

The Right to an Attorney: Currently Unavailable

A Talk with Seymour James

I. The Right to Counsel

A. Sixth Amendment Constitutional guarantee

1. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense.”¹
2. Post *Gideon v Wainwright*, the right to counsel exists in both federal and criminal prosecutions.

B. *Gideon v Wainwright* (1963)²

1. In 1961, Clarence Earl Gideon was charged with breaking and entering with intent to commit petty larceny. The court declined to appoint him an attorney, and he was subsequently convicted at trial. Gideon sued the Secretary of the Florida Department of Corrections, arguing that that his Sixth Amendment Rights, as applied to the states by the Fourteenth Amendment, had been violated when he was refused counsel.
2. The court unanimously ruled that under the Fourteenth Amendment, states are required to provide counsel to indigent defendants who have been criminally charged. There is no requirement for the defendant to prove “special circumstances”; rather, counsel is a matter of right.
3. With the assistance of an appointed attorney, Gideon was acquitted at retrial.

C. Miranda Warning

1. The right to counsel, as established in *Gideon v Wainwright*, was incorporated into the Miranda Warning³ recited to a defendant upon their criminal arrest. A typical reading of the Miranda Rights explains that if the defendant cannot afford an attorney, one will be appointed for them if desired.

D. *In re Gault* (1967)⁴

1. Gerald Gault, a fifteen year old, was arrested for making obscene phone calls to a neighbor. His parents were not notified of his arrest, he was not afforded counsel, his accuser was not present at his juvenile hearing,
2. Juveniles accused of crimes in delinquency proceedings have the right to appointed counsel.

E. *Argersinger v Hamlin* (1972)⁵

1. The Supreme Court expanded the ruling in *Gideon* to apply to any crime that is subject to actual imprisonment, which includes both felonies and misdemeanors.

II. Overburdened Indigent Defenders

A. Heavy workloads of public defenders

1. *Strickland v Washington* (1984)⁶

¹ U.S. Const. amend. VI.

² *Gideon v. Wainwright*, 372 U.S. 335 (1963)

³ *Miranda v. Arizona*, 384 U.S. 436 (1966)

⁴ *re Gault*, 387 U.S. 1 (1967)

⁵ *Argersinger v. Hamlin*, 407 U.S. 25 (1972)

⁶ *Strickland v. Washington*, 466 U.S. 668 (1984)

- a. The Supreme Court confirmed a national minimum standard of “reasonably effective assistance” for the constitutional right to counsel.
- 2. Many public defenders handle a heavy caseload- sometimes up to 500 cases at a time, which inevitably decreases the quality of any given client’s defense.
 - a. Overburdened caseloads may prevent attorneys from providing “reasonably effective assistance,” a task that includes conducting adequate investigations, witness interviews, and legal research, amongst others.
- B. Caseload limits
 - 1. In New York, workloads for attorneys providing representation to indigent clients in criminal matters are regulated by Rules of the Chief Administrative Judge, §127.7⁷.
 - a. §127.7 (a) dictates that attorneys “shall not exceed 150 felony cases; or 400 misdemeanor cases; or a proportionate combination of felony and misdemeanor cases.”
 - b. §127.7 (b) allows the Chief Administrator of the Courts to review the workloads for compliance with the above rule. He or she may consider: “(1) difference among categories of cases that comprise the workload of the defense organization; (2) the level of activity required at different phases of the proceeding; (3) local court practice, including the duration of a case; and (4) any other factor the Chief Administrator deems relevant.”
 - c. Caseload restrictions result in a need for more attorneys. The judiciary budget allocates funding for additional staff necessary to reduce workloads, to be phased in over 4 years.
- C. Other Efforts to Reduce Caseloads
 - 1. Diversion Programs
 - a. Diversion programs allow defendants to circumvent prosecution. Programs include mediation, or permitting defendants who struggle with a drug or alcohol dependency to receive treatment.
 - 2. Decriminalization of minor offenses
 - a. Some minor criminal charges may be subsumed by civil courts in order to alleviate and allocate resources to public defenders.
 - b. Marijuana Arrests
 - i. New York Penal Law § 221.05 states that “A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana.”⁸
 - ii. The United States made 660,000 possession of marijuana arrests in 2011, 50,000 of which took place in New York.
 - c. Disorderly Conduct
 - i. New York Penal Law § 240 imposes criminal sanctions, including the possibility of imprisonment, for disorderly conduct.⁹
 - d. Traffic Offenses

⁷ N. Y. Ct. Rules, § 127.7, NY R CHIEF ADMIN § 127.7

⁸ NY PENAL § 221.05

⁹ NY PENAL § 240

- i. §511 of the New York Vehicle and Traffic Law¹⁰ states that driving with a suspended license may lead to a charge of a misdemeanor or a felony, punishable either by a fine or imprisonment.

III. Overzealous Criminalization

A. Stop and Frisk

Stop and Frisk was initiated by New York City Police Commissioner Raymond Kelly. The practice allows police to question and search people if there is both reasonable suspicion and probable cause. However, the power to stop and frisk individuals has been abused by police as a means to make unlawful arrests, most often of young people of color.

1. In order to charge stopped persons with marijuana possession, police commonly directed stopped individuals to remove marijuana from their pockets. This is because possessing concealed marijuana up to 25 grams is only a violation, but exposing possessed marijuana “in a public place” or “open to public view” is a class B misdemeanor.¹¹
2. *Juan Gomez-Garcia, James McPherson, Willie Spence, Moshesh Harris, and Mahendra Singh v The New York City Police Department; Raymond W. Kelley, New York City Police Department Commissioner, in his official capacity; and The City of New York* (2012)¹²
 - a. The Legal Aid Society and Davis Polk & Wardwell LLP launched an action for declaratory and injunctive relief for plaintiffs victimized by the NYPD’s illegal marijuana arrest practices.
 - b. In response to the complaint, Commissioner Kelley directed police officers to cease making arrests for possession of small quantities of marijuana discovered when individuals were ordered to empty their pockets in stop and frisk encounters.

B. “Broken Windows Theory”

1. Criminological theory that proposes small crime prevention as means to prevent the escalation of more serious urban crime.

C. Criminalizing MTA Rules of Conduct¹³

1. §1050.4: Payment of Fare and Access to Authority Facilities
 - a. No person shall “proceed over or under any turnstile or otherwise proceed in any other unauthorized manner through an exit gate or through or past any other point at which a fare is required or collected”
 - b. Individuals who cannot afford train fare may be charged with blocking access to authority facilities while asking passengers to swipe them in.
2. §1050.7 (j): Disorderly Conduct

¹⁰ N.Y. Veh. & Traf. Law § 511

¹¹ NY PENAL § 221.10

¹² *Gomez-Garcia v. N.Y.P.D.*, No. 0451000-2012, 2012 WL 2362711, at *1 (N.Y. Sup. Ct. June 22, 2012).

¹³ 21 CRR-NY 1050

- a. MTA passengers may not “occupy more than one seat on a station, platform or conveyance when to do so would interfere...with the operation of the Authority’s transit system or the comfort of other passengers.”
 - b. Individuals who put their feet up on the train are often charged with violating this provision, even during off-hours.
3. §1050.10 (a): Penalties
- a. Any person committing an MTA violation may be subject to “criminal prosecution, which may lead to a fine or imprisonment of not longer than ten days.”

IV. Reforming Public Defense

A. Need for Comprehensive Defense

- 1. 40-60% of people charged with criminal code violations have mental health issues, which could be used as mitigating factors at trial if properly addressed.
- 2. However, in an effort to be “tough on crime,” government funding to prosecutors far exceeds that given to public defense. This leaves many indigent defenders unable to hire medical experts and social workers to verify the need for client treatment and addresses larger social issues.

B. No Federal Oversight

- 1. There is no federal agency that regulates indigent defense or provides assistance to local governments. Rather, public defense is regulated by the states.
 - a. In New York, public defenders are organized through a private legal aid bureau that contracts with the city in order to provide representation to indigent clients.

C. Trends in Public Defense

- 1. Increase in misdemeanor charges occasioning severe collateral consequences, such as deportation of legal immigrants and denial of public benefits.
 - a. “Any alien who at any time after admission has been convicted of a violation of... any law or regulation of a State [or] the United States...is deportable”¹⁴
 - b. This includes misdemeanors as well as more serious convictions.
- 2. *Padilla v Kentucky* (2010)¹⁵
 - a. Supreme Court decides that criminal defense attorneys must warn their non-citizen clients that a guilty plea may result in deportation.

¹⁴ 8 U.S.C.A. § 1227

¹⁵ *Padilla v Kentucky* 559 U.S. 356 (2010)