendants — recall that the Sixth Amendment provides a *right* to conflict-free counsel⁹¹ — and may even threaten the adversarial process itself.⁹² But the Sixth Amendment also gives a defendant the right to choose his counsel. *Faretta* shows that neither paternalist nor institutional concerns are necessarily sufficient to defeat a knowing and intelligent choice by the defendant regarding how to conduct his defense. The key to unraveling this doctrinal puzzle is to recognize that not all conflicts are created equal. Two dimensions of conflicts of interest — actual/potential and structural/nonstructural — guide this analysis.

Where conflicts of interest are only potential, defendants should be allowed to determine whether the risk is serious enough to justify sacrificing their counsel of choice. The concern that actual conflicts will materialize is certainly serious — it was exactly such a conflict that led the *Holloway* Court to announce an automatic reversal rule for ex ante conflicts that trial courts refuse to consider.⁹³ And of course, courts may not know in advance the likelihood or severity of actual conflicts, a fact that may justify the discretion to bar even potential conflicts.

But to argue that waiver is irrelevant in such a situation ignores the fact that the *defendant* usually has a good understanding of whether a conflict is likely to develop, and if so, how threatening it would be. The government argued in *Wheat* that the defense lawyer might need to cross-examine his own clients, but the defendants argued that, based on their understanding of the facts, there would be no actual conflict even if the defendants were called as witnesses against each other.⁹⁴ Cases like *Wheat* therefore illustrate the very serious risk

lowing Congress to regulate any activity affecting interstate commerce would effectively negate any substantive enforcement of the constitutional scheme of enumerated powers).

⁹¹ See *supra* p. 1552.

⁹² See *Wheat v. United States*, 486 U.S. 153, 159–60 (1988).

⁹³ See *Holloway v. Arkansas*, 435 U.S. 475, 489–91 (1978).

⁹⁴ See *Wheat*, 486 U.S. at 156; *id.* at 169–71 (Marshall, J., dissenting) (explaining in detail why the particular facts of this case made any actual conflict exceedingly unlikely).

that prosecutors will attempt to exploit, or even manufacture, potential conflicts solely to disqualify effective defense counsel.⁹⁵

The difference between structural and nonstructural conflicts is also relevant because it distinguishes threats to the adversarial system itself from threats to the defendant in his capacity as a litigant. The principle of defendant autonomy in the Sixth Amendment should give defendants discretion to make decisions for themselves, but it should not allow defendants to alter the structure of the adversarial process. A helpful analytical tool is the distinction in the Model Rules of Professional Conduct between representation “directly adverse” to interests of a current client⁹⁶ and representation “materially limited” by other interests.⁹⁷

Put simply, “direct adversity” exists under the Model Rules when a lawyer takes a position against a current client. The classic example is a lawyer representing two sides of the same litigation, but direct adversity also exists when a lawyer is required to cross-examine a current client to the detriment of the client’s legal position.⁹⁸ For sufficiently serious conflicts, it would be proper to limit choice of counsel, because allowing defendants to waive a structural conflict would imperil the very structure of the adversarial process itself.⁹⁹

By contrast, a “material limitation” conflict exists “if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests.”¹⁰⁰ Here, there is some risk that conflicted counsel may not be a fully zealous advocate for his client, but the conflict does not arise from the nature of the adverse parties or the structure of the proceedings. The risk is simply that the lawyer will not be as effective as another lawyer without the same limitation. But the Sixth Amendment presumes that defendants are capable of weighing relevant costs and benefits when choosing an advocate. Absent a direct threat to the structure of the adversarial process, defendants should be left to their choice.

⁹⁵ See *id.* at 157 (majority opinion); *id.* at 170 n.3 (Marshall, J., dissenting) (discussing the likelihood that exactly such an abuse occurred in this case).

⁹⁶ See MODEL RULES OF PROF’L CONDUCT R. 1.7(a)(1) (2009).

⁹⁷ See *id.* R. 1.7(a)(2).

⁹⁸ See *id.* R. 1.7 cmt. 6.

⁹⁹ For this reason, the Model Rules categorically bar the classic case of direct adversity, where one lawyer represents both sides in the same adverse proceeding, notwithstanding the consent of all affected parties. See *id.* R. 1.7(b)(3). The Model Rules could conceivably allow for consent in other cases of direct adversity, but Rule 1.7(b)(1) also requires that the lawyer reasonably believe he can diligently represent all parties. See *id.* R. 1.7(b)(1). Thus, consent would likely be insufficient under the Rules where a lawyer was required to cross-examine his own client to that client’s detriment.

¹⁰⁰ *Id.* R. 1.7 cmt. 8.

Combining these two dimensions creates a useful map for reconciling the Sixth Amendment choice of counsel with the institutional interests of courts. Where conflicts are only potential, defendants should have the right to weigh the risks themselves, given defendants' superior knowledge of their own defense strategy. Where conflicts do not present direct adversity between an advocate and his client, defendants should be able to decide whether the risk of material limitation is enough to justify selecting different counsel.¹⁰¹ But where conflicts are both actual *and* structural, the direct threat to the adversarial system justifies overriding the wishes of the defendant. Thus, the defendants in *Holloway* could not have consented to their lawyer's conflict because their respective defenses turned largely on their need to cross-examine each other's testimony.¹⁰² Similarly, if the defendants in *Wheat* had actually needed to challenge each other's respective testimonies to conduct their own defenses, disqualification would likely have been justified.

The mere possibility that the government will call codefendants as witnesses against each other does not itself establish a structural conflict — as the defendants argued in *Wheat*, there may be no conflict between them. Courts should therefore require more than just the word of the prosecutor when determining whether an actual, structural conflict exists. While the defendant has a clear incentive to choose the best advocate, the prosecutor has a strategic incentive to *disqualify* that advocate, so courts should be very skeptical of trusting the government regarding the nature of an alleged conflict.

B. Exclusionary Bar Practices

Reconciling the Sixth Amendment right to choice of counsel and state bar exclusionary practices is a more difficult issue. The subject has received substantially less attention in litigation and scholarship than conflicts of interest, and it does not lend itself well to definition by identifiable rules. It should be acknowledged that any honest interpretation of the Sixth Amendment must account for the inherent powers doctrine, and thus must give courts at least *some* discretion to limit a defendant's pool of available advocates. But to justify bar membership as a limit on choice of counsel by reference to the inherent

¹⁰¹ One other important issue in *Wheat* was the procedural concern that a defendant could insist on waiving his right to conflict-free counsel but then, post-conviction, obtain reversal by showing that the conflict prejudiced his representation. See *Wheat v. United States*, 486 U.S. 153, 161–62 (1988). This fear that trial courts could thus be “whipsawed,” *id.* at 161 (internal quotation marks omitted), is legitimate, but is best dealt with through other doctrinal adjustments. Rather than restrict defendants' Sixth Amendment right to choice of counsel to prevent whipsaw, the Court would have done better to clarify that a defendant who knowingly waives his right to conflict-free counsel also waives his right under *Cuyler* to reversal upon a showing of mere prejudice.

¹⁰² See *Holloway v. Arkansas*, 435 U.S. 475, 478–81 (1978).

powers doctrine simply restates the question: does the Sixth Amendment provide *any* substantive limit on the authority of courts to decide whom a defendant may choose as his advocate? While many courts have suggested that the answer here is “no,”¹⁰³ there are nevertheless strong historical, practical, and doctrinal reasons to think that the Sixth Amendment erects substantive boundaries to this discretion.

The history of legal practice in the United States strongly suggests that the Sixth Amendment should not be read to fully incorporate bar exclusionary practices in their current form. To begin with, a reader simply cannot escape the text of the Judiciary Act of 1789, which distinguished between “counsel” and “attorneys at law.”¹⁰⁴ As the Sixth Circuit in *Whitesel* acknowledged, this distinction suggests that the terms were understood to have different meanings.¹⁰⁵ Such a distinction would make sense in light of the colonial conception of the lawyer class as an arm of English tyranny.¹⁰⁶

Throughout the colonial period and Founding era, the practice of law, though still regulated by courts, was dramatically less formalized than we could imagine today. As noted previously, bar associations themselves did not exist until the 1870s,¹⁰⁷ and exclusion of non-bar members was not practiced until the twentieth century.¹⁰⁸ Colonial and Founding-era courts relied primarily on personal and informal evaluations of an advocate’s integrity and competence, and apprenticeships were the predominant mode of legal training until the late nineteenth century.¹⁰⁹ Obviously, this understanding of legal qualification diverges sharply from modern standards, under which most aspiring attorneys are required to graduate from an accredited law school, pass a standardized bar exam, and survive a character and fitness inquiry by professional guilds of existing lawyers. Even if the Sixth Amendment incorporates some understanding of the inherent powers doctrine, contemporary bar exclusionary practices greatly exceed whatever baseline the Constitution establishes.

From a doctrinal standpoint, it would be an anomaly in the constellation of constitutional rights to hold that reference to state law would determine the substance of the Sixth Amendment. In almost no other context would the Court ever decide that a constitutional right

¹⁰³ See cases cited *supra* note 39.

¹⁰⁴ See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92 (codified as amended at 28 U.S.C. § 1654 (2006)).

¹⁰⁵ See *United States v. Whitesel*, 543 F.2d 1176, 1179 (6th Cir. 1976).

¹⁰⁶ See *Faretta v. California*, 422 U.S. 806, 826 (1975) (“The colonists brought with them an appreciation of the virtues of self-reliance and a traditional distrust of lawyers.”).

¹⁰⁷ See Wolfram, *supra* note 32, at 619 & n.3, 620.

¹⁰⁸ See Rigertas, *supra* note 34, at 92–102.

¹⁰⁹ See generally Susan Katcher, *Legal Training in the United States: A Brief History*, 24 WIS. INT’L L.J. 335 (2006).

applied in full against the states, but then say that states nevertheless had the authority to alter the scope of that right as they saw fit.¹¹⁰ Indeed, the district court in *Stockheimer* seemed acutely aware of the awkwardness of such a result.¹¹¹ The more standard and sensible approach would be to acknowledge that the states (via state bars and courts) have broad discretion to regulate the practice of law, but that there are certain lines they may not cross. Otherwise, the right to choice of counsel takes the curious form of a right that is only violated when a state says it is violated, and thus could vary dramatically from state to state.

Of course, the Fourteenth Amendment's Due Process Clause may prevent a state from violating rights it has promised to protect, even where the state was under no constitutional obligation to protect those rights in the first place.¹¹² Thus, it might be said that "due process" itself varies from state to state, so Sixth Amendment variance should cause no greater concern. But this objection misstates the nature of the due process right, which is that states must provide a minimum level of process to recognized rights, even if the state created those rights in the first place.¹¹³ So there is no "variance" among states on the constitutional standard for determining whether sufficient process

¹¹⁰ One possible exception comes from obscenity law, where the test for determining whether expression is obscene (and thus not protected by the First Amendment) includes asking whether "the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest." *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972) (per curiam)) (internal quotation marks omitted). But even though obscenity law purports to call upon contemporary community standards, it is still the *community*, not the state itself, whose standards define the substance of the right. More generally, obscenity law operates at the doctrinal fringes of the First Amendment, and the *Miller* test is among the most criticized of all constitutional doctrines. See Elizabeth M. Glazer, Essay, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1380-81 (2008) ("[C]ommentators have criticized the application of the obscenity doctrine for, among other things, its incongruity with the First Amendment's core purposes, its inability to capture what is truly offensive about speech, its obsolescence in light of new technology, and its codification of morals-based legislation." (footnotes omitted)). Indeed, if contemporary choice-of-counsel doctrine resembles obscenity in this respect, then that resemblance may be a further cause for concern.

¹¹¹ See *United States v. Stockheimer*, 385 F. Supp. 979, 983 (W.D. Wis. 1974) ("I am not prepared to hold that the term 'counsel[]' . . . includes only persons licensed by some state to practice law, and that the federal constitutional provision is thus limited by what the various states may choose to do about licensing." (emphasis added)).

¹¹² See *Goldberg v. Kelly*, 397 U.S. 254, 260-64 (1970) (holding that it violates due process for a state to terminate welfare benefits without a preliminary hearing, even though welfare is a benefit that the state has no obligation to provide); see also *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (establishing that the substance of a state-created entitlement may be at the state's discretion, but that courts may independently assess the procedures used to protect that entitlement, regardless of the state's designated procedures).

¹¹³ After all, the problem in *Goldberg* was not that the state had promised to provide a preliminary hearing but then failed to do so. Rather, it was that the state's provision of a *post*-termination hearing was procedurally insufficient to protect the property right in welfare created by state law. See *Goldberg*, 397 U.S. at 259 & n.5, 260, 263-64.

was given for depriving a citizen of his right; the only variance is in what rights different states choose to protect in the first place. But a defendant's right to counsel of choice comes not from state recognition, but from the Constitution itself, and so variance from state to state on this issue would be akin to variance on the standards for any other substantive right.

A more general objection to the preceding historical and doctrinal arguments might be that "legal qualification" is itself an ambiguous, dynamic concept, and thus appropriately committed to state courts and bar associations for precise elaboration. So while apprenticeships might have sufficed in the eighteenth century, more rigorous standards are needed today, and state bars are the entities best fit to decide the relevant qualifications for an expanding and evolving profession.¹¹⁴ Under this view, it would be incorrect to say that the substance of the right depends on state law — rather, the substance of the right is choice of *qualified* counsel, with an understanding that state bars are best positioned to determine the standards of quality.

But the argument that state bar regulations faithfully track minimum standards of basic competence simply blinks reality. There is no denying that state bar associations have strong incentives to craft regulations that favor the institutional, ideological, and financial interests of their existing members.¹¹⁵ After all, state bars are effectively guilds whose members have legal control over their competitors. The point here, of course, is not to condemn state bar regulation outright, nor to cast doubt on the general integrity of members of the legal profession. There are genuine competing arguments that the legal profession by its nature must be responsibly and actively self-regulating, and the benefits may ultimately outweigh the costs. The point is simply to note the structural reasons to be skeptical that bar associations will set ideal standards for basic legal qualification. And where constitutional rights are at stake, courts are generally wary of deferring to actors with institutional interests in limiting the exercise of those rights.¹¹⁶

¹¹⁴ *But see* GILLERS, *supra* note 31, at 636 (arguing that "a system of local licensure does not fit well with twenty-first-century law practice and client need").

¹¹⁵ *See, e.g.*, Samuel J. Levine, *Taking Ethical Obligations Seriously: A Look at American Codes of Professional Responsibility Through a Perspective of Jewish Law and Ethics*, 57 CATH. U. L. REV. 165, 180 n.45 (2007) (listing examples of self-serving regulations passed by state bar associations and noting significant scholarly criticism of lawyer self-regulation); William H. Simon, *Who Needs the Bar?: Professionalism Without Monopoly*, 30 FLA. ST. U. L. REV. 639, 640 (2003) (noting the "widely felt doubts about monopolistic self-regulation" in the legal profession).

¹¹⁶ *See, e.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 565–68, 579 (1973) (finding that due process precluded a board composed of independent optometrists from judging misconduct among optometrists employed by corporations because of the independent optometrists' competing pecuniary interests).

Of course, even accepting that the Sixth Amendment standard of competence is independent of bar membership, that still leaves the difficult doctrinal question of how courts should define qualification for choice of counsel. Looking at the history of legal practice and the treatment of this issue by lower courts, it seems likely that choice of counsel could still be limited to advocates with basic education and training in the practice of law.¹¹⁷ Consider again the definition of “counsel” provided in *Stockheimer*: “‘counsel’ . . . is a person who is legally trained and qualified to perform the function of an attorney for a defendant in a criminal case.”¹¹⁸ Taking this definition as a starting point, a few more specific doctrinal standards could be enumerated.

As an initial matter, it would be important to acknowledge that basic education and training in the practice of law can take (and has taken) many different forms. Standard three-year law school programs are only one such example. Other examples could include apprenticeship programs, education in nontraditional legal academies or training programs, or perhaps even individual study. The constitutional standard could be formulated as follows: Courts shall allow representation of criminal defendants by non-bar advocates if the advocate demonstrates that he has received actual education and training such as would allow competent representation of the defendant in his particular case. Courts should generally presume competence where the advocate’s experiences (1) parallel historical traditions of legal education and (2) relate specifically to the substantive law and procedural rules governing the defendant’s case. Otherwise, the burden should be on the non-bar advocate to defend his qualification.

Obviously such a standard would create some areas of substantial ambiguity (as nearly all constitutional standards do), but a few general points could be made about what this standard would look like in practice. First, disbarment alone generally should not be sufficient to disqualify an advocate for Sixth Amendment purposes. While allowing representation by disbarred attorneys might seem abhorrent under modern assumptions, such attorneys have previously met the initial requirements for bar membership, and thus will usually have the relevant training and experience to pass constitutional muster. Indeed, given the concern that bar exclusion might be partially political or

¹¹⁷ The scope of what the Sixth Amendment *protects* is different, of course, from what it *allows*. It would be tolerable under the Sixth Amendment for states to *allow* defendants to select any advocate of their choosing, but the Sixth Amendment likely does not *compel* states to allow such unlimited choice by defendants.

¹¹⁸ *United States v. Stockheimer*, 385 F. Supp. 979, 983 (W.D. Wis. 1974).

ideological, it would be particularly important for defendants with minority viewpoints to be free to select disbarred attorneys.¹¹⁹

Second, courts should generally allow representation by advocates who have had formalized, pertinent training, even when that training falls outside of a state bar's prescribed model. Apprenticeship is a familiar example, but another option could be a specialized criminal defense academy. Such a program could train aspiring advocates in the law and practice of criminal defense work, but at a sliver of the time and cost of the more generalized law school experience. Of course, courts might still need to make initial judgments regarding the practical sophistication of such programs, but the operators of the programs would have strong incentives to regularize their own practices and to familiarize courts with the value of these programs.

Indeed, the example of the criminal defense academy is particularly important because it demonstrates that choice-of-counsel doctrine has substantial implications not just for individual defendants, but for the systemic provision of indigent defense. It is widely acknowledged today that the general state of public defense is dire¹²⁰ — not necessarily because public defenders are any less talented or hard-working, but because their Sisyphean case loads make careful attention to individual defendants a practical impossibility.¹²¹ Increased protection for choice of counsel might therefore increase the pool of able and available criminal defense advocates. Of course, insofar as such advocates were not licensed state attorneys, their practice would be limited to defendants who actively chose such representation. But given the present state of public defense, it seems plausible that many defendants would happily trade overworked state-appointed counsel for advocates trained specifically to handle criminal defense.

C. Other Considerations Regarding the Scope of Choice of Counsel

Beyond the particulars of conflicts of interest and representation by non-bar advocates, a few final points are in order regarding general implications for expanding the choice-of-counsel right. First, it is

¹¹⁹ See *id.* at 982 (noting the defendant's belief that his chosen disbarred attorneys "share[d] his philosophy and opinions concerning the constitutional rights of citizens of the United States"). Of course, to say that disbarment alone should not prohibit a defendant from receiving his counsel of choice is not to say that the underlying *reasons* for disbarment could not also prevent representation under the Sixth Amendment. Disbarment based on errors in actual representation (such as gross incompetence or fraud) would therefore be much more relevant than disbarment for general character and fitness inquiries (such as civil disobedience or failure to pay dues).

¹²⁰ See generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

¹²¹ See Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (discussing how the time constraints caused by excessive case loads hinder public defenders from providing each indigent defendant with the appropriate representation).

worth noting that choice of counsel is not “absolute,” which is simply to say that, like all rights, it has certain bounds. Many standard “limitations” on the right are quite uncontroversial, some too obvious to require much explanation. For example, the Sixth Amendment does not give a defendant the right to compel the assistance of unwilling counsel or to demand that the state pay for counsel of his choosing,¹²² or to insist that a court change its schedule to accommodate the participation of his chosen counsel,¹²³ or to challenge criminal forfeiture laws that would limit his ability to pay attorneys’ fees.¹²⁴ These “restrictions” simply reflect the unexceptional principle that the right to choice of counsel, like most constitutional rights, is a right against government *interference*, not a right to government *provision*.¹²⁵

The second issue is the relationship between expanded choice of counsel and ineffective assistance claims. The proper resolution here actually seems quite simple. Just as defendants who waive assistance of counsel entirely also waive their right to argue that their own self-representation constituted ineffective assistance,¹²⁶ so would defendants who choose non-state approved attorneys need to waive subsequent ineffective assistance claims. Defendants have the right to disagree with the state on what makes an attorney qualified to handle their defense, but when they exercise such disagreement, defendants may be required to stand by their decisions. Courts might otherwise face a whipsaw possibility with defendants insisting on unlicensed attorneys but then subsequently arguing ineffective assistance.¹²⁷

A third and more complicated general issue relates to the distinction between regulations and restrictions. The preceding discussion has presumed that a defendant’s choice of counsel was knowing and intelligent. The argument that courts should provide greater substan-

¹²² See *Wheat v. United States*, 486 U.S. 153, 159 (1988) (“[A] defendant may not insist on representation by an attorney he cannot afford or who for other reasons declines to represent the defendant.”).

¹²³ See *Morris v. Slappy*, 461 U.S. 1, 11–12 (1983) (giving trial judges substantial discretion regarding whether to issue continuances, notwithstanding arguments that certain schedules would be needed to allow full participation by defendant’s chosen counsel).

¹²⁴ See *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 619 (1989) (upholding drug forfeiture statute with no exemption to allow assets to go toward attorneys’ fees).

¹²⁵ Of course, the Sixth Amendment does require that the state provide counsel to indigent defendants, but this obligation stems from the understanding that subjecting defendants to criminal jeopardy without minimally effective assistance of counsel would unduly threaten defendants’ fair trial and due process rights. See *Gideon v. Wainwright*, 372 U.S. 335, 339, 344 (1963).

¹²⁶ See *Faretta v. California*, 422 U.S. 806, 835 n.46 (1975).

¹²⁷ A separate ineffective assistance issue would arise if courts decided to take up the practice of using nontraditional lawyers to fulfill their obligation to appoint counsel for indigent defendants. The argument that “counsel” for Sixth Amendment purposes is broader than “state licensed attorney” necessarily suggests that, at least in some cases, appointment of non-bar advocates could satisfy *Gideon*. But in such cases, defendants would not need to forego ineffective assistance remedies, as they would not be insisting on unapproved representation.

tive protection to a defendant's choice has little weight unless defendants are genuinely giving informed consent to their representation. But determining in practice whether a defendant has actually made a knowing and intelligent choice could often be quite difficult. Therefore, even an expanded choice-of-counsel jurisprudence could distinguish between categorical restrictions on a defendant's choice and procedural regulations designed to ensure that the defendant's choice is genuinely informed and voluntary (for example, by requiring the defendant to explain satisfactorily that he understands what rights he will be giving up if he selects a non-bar advocate).

Difficult questions may arise even under this framework, especially if a court determines that a defendant lacks the basic ability to make such a choice for himself in the first place.¹²⁸ But practical elaboration of a developing doctrine is the norm, not the exception, in constitutional jurisprudence. The possibility of difficult cases does not mean that expanding choice of counsel would foreclose a principled doctrine, nor is it worth sacrificing the autonomy of criminal defendants.

IV. CONCLUSION

A criminal defendant facing serious criminal charges may never encounter a more personal situation in his life, nor one where the consequences of his choices are greater. Protecting the autonomy of criminal defendants may be challenging when a defendant's genuine choices risk harm to himself and to the integrity of the judicial process. But the Sixth Amendment reflects a decidedly personal and individual vision of criminal defense that puts the defendant, not his lawyer or the state, in control. A defendant's choice of counsel is surely as personal and fundamental a decision as any other, and it merits substantive judicial protection.

¹²⁸ See, e.g., Hashimoto, *supra* note 1, at 1184–87 (discussing the complicated relationship between mental illness and defendant autonomy).