

KEYNOTE SPEECH: CRIMINAL LEGAL AID IN COMMON LAW COUNTRIES

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INTERNATIONAL CONFERENCE ON CRIMINAL LEGAL AID SYSTEMS

BEIJING, CHINA DECEMBER 15, 2012

I would first like to join Jennifer Lyman and previous speakers by thanking Professor Gu and the China University of Political Science and Law for planning this excellent conference and inviting both international and Chinese experts to participate in it. I am deeply honored to play a small part in such a significant event.

It is worth noting that today marks the 221st anniversary of the ratification of the Bill of Rights to the United States Constitution on December 15, 1791. Those first ten amendments provide the basis for the freedoms that the American people have enjoyed ever since; and among them is the right to counsel enshrined in the sixth amendment. I think it is also worth noting that this anniversary and the worldwide celebration of International Human Rights Day earlier this week occur in such proximity to each other, and to our conference.

In my paper, *An Assessment of the Right to Counsel in the United States*, I identify three serious deficiencies that have prevented the United States from fulfilling the dream of the *Gideon* case – the dream, as described by Anthony Lewis in his 1964 classic book *Gideon's Trumpet*, “of a vast, diverse country in which every man charged with crime will be capably defended, no matter what his economic circumstances, and in which the lawyer representing him will do so proudly, without resentment at an unfair burden, sure of the support needed to make an adequate defense.”

Today I will briefly explain those deficiencies, and I will then present for your consideration what I believe to be the three great strengths of the criminal justice system in the United States.

The first deficiency is the unfunded federal mandate. While the right to counsel is a federal constitutional right, proclaimed by the Supreme Court of the United States, its costly implementation has been left virtually entirely to each of the 50 states. This unfunded federal mandate is unacceptable, and I therefore join the American Bar Association's longstanding proposal, endorsed by several recent national assessments, that Congress remedy it now, as we approach the fiftieth anniversary of the *Gideon* decision on March 18, 2013.

The second serious deficiency is that the right to counsel has been proclaimed and extended not by a democratically elected Congress, but by the Court. And the Court has done a poor job of coming to terms with the reality that effective lawyering is costly. This failure is particularly evident in the 1972 case of *Argersinger v. Hamlin*, where the Court extended the right to counsel to all crimes that could result in a period of incarceration; and where it raised but largely evaded the critical issue of cost. It is time for the Court, in an appropriate case, to address this issue, if Congress will not act.

The third deficiency is what I call in my paper, and I think I may have coined a new English word, the relentless “punitization” – the ever-increasing harshness – of criminal justice legislation in every state and Congress over the last several decades. This harshness has two components; first in extending the number of activities that are made criminal, and second in the imposition of more and harsher punishments. It is not by accident that the United States has achieved the negative distinction of being the world’s leader in the incarceration of its citizens. This too urgently calls for correction.

In my opinion, the three great and enduring characteristics that mark the United States justice system are (1) an insistence upon fair play; (2) the right to zealous representation by counsel; and (3) an independent judiciary.

Our first strength lies in what our Constitution calls Due Process of Law and Equal Protection of the Law; and what I call our deep national commitment to fair play as between the enormous power of the government, on the one hand; and the fundamental human rights of every person. Our national consensus is that it would be profoundly wrong, and destructive of human rights, for the government to wield total control over the liberty of the people.

Our second strength is our belief that this fundamental right of fair play can best be achieved by vigorous and effective representation of the accused person by an attorney, whose professional duty lies solely with his or her client, yet who is also obliged to act ethically and within the law in every case. To ensure this loyalty to the client, we insist that the provision of counsel be independent – that is, separate from the police, the prosecution and the courts. Why we believe that the assistance of counsel is so vital is explained eloquently by Justice Sutherland writing for the Court in *Powell v. Alabama* in 1932, and by Justice Black in *Gideon v. Wainwright* in 1963; and these cases are cited in the Chronology.

Our third great strength, our national treasure, is our commitment to an independent judiciary. This reflects our judgment that no lawyer, no matter how learned or eloquent, can effectively protect the rights of his or her client without resort to an independent and impartial arbiter of the law. The judicial branch can pass no laws and can dispense no funds; its role in comparison to the legislative and executive branches of government is relatively passive. But it has, and we believe it must have, the final authority to interpret our laws and our Constitution. In the words of the famous case of *Marbury v. Madison*, it must have the authority “to say what the law is.”

As is the case with any country, the United States’ execution of these great principles often falls short, sometimes woefully short. But these three principles – fair play, the right to counsel, an independent judiciary – are the bedrock upon which our system of justice rests. And so I thought it would be correct to present them to you today for your thoughtful consideration.

I close with the words of Eleanor Roosevelt, a principal author of the Universal Declaration of Human Rights and the widow of President Franklin Delano Roosevelt: “Where, after all, do universal human rights begin? In small places, close to home. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity.” Thank you for your attention.

