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Gideon v. Wainwright Revisited: What Does the Right to Counsel Guarantee Today?

Michael B. Mushlin
Elisabeth Haub School of Law at Pace University

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Conference

Gideon v. Wainwright Revisited: What Does The Right To Counsel Guarantee Today?†

I. Foreword

Michael B. Mushlin††

In *Gideon v. Wainwright*,[1] the Supreme Court unanimously held that indigent state felony defendants are constitutionally entitled to the appointment of trial counsel. The opinion aroused wide support, and even enthusiasm, almost from the moment it was announced in 1963.[2] Two and a half decades later

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† This conference was sponsored by The Legal Aid Society on October 22, 1988 to celebrate the twenty-fifth anniversary of *Gideon*. The conference transcript has been edited and expanded upon by many of the participants. The Pace Law Review would like to thank Michael B. Mushlin and Susan B. Lindenauer (Counsel to Executive Director, The Legal Aid Society) for their organizational and editorial assistance.

†† Professor of Law, Pace University. B.A., Vanderbilt University, 1966; J.D., Northwestern University, 1970. I am grateful for the willingness of Professors Donald L. Doernberg and Barbara Salken to review and comment on earlier drafts of this foreword. (Professor Mushlin served as the Reporter for the Twenty-Fifth Anniversary Program on Gideon v. Wainwright.)

1. Gideon v. Wainwright, 372 U.S. 335 (1963). *See infra* note 66.

2. The President of the American Bar Association hailed *Gideon* soon after it was decided as one of the "great advances in the administration of criminal justice in our

this support has not diminished.[3] Even former Attorney General Edwin Meese III approves.[4] However, are the words of praise only lip service to the noble idea of the right to counsel? Has *Gideon* really made a difference? Has its promise of a fair shake for poor criminal defendants been kept, or has *Gideon* meant only that defendants are provided with the fleeting and pressured presence of an unprepared lawyer? Moreover, does *Gideon's* extend beyond the initial criminal trial stage to other important quasi-criminal and civil proceedings?

To commemorate the twenty-fifth anniversary of *Gideon*, to reflect upon its impact today, and to assess its broader meaning, The Legal Aid Society of New York convened a meeting on October 22, 1988, at the Association of the Bar of the City of New York. A diverse collection of distinguished individuals addressed the conference. The speakers included a leading author and chronicler of *Gideon*,[5] judges,[6]practitioners,[7] academics,[8] and

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country." A. LEWIS, GIDEON'S TRUMPET 206 (1964) (quoting Sylvester C. Smith, Jr.). Newspapers joined in the applause. Anthony Lewis reports that the St. Petersburg Times, for example, editorialized soon after *Gideon* that the opinion "clings to the ancient democratic tradition of protecting the individual against the tyranny of any governmental agency." *Id.* at 206. Lewis also reported that The Washington Post compared Clarence Gideon to the Old Testament Gideon who "was summoned by an angel" to lead a fight for justice. *Id.* at 206-07.

3. Although *Gideon* is one of the important Warren Court era decisions, it has escaped the criticism that has accompanied some of that Court's criminal law decisions. *See, e.g.*, Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417 (1985); Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174 (1988); Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974).

4. Lewis, *A Muted Trumpet*, N.Y. Times, Mar. 17, 1988, at A31, col. 1. Former Attorney General Meese stated that "representation by counsel in all criminal cases is essential to the fair and effective administration of justice." Another measure of the current popularity of *Gideon* is found in the comment by Abe Krash, one of the participants in the petitioner's brief in Gideon's appeal to the Supreme Court, that "no responsible voice today urges that *Gideon* should be reversed." *See infra* p. 382 (Krash).

5. Anthony Lewis is a New York Times correspondent and author of GIDEON'S TRUMPET (1964), the best-selling history of the case.

6. Jack Weinstein, Chief Judge of the United States District Court for the Eastern District of New York; Judith Kaye, Associate Judge on the New York Court of Appeals; and Michael Juviler, Justice of the Supreme Court of the State of New York.

7. Paula Deutsch, criminal defense trial attorney with The Legal Aid Society; Susan Salomon, a Legal Aid Society appellate lawyer; Barbara Underwood, head of the Appeals unit of the Brooklyn District Attorney's Office, and former Professor of Law at Yale Law School; and Ronald Tabak, an attorney with extensive experience litigatng death penalty cases.

8. Burt Neuborne, a noted Constitutional Law scholar from New York University

even players in the *Gideon* drama.[9] The Pace Law Review has chosen to publish this edited version of the proceedings[10] to provide an illuminating perspective on one of the most significant Supreme Court decisions of our time.

The comments of the authors range widely. Yet, two overriding, and in a sense contradictory, themes dominate. One is celebratory. It praises the vision *Gideon* offers to our adversarial system of justice. The other is critical. It highlights the ways in which the *Gideon* promise has been betrayed, not realized.[11] In this *Foreword*, I will preview some of the authors' reflections on both these themes.

A. Gideon *Celebrated*

In *Gideon* the highest Court in the land "reach[ed] down"[12] to hear the plea of a fifty-two year old drifter, an outcast from society. The story of how lawyers and judges handled Clarence Gideon's handwritten misspelled appeal is worth remembering. As Anthony Lewis states, the "care, the vision, the imagination" of the attorneys appointed by the Supreme Court to represent Gideon on his appeal makes one "proud of law and lawyers in this country."[13] The simple elegance of the majority opinion written by Justice Black,[14] is also impressive. In that opinion Justice Black proclaimed the "obvious truth [that] any person

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School of Law who served as moderator of the conference; Professor Yale Kamisar of Michigan Law School, a renowned Criminal Procedure scholar who was a keynote speaker at the conference; and Professor Charles Ogletree, recent addition to the full-time Harvard Law School faculty, after having had an outstanding career as a criminal defense practicioner and lecturer.

9. The participants in the *Gideon* saga were: Abe Krash, a partner in the law firm of Arnold and Porter, who served as counsel with Abe Fortas on the *Gideon* appeal to the Supreme Court; and Nicholas Katzenbach, Attorney General of the United States during the Johnson Adminsitration.

10. The remarks of the speakers at the conference were transcribed and edited versions sent to the speakers for their review. Some of the speakers, including Professor Kamisar and Ronald Tabak expanded on the address that they gave at the conference.

11. Professor Neuborne, in a working paper prepared for the conference speakers, suggested these terms. *See infra* p. 341 (Neuborne).

12. *See infra* p. 345 (Kamisar).

13. A. LEWIS, *supra* note 2, at 36. For a fascinating description of the strategy decisions made by the drafters of the Supreme Court brief in *Gideon*, *see infra* pp. 380-81 (Krash).

14. Justice Black had expressed a similar view twenty years before in a dissenting opinion in Betts v. Brady, 316 U.S. 455, 474-77 (1942) (Black, J., dissenting).

hauled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him."[15]

One might justifiably wonder, as does Judge Judith Kaye, a keynote speaker at the conference, why it took the Supreme Court so long to discover such an obvious truth.[16] Dramatic evidence of this truth is to be found in *Gideon* itself. The trial court said that Clarence Gideon had done about as well representing himself as an attorney might have done.[17] However, Anthony Lewis' presentation at the conference describing the making of a motion picture based on the case, disproves that assertion. The movie portrayed Fred Turner, the local Florida attorney who represented Gideon after his case was remanded by the Supreme Court for a new trial. Lewis vividly describes how Turner's deceptively simple questions, overlooked at the first trial, won an acquittal for his client.[18]

Just as Turner made a difference to Clarence Gideon, *Gideon's* "great civilizing statement"[19] that a lawyer is required for the trial of a serious criminal case improved the quality of criminal justice dispensed in this country.[20] *Gideon* led directly to the dramatic growth of Legal Aid, public defender, and assigned counsel programs.[21] Today, lawyers for the poor are common fixtures in criminal courts throughout the land. Judges at the conference reported that these lawyers usually provide quality representation to their clients.[22] But the effort required is staggering.

The conference proceedings shed some light on the struggle defense lawyers endure to fulfill the mandate of *Gideon*. Paula Deutsch gives a gripping example in her account of the experiences of one Legal Aid Society trial attorney. She describes how the mire of staggering caseloads, sullen defendants, and hostile judges make it almost impossible to represent clients effectively

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15. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

16. *See infra* p. 422 (Kaye).

17. *See* A. LEWIS, GIDEON'S TRUMPET 238 (1964).

18. *See infra* p. 385 (Lewis).

19. *See infra* p. 341 (Neuborne).

20. *See infra* p. 399 (Ogletree).

21. *See generally* R. HERMAN, ASSOCIATION COUNSEL FOR THE POOR: CRIMINAL DEFENSE IN URBAN AMERICA (1977); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, LEGAL AID HANDBOOK: HOW TO ORGANIZE AND OPERATE A LEGAL AID OFFICE (1971).

22. *See infra* p. 401 (Weinstein); p. 403 (Juviler).

and humanely. Her account is a rare description of the day to day professional life of Legal Aid attorneys. As much as is possible from the printed word, one begins to appreciate what it takes these lawyers to, as Deutsch puts it, "go in there as their champion."[23] Susan Salomon, a Legal Aid Society appellate lawyer, adds her first-hand account of the difficulties faced by criminal defender appellate attorneys. They, too, must cope with huge caseloads and limited resources to adequately represent their clients on appeal.

These presentations, therefore, make an important contribution to the *Gideon* literature. Because of the skill and diligence of attorneys like Ms. Deutsch and Ms. Salomon, the "silent voices"[24] of previously unrepresented criminal defendants, most of whom are minority and all of whom are poor, are now heard in the criminal courts. But for *Gideon* that could not have happened.

A quarter of a century later, the "romance of *Gideon* remains undiminished"[25] precisely because defense attorneys like Deutsch and Salomon pull justice out of a system that shouldn't have it.[26] However, as both suggest, a remembrance of *Gideon* cannot be an occasion for celebration alone. The conference proceedings reveal that *Gideon's* deeper vision of a system of justice in which money does not matter is far from realized.

B. Gideon's *Promise Betrayed*

Twenty-five years after *Gideon*, adequate legal representation for poor defendants has not been obtained. For defendants in capital cases, there is a crisis in representation; for civil defendants, *Gideon* has yet to mean that they have even the hope that counsel will be available to them. For many of the nation's poor, therefore, the stark reality is that the legal system functions "as if *Gideon* had never been decided."[27]

Gideon's promise has not yet been realized even in the criminal trial process with which *Gideon* dealt directly. Counsel

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23. *See infra* p. 387 (Deutsch).
24. *See infra* p. 400 (Ogletree).
25. Lewis, *supra* note 70.
26. *See infra* p. 340 (Neuborne). (This does not appear as an actual quote.)
27. *See infra* p. 341 (Neuborne).

are invariably assigned to these cases. Unfortunately, however, not all defense counsel measure up to the standards of Paula Deutsch and Susan Salomon. Barbara Underwood reveals that in many criminal cases the assignment of a lawyer means only that there is a "warm body" at counsel table.[28] Underwood's story of a defense counsel who failed to investigate points on appeal even when prompted by the district attorney, illustrates how far we have to go to realize the promise of *Gideon* for the typical criminal defendant. Chief Judge Jack Weinstein's discussion adds another dimension to the problem: defense counsel who serve only as technocrats, unconcerned with the human dimension of the legal problems that their clients present.[29]

Conference speakers offer a number of explanations for this sorry state of affairs. Professor Charles Ogletree, for example, points to public defender systems that provide little training for attorneys and few resources to investigate and prepare cases.[30] The current Supreme Court's treatment of the right to counsel also has contributed to this problem according to Professor Yale Kamisar, a keynote speaker at the conference. As early as 1932 the Court held that the right to appointed counsel means the right to "effective"[31] aid. However, the Court, in recent years, has drained almost all meaning from this term. Professor Kamisar uses *Strickland v. Washington*[32] to illustrate this point.

Strickland held that to prevail with an ineffective assistance of counsel claim, a defendant must establish not only that his attorney's conduct was "outside the wide range of professionally competent assistance,"[33] but also that the failure was the direct cause of the conviction.[34] According to Professor Kamisar this is

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28. *See infra* p. 396 (Underwood).

29. *See infra* p. 403. (Weinstein).

30. *See infra* p. 398-99 (Ogletree). For a further discussion of how large caseloads and inadequate funding of agencies providing defense counsel to the indigent have eroded the right to counsel see Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Consitutional Right to Effective Counsel,* 13 HASTINGS CONST. L. Q. 625 (1986).

31. Powell v. Alabama, 287 U.S. 45, 71 (1932).

32. 466 U.S. 668 (1984). Professor Kamisar discusses this case in the specific context of death penalty litigation. While *Strickland* has had a peculiarly disastrous effect on death penalty litigation, Professor Kamisar's criticisms are applicable to other criminal cases as well. *See infra* notes 171-211 and accompanying text.

33. 466 U.S. at 690.

34. *Id.* at 694.

a "herculean task."[35] The result of *Strickland* is that the Supreme Court, in fact, has isolated itself from effectively reviewing problems in implementing *Gideon*.[36]

Death penalty cases provide a second example of *Gideon* betrayed. Ron Tabak, a well-known advocate for the condemned, recounts numerous shocking instances of the failure to provide counsel in these cases. An attorney can literally make a life or death difference in capital cases, but all too often, Tabak explains, the lawyer assigned to the case is not up to the job.[37] Frequently, death penalty lawyers neglect to even present mitigating evidence at the penalty phase of the proceedings. As Professor Kamisar says, "even in the most outrageous and gruesome murder cases, juries have voted for life . . . when provided some basis for mercy, such as the terrible circumstances affecting the defendant's formative development."[38] But because of numerous failures of defense counsel to develop this aspect of their cases, often only the prosecutor is heard by the jury that fixes the penalty.[39]

Tabak and Kamisar also decry the failure to assign counsel in death penalty habeas corpus cases. It is there that constitutional errors can be detected, corrected, and unjust executions prevented. Tabak states that from one-third to one-half of all death penalty convictions are vulnerable to reversal or retrial as a result of habeas corpus proceedings.[40] At the time of the conference, the Fourth Circuit had offered some cause for optimism by holding that death penalty inmates were entitled to counsel in these proceedings as part of the constitutionally guaranteed right of "access to the courts."[41] However, that hope was dashed

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35. *See infra* p. 367 (Kamisar).

36. *See infra* p. 370 (Kamisar).

37. *See infra* p. 408 (Tabak). Tabak, *The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s*, 14 N.Y.U. REV. L. & SOC. CHANGE 797, 803-07 (1986).

38. *See infra* p. 362 (Kamisar).

39. *See infra* p. 362 (Kamisar). Professor Kamisar assigns as a major reason for this default the "scandalously little capital defense lawyers are paid in some states." *See infra* p. 365. Professor Kamisar reports that in some southern states lawyers earn less than a $1,000 per case, making the actual rate of compensation for the diligent attorney less than the attorney could earn "pumping gas." *See infra* p. 365-66.

40. Tabak, *supra* note 37, at 829-34.

41. Giarratano v. Murray, 847 F.2d 1118 (4th Cir. 1988), *rev'd*, 109 S. Ct. 2763 (1989).

when the Supreme Court granted certiorari in the case only one week afterwards,[42] and later reversed by a five to four vote.[43]

The failure to apply *Gideon* to serious civil proceedings is the final area in which *Gideon* has not been realized. The Supreme Court has limited *Gideon* to criminal trials.[44] In place of *Gideon's* firm requirement of an attorney in every case, for civil and quasi-criminal cases the Court has resurrected the case by case *Betts v. Brady*[45] approach, which requires the losing party to demonstrate on the record that counsel would have made a difference to the outcome of the case. Thus, in non-criminal cases an indigent litigant will not be entitled to counsel unless she can affirmatively demonstrate that an attorney would materially affect the outcome of the proceedings, no matter how grevious the deprivation.[46] Because the right to counsel has not been recognized outside the criminal trial process, in many cases, such as eviction proceedings in which poor defendants face the loss of life's very necessities, they must proceed without the aid of counsel.[47] The resulting eviction of thousands of poor unrepresented tenants, in Professor Kamisar's words, "is to put

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42. Giarratano v. Murray, 109 S. Ct. 303 (1988) (certiorari granted).

43. Murray v. Giarratano, 109 S. Ct. 2765 (1989). Professor Kamisar foreshadowed this development when he expressed the hope that the "[h]igh Court not address this issue for several more years, in the hope" that in the meantime other lower courts will follow the lead of the Fourth Circuit. *See infra* p. 375.

44. The Court has refused claims that the right to assigned counsel attaches automatically to probation revocation proceedings. Gagnon v. Scarpelli, 411 U.S. 778, 791 (1973). Some states, however, have enacted statutes insuring their citizens the right to counsel in probation revocation proceedings. *See, e.g.*, Walker v. McLain, 768 F.2d 1181 (10th Cir. 1985); State v. Coltrane, 307 N.C. 511, 299 S.E.2d 199 (1983). The Court has also refused claims that the right to assigned counsel attaches automatically to state-initiated proceedings to terminate parental rights. Lassiter v. Dep't of Social Servs., 452 U.S. 18, 32-33 (1981).

45. 316 U.S. 455 (1942). In *Gideon* the Court had rejected this 1942 ruling. Gideon v. Wainwright 372 U.S. 335, 339 (1963).

46. This is true even if the civil proceeding threatens deprivation of constitutionally-protected rights, such as parental rights. *See* Lassiter v. Dep't of Social Servs., 452 U.S. 18, 27 (1981). Professor Kamisar criticizes this doctrine in practice because it leads to the absurdity of needing a lawyer to demonstrate that the defendant needs a lawyer. Nevertheless, the Court's opinions in these cases read "as if the *Betts v. Brady* approach had never been discredited." *See infra* p. 354 (Kamisar).

47. *See infra* p. 352-53 (Kamisar). For a description of the harsh consequences of the deprivation of counsel to poor tenants, see Scherer, *Gideon's Shelter: The Need to Recognize a Right to Counsel for Indigent Defendants in Eviction Proceedings*, 23 HARV. C.R.-C.L. L. REV. 557 (1988).

it mildly, anomalous — and, to put it strongly, scandalous."[48]

While Professor Kamisar is not optimistic that the Court will soon change direction,[49] the conference proceedings do contain the seeds of hope. Judge Kaye in her remarks reminds us that "[s]tate courts throughout the country [have] recently . . . been more aggressive participants in the process of defining and protecting individual rights,"[50] by "increasingly . . . turning to their own state constitutions as the dispositive ground for their decisions . . . ."[51] It may well be that through such interpretations the true meaning of *Gideon* finally will be realized.[52]

C. Gideon *Rediscovered*

Gideon is measured as much in intangibles as in the precise contours of its holding. Perhaps the most lasting significance of *Gideon* is that it "inspire[d] the most profound dialogue about the fundamental nature of this nation's pledge of justice for all."[53] That question is as important and as unresolved today as it was when *Gideon* was decided a quarter of a century ago.

On one side *Gideon* offers the sterile right to appointed counsel that is satisfied by the simple assignment of an overworked, undertrained young attorney without the ability or resources to make a major difference in the proceeding. But the conference proceedings offer a different and much more expansive vision of *Gideon*. That vision is "about obtaining access for everybody . . . [to] justice"[54] by ensuring that all persons are given fair treatment in the courts regardless of their financial status.

If this broader vision of *Gideon* more closely conforms to our aspirations, then the work started in *Gideon* is far from over.

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48. *See infra* p. 353 (Kamisar).

49. Indeed, Professor Kamisar predicts that "it may take another forty years before we see the emergence of a federal constitutional right to appointed counsel in eviction proceedings." *See infra* p. 353 (Kamisar).

50. *See infra* p. 424 (Kaye).

51. *See infra* p. 425 (Kaye).

52. For example, litigation to provide the right to counsel in eviction proceedings is pending in New York state courts. *See infra* note 112 and accompanying text.

53. *See infra* p. 419 (Kaye).

54. *See infra* p. 415 (Katzenbach).

The increasing sophistication of the law and the increasing breakdown of society into "haves and a permanent underclass of have nots"[55] makes the need for access to lawyers more critical than ever. But, as the conference reveals, the need is not even close to being met, and in many ways is even less well served now than in the past. For example, legal services programs, that at the time of *Gideon* were flourishing, are now under unrelenting pressure from Washington . . . [and] are grossly inadequate."[56]

As Judge Kaye states:

> We may still refer to the noble idea that every defendant stands equal before the law, but in fact we have reconciled ourselves to standing short of achieving it. Ironically, with society and the law moving briskly toward a new century there may well be even greater imbalances and distances between individuals like Clarence Gideon and acquittals after trial with effective counsel at defendant's side. The law grows increasingly sophisticated as public dedication to the principle of equal justice seems to dwindle.[57]

What can be done to stop this "terrible descent from shining ideals into tarnished reality?"[58] The conference suggested one answer: for *Gideon* to be truly realized, this generation's lawyers must devote the same devotion and energy to the task as the generation of lawyers that led the Court to the holding in *Gideon*.[59] As a young lawyer Abe Krash threw himself into the task of writing the *Gideon* Supreme Court brief. At the conference he looked back at that time as one of the proudest moments of his life.[60] If that spirit survives, there is reason to hope with Yale Kamisar that *Gideon's* trumpet will sound again.[61]

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55. *See infra* p. 403 (Weinstein).

56. *See infra* p. 403 (Weinstein). A recent report of a committee of lawyers commissioned by New York Court of Appeals Chief Judge Sol Wachtler to study the advisability of requiring mandatory pro bono representation of indigents details the present crisis of unmet civil legal needs. Following an exhaustive review, the Committee came to the conclusion that "the poor need legal help to obtain basic human requirements and to an appalling degree cannot get it." Committee to Improve the Availability of Legal Services, *Preliminary Report to the Chief Judge of the State of New York*, 15 (June 30, 1989).

57. *See infra* p. 425 (Kaye).

58. *See infra* p. 403 (Weinstein).

59. *See infra* p. 379 (Krash).

60. *See infra* p. 383 (Krash).

61. *See infra* p. 378 (Kamisar).