Lecture Notes

# Chapter 12: Attorneys, Trials, and Punishments

## Annotated Chapter Outline

1. The Right to Counsel
   1. Indigents and the Right to Counsel: Foundations
      1. *Powell v. Alabama (1932)*
         1. The Court declined to decide if the Constitution guarantees the right to counsel for every defendant.
         2. But, writing for the majority, Justice Sutherland recognized that cases involving unusual situations would necessitate lawyers’ participation to secure fundamental fairness for defendants.
      2. *Johnson v. Zerbst (1938)*
         1. The Court ruled that, under the Sixth Amendment, indigent defendants involved in federal criminal prosecutions are entitled to be represented by counsel.
      3. ***Betts v. Brady (1942)***
         1. Indicted for robbery in Maryland, Smith Betts—a poor, uneducated but literate, white man—wanted an attorney at government expense.
         2. Like many states, Maryland provided indigents with counsel only in rape and murder cases.
         3. On appeal he asked the Supreme Court to apply Johnson to the states, thereby incorporating the Sixth Amendment guarantee.
         4. The Court refused, 6–3.
         5. Justice Owen J. Roberts claimed that the framers never intended that the right to counsel be defined as a fundamental guarantee, just that it apply to extreme situations as in *Powell*.
      4. *Gideon v. Wainwright (1963)*
         1. This case provides another example of the Warren Court’s revolution in criminal rights.
         2. In considering cases applying the Bill of Rights to the states, Justice John Marshall Harlan’s minority views in the incorporation cases were adopted by later justices.
         3. This case has had a tremendous impact on the U.S. criminal justice system, in which 80–90 percent of the criminally accused are eligible for legal defense at the government’s expense.
   2. Applying *Gideon*
      1. ***Argersinger v. Hamlin (1972)*** and ***Scott v. Illinois (1979)***
         1. In these cases the justices developed the “loss of liberty” rule: an indigent charged with a crime that upon conviction will lead to incarceration for even one day is entitled to be represented by counsel at government expense.
      2. ***Alabama v. Shelton (2002)***
         1. LeReed Shelton, convicted of third-degree assault, was sentenced to a jail term of thirty days, which the trial court immediately suspended, placing Shelton on probation for two years.
         2. The question the Court addressed was whether the Sixth Amendment right to appointed counsel, as delineated in Argersinger and Scott, applies to a defendant in Shelton’s situation.
      3. ***Douglas v. California (1963)***
         1. The Court held that the right to appointed counsel extended through the first obligatory appeal.
      4. ***Ross v. Moffitt (1974)***
         1. The Burger Court—while not reversing *Douglas*—refused to extend to subsequent appeals the right to state-provided counsel for indigents.
      5. ***Halbert v. Michigan (2005)***
         1. Michigan removed the right to counsel for indigent defendants who pleaded guilty at trial and were trying to make a first appeal of their cases.
         2. The Supreme Court invalidated Michigan’s law—a step, it said, necessitated by Douglas and Ross.
   3. Money, Justice, and (Effective) Representation
      1. Today, most poor people accused of crimes are represented by public defenders or by attorneys appointed by trial court judges.
      2. Those individuals with substantial resources are still able to hire the best lawyers, investigators, and experts to advance their defenses against criminal charges.
      3. The Court has recognized that “the right to counsel is the right to the effective assistance of counsel.”
      4. *Strickland v. Washington (1984)*
         1. The Court laid out a test that defendants must meet if they desire to invoke the right to counsel.
2. The Pretrial Period and the Right to Bail
   1. ***United States v. Salerno (1987)***
      1. This case challenged the Bail Reform Act of 1984, which authorized judges to deny bail to defendants to “assure . . . the safety of any other person and the community.”
      2. After federal prosecutors presented evidence suggesting that Anthony Salerno would commit murder if let out, the judge denied bail.
      3. Salerno successfully appealed to the U.S. Court of Appeals, which declared the 1984 act unconstitutional.
      4. The federal government then asked the Supreme Court to reverse.
      5. In a 6–3 decision, the Court did just that.
      6. By upholding the 1984 federal law, the majority gave implicit assent to the statutes of twenty-four states that allowed the denial of bail on similar bases.
3. The Sixth Amendment and Fair Trials
   1. Speedy Trials
      1. ***Barker v. Wingo (1972)***
         1. Two individuals, Willie Barker and Silas Manning, were charged with beating an elderly Kentucky couple to death with a tire iron.
         2. The prosecutor had a strong case against Manning but not against Barker.
         3. To convict Barker, the prosecutor needed Manning to testify, but Manning refused on Fifth Amendment grounds.
         4. The prosecutor devised the following strategy:
            1. He would put Manning on trial first, and, after obtaining a conviction against him, he would try Barker and call Manning as a major witness.
            2. Manning would no longer be able to refuse to testify on Fifth Amendment grounds because once he was convicted of murder, he could not further incriminate himself.
         5. Getting Manning convicted took longer than the prosecutor had anticipated.
         6. Finally, five years after he was indicted for murder, Barker was tried, found guilty, and sentenced to life in prison.
         7. Barker’s attorneys appealed the conviction on the grounds that the five-year delay was a violation of the Sixth Amendment.
         8. A unanimous Supreme Court, through an opinion by Justice Lewis F. Powell Jr., refused to designate a specific length of time that would constitute unreasonable delay.
         9. As applied to Barker, the Court found no constitutional violation.
      2. ***Vermont v. Brillon (2009)***
         1. The Court considered whether delays caused solely by an indigent defendant’s public defender could violate the defendant’s speedy trial rights and be charged against the state pursuant to the test in Barker.
         2. The defendant, Brillon, argued that the Court should answer in the affirmative because public defenders are paid by the state.
         3. Writing for a 7–2 Court, Justice Ruth Bader Ginsburg held against Brillon.
   2. Jury Trials
      1. Jury Members
         1. To put together representative panels, many jurisdictions follow a procedure that works this way:
            1. Individuals living within a specified geographic area are called for jury duty.
            2. Those selected form the jury pool, or venire, the group from which attorneys choose the jury.
            3. The judge may conduct initial interviews and excuse certain classes of people and certain occupational groups, as allowed under the laws of the particular jurisdiction.
            4. The opposing attorneys interview the prospective jurors in the process called *voir dire*.
         2. The objective of this long-standing process is to form a petit jury representing a cross section of the community.
         3. Attorneys, especially prosecutors, may use their peremptory challenges systematically to excuse Black people and other people of color from juries.
         4. Most courts refused to interfere with the traditional privilege of attorneys to excuse jurors for no specific reason, viewing it as part of a litigation strategy.
         5. ***Swain v. Alabama (1965)***
            1. The U.S. Supreme Court reinforced this sentiment by making it difficult for judges to prohibit prosecutors from using the peremptory challenge to remove prospective jurors for reasons of race.
         6. *Batson v. Kentucky (1986)*
            1. The Court reevaluated Swain and startled the legal community by holding that even peremptory challenges are subject to court scrutiny.
            2. Prior to this case, the justices generally refused to interfere with attorney exercise of peremptory challenges, even in the face of evidence that prosecutors often used them to exclude Black people from juries, as reported in Marshall’s concurrence.
            3. In *Batson* the justices reevaluated their approach and established a framework by which defendants could challenge prosecutors who appeared to be using their peremptory challenges in a racially discriminatory way.
         7. *Powers v. Ohio (1991)*
            1. The Court ruled that criminal defendants may object to race-based exclusion of jurors through peremptory challenges even when the defendant and the excluded juror belong to different racial groups.
         8. *Edmonson v. Leesville Concrete Co (1991)*
            1. The Court applied the *Batson* framework to civil cases, holding that private litigants may not use their peremptory challenges in a racially biased manner.
         9. *Georgia v. McCollum (1992)*
            1. The Court held that the prosecution can stop the defense from exercising its peremptories to eliminate Black people from a jury.
         10. ***J.E.B. v. Alabama ex rel. T.B. (1994)***
             1. The justices applied *Batson* to intentional sex discrimination in selecting jurors.
         11. ***Flowers v. Mississippi (2019)***
             1. Justice Kavanaugh, writing for the majority, emphasized the continuing importance of Batson.
      2. Jury Size
         1. A long-standing tradition Americans adopted from the English is the jury size of twelve people.
         2. Beginning in the mid-1960s, many states began to abandon this practice, substituting six-person juries in noncapital cases.
         3. These states reasoned that six-person juries would be more economical, faster, and more likely to reach a verdict.
         4. ***Williams v. Florida (1970)***
            1. This case was a 1970 appeal from a robbery conviction.
            2. Justice White explained that the number twelve had no special constitutional significance.
            3. All the Constitution requires, according to the Court, is a jury sufficiently large to allow actual deliberation and to represent a cross section of the community.
      3. Jury Verdicts
         1. Following the English tradition, the framers thought juries should reach unanimous verdicts or none at all.
         2. If a jury cannot reach a unanimous verdict, the judge declares the jury “hung” and the prosecutor either schedules a retrial or releases the defendant.
         3. Long ago, Louisiana and Oregon altered the unanimity rule for twelve-person juries, requiring instead the agreement of nine or ten of the twelve.
         4. Both states adopted these policies to prevent Black jurors from affecting decisions.
         5. ***Johnson v. Louisiana*** and ***Apodaca v. Oregon (1972)***
            1. A divided Court held that non-unanimous verdicts were constitutional.
            2. Neither the majority nor the dissenters mentioned the racist origins of these rules.
         6. ***Ramos v. Louisiana (2020)***
            1. The court concluded that *Johnson* and *Apodaca* had been wrongly decided.
            2. The Court acknowledged that the non-unanimous rules traced to a desire to blunt the influence of people of color on juries.
            3. It had little difficulty concluding that the rules violate the Constitution.
   3. Impartial Juries
      1. *Press v. Jury*: The Warren Court
         1. Before the mid-1960s, no balance existed between freedom of the press and the right to an impartial jury—the former far outweighed the latter.
         2. Reporters, accompanied by crews carrying bulky, noisy equipment, simply showed up and interviewed and photographed witnesses and other participants at will.
         3. *Sheppard v. Maxwell (1966)*
            1. This case is the Warren Court’s strongest statement on this clash of rights.
            2. The Supreme Court’s ruling ordered Sheppard, who had already spent ten years behind bars, released from prison.
            3. *Sheppard* provides lower court judges with real ammunition to combat the dangers of an overzealous press.
      2. *Press v. Jury*: After Sheppard
         1. *Gannett Co. v. DePasquale (1979)*
            1. A newspaper company asked the Court to prohibit a judge from closing the pretrial hearings for a highly publicized case.
            2. Writing for a majority of the Court, however, Justice Potter Stewart declined to do so.
            3. Adopting the Warren Court’s reasoning in *Sheppard*, he claimed that adverse publicity can endanger proceedings, a problem particularly acute at the pretrial stages.
         2. *Richmond Newspapers v. Virginia (1980)*
            1. The Court ruled in favor of a First Amendment claim over a Sixth Amendment claim, modifying the balance between these rights.
            2. The Court said that judges can pursue a variety of strategies to protect the accused, but they cannot completely close trial proceedings to the public and press.
            3. Audio and video recording equipment is not as noisy and disruptive as it was when Sheppard was decided.
4. Trial Proceedings
   1. ***Maryland v. Craig (1990)***
      1. The Court upheld a Maryland procedure that allowed abused children to testify via closed-circuit television.
      2. This procedure permitted the defendant to see the testimony of the alleged victim but protected the child witness from the trauma of face-to-face interaction with her accused abuser.
   2. ***Crawford v. Washington (2004)***
      1. The defendant, Michael Crawford, was accused of stabbing a man who allegedly tried to rape his wife, Sylvia.
      2. The state played for the jury a recorded statement that Sylvia made during a police interrogation suggesting that the stabbing was not committed while her husband was defending her against a rape.
      3. Sylvia did not testify because of the state’s marital privilege, which generally bars a spouse from testifying without the other spouse’s consent.
      4. Crawford objected to Sylvia’s tape-recorded statement on the ground that his attorney never had an opportunity to cross-examine his wife and so admitting the evidence violated his Sixth Amendment right to confrontation.
      5. The Court agreed with Michael Crawford.
   3. ***Davis v. Washington (2006)***
      1. The justices agreed that prosecutors could introduce victims’ emergency phone calls to 911 even if the victims are not in court for cross-examination.
      2. However, the Court refused to allow a victim’s statement to police, given at the crime scene, to be used at trial unless the victim was willing to be cross-examined.
   4. ***Melendez-Diaz v. Massachusetts (2009)***
      1. The prosecution introduced sworn certificates of state laboratory analysts stating that material seized by police and connected to Melendez-Diaz was quite likely cocaine.
      2. Melendez-Diaz’s attorney objected, claiming that under Supreme Court precedent, the analysts should testify in person and face cross-examination.
      3. The Supreme Court agreed.
   5. ***Michigan v. Bryant (2011)***
      1. The Court held that a statement made to police by a victim at a crime scene was nontestimonial even though the victim died before the start of the trial.
      2. Sotomayor reasoned that the statement was nontestimonial in nature because it was made with the purpose of assisting the police in an ongoing emergency situation.
      3. To Scalia, because the victim’s purpose was to ensure the arrest and prosecution of the defendant, the victim’s statement clearly amounted to testimony for purposes of the confrontation clause.
5. Final Trial Stage: An Overview of Sentencing
   1. If a jury finds a defendant guilty, the judge will typically set a future court date to determine and pronounce the appropriate sentence.
   2. This step has engendered a good deal of debate.
      1. On any given day in the United States, defendants convicted of the same crime in different localities can receive vastly different sentences.
         1. One reason for this is that judges consider a variety of information before pronouncing sentence.
         2. Judges maintain that by considering a broad array of information about convicted defendants, they can form a more complete picture and hand down appropriate sentences.
      2. Some scholars argue that irrelevant factors enter the process.
      3. Another serious issue is that racial discrimination may influence sentencing decisions.
   3. Congress has tried to limit judges’ discretion by creating the United States Sentencing Commission.
   4. The commission’s task is to establish sentencing guidelines that federal judges must follow.
   5. However, the Court has rendered the guidelines are effectively advisory.
6. The Eighth Amendment
   1. Defining “Cruel and Unusual”
      1. ***Solem v. Helm (1983)***
         1. In 1979 Jerry Helm was convicted of writing a $100 bad check.
         2. On six previous occasions he had been convicted of other nonviolent crimes.
         3. The judge, believing Helm to be beyond rehabilitation, invoked the South Dakota recidivism law and sentenced him to life in prison without possibility of parole.
         4. By a 5–4 vote, the Supreme Court found that the life sentence violated the cruel and unusual punishment clause.
         5. Justice Powell’s majority opinion held that the Eighth Amendment proscribes not only barbaric punishments but also sentences that are disproportionate to the crime committed.
      2. *Harmelin v. Michigan (1991)*
         1. The justices rejected a convict’s claim that a sentence of life in prison without possibility of parole for a first-time offense of cocaine possession violated the cruel and unusual punishment clause.
         2. They could not agree on the reason this sentence was not grossly disproportionate.
      3. ***Ewing v. California (2003)***
         1. The Court addressed the constitutionality of sentencing statutes popularly known as “three strikes and you’re out” laws.
         2. Under California law, the prosecutor had the option of charging Ewing with a felony or a misdemeanor.
         3. The prosecutor decided that a felony grand theft charge was the appropriate alternative.
         4. Ewing was convicted of the felony charge and therefore became eligible for sentencing under the state’s three-strikes statute.
         5. The judge sentenced him to a term of twenty-five years to life in prison.
         6. Ewing appealed, claiming that the sentence was disproportionate to the triggering offense of stealing three golf clubs.
         7. The Court upheld the state law.
      4. *Graham v. Florida (2010)*
         1. The Court considered whether the Constitution permits a juvenile offender to be sentenced to life in prison without parole for a nonhomicide crime.
         2. Graham challenged his sentence under the Eighth Amendment’s cruel and unusual punishment clause.
         3. The majority of the justices agreed with Graham.
         4. The decision held that a type of punishment—life without the possibility of parole—could not be imposed on an entire category of offenders—juveniles.
      5. ***Miller v. Alabama (2012)***
         1. The Court addressed the question of whether juveniles found guilty of homicide could be sentenced to life in prison without the possibility of parole.
         2. The juveniles claimed that the imposition of such a sentence amounted to cruel and unusual punishment for much the same reasons the Court gave in Graham.
         3. A five-person majority agreed.
   2. Capital Punishment: Foundations
      1. ***Furman v. Georgia (1972)***
         1. William Furman, a Black man, was accused of murdering a white man, the father of five children.
         2. Under Georgia law, the jury determined whether a convicted murderer should be put to death.
         3. This system, the NAACP Legal Defense and Educational Fund argued, led to unacceptable disparities in sentencing.
         4. Black defendants convicted of murdering whites were far more likely to receive the death penalty than were whites convicted of the same crime.
         5. A divided Supreme Court agreed with the LDF.
         6. The views presented in the opinions of the five-member majority varied considerably.
      2. *Gregg v. Georgia (1976)*
         1. The Court considered the constitutionality of a new breed of death penalty laws written to overcome the defects of the old laws.
         2. With only two justices dissenting, the Court held a Georgia law was constitutional.
         3. Membership change on the Court occurred between the *Furman* and *Gregg* cases.
         4. Public support for the death penalty also increased between them.
   3. The Current State of the Death Penalty
      1. *Eddings v. Oklahoma (1982)*
         1. The Court held that a trial court judge could not refuse to hear mitigating evidence pointing to the defendant’s youth, troubled childhood, and history of mental problems.
      2. ***McCleskey v. Kemp (1987)***
         1. Despite statistical evidence showing that Black defendants were 1.1 times more likely than other defendants to receive death sentences, the Court rejected arguments that the disparate application of death penalty laws violates the Constitution.
      3. *Atkins v. Virginia (2002)*
         1. The Court revisited its controversial ruling in *Penry v. Lynaugh (1989)* that the Eighth Amendment does not categorically prohibit the execution of an intellectually disabled defendant convicted of capital murder.
         2. The Court’s decision was clear: states cannot impose the death penalty on the intellectually disabled.
      4. ***Roper v. Simmons (2005)***
         1. The Court exempted juvenile defendants from the death penalty.
      5. ***Kennedy v. Louisiana (2008)***
         1. The Court exempted the crime of child rape from the death penalty.
7. Posttrial Protections and the Double Jeopardy Clause
   1. ***Ashe v. Swenson (1970)***
      1. Bob Fred Ashe, along with others, was charged with breaking into a house and robbing its owner and five others who were playing poker.
      2. The prosecutor tried Ashe for robbing one of the poker players.
      3. That trial ended in a verdict of not guilty because of insufficient evidence.
      4. Six weeks later, the prosecutor charged Ashe with robbing another member of the poker party and this time got a conviction.
      5. Ashe claimed on appeal that the second trial violated his right to be protected from double jeopardy.
      6. The Supreme Court agreed, holding that the robbery was a single offense, although there were multiple victims.
   2. ***Kansas v. Hendricks (1997)***
      1. The Court considered a challenge to a statute that permitted the state to keep certain sexual offenders in custody even after they had served their sentences.
      2. According to the law, violent sexual predators who have mental abnormalities that prohibit them from controlling their unlawful sexual conduct may be committed to mental health facilities after completion of their criminal sentences.
      3. Leroy Hendricks was a pedophile with a forty-year history of sexually molesting young boys and girls.
      4. In 1984 he was convicted of sexually assaulting two teenage boys.
      5. As his prison sentence was about to be completed in 1994, Kansas authorities initiated proceedings to commit him to a mental institution.
      6. A jury found beyond a reasonable doubt that he should be committed.
      7. Hendricks appealed, claiming that the commitment constituted a second punishment for his offense in violation of the double jeopardy and due process clauses.
      8. A closely divided Supreme Court upheld the law.
8. Postrelease Protections
   1. ***Connecticut Department of Public Safety v. Doe (2003)*** *and Smith v. Doe (2003)*
      1. The Court considered a variation on isolating convicted criminals from society: registration.
      2. Although the legal challenges in these cases differed, the laws at issue—those requiring sex offenders to register their names and home addresses with local law enforcement authorities—are similar, and they bear the names of child victims.
      3. Writing for a 9–0 Court in *Connecticut Department of Public Safety v. Doe*, Chief Justice Rehnquist held that the government “has decided that the registry requirement shall be based on the fact of previous conviction, not the fact of current dangerousness.”