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V. *Gideon v. Wainwright's* Application in the Courts Today

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Hon. Michael R. Juviler

A. Gideon's *Effect on a Legal Aid Trial Attorney*[245]

We have talked today about the ideals of *Gideon*. We have talked about ideals such as the fourth and fifth amendments. These are the reasons that we, as Legal Aid lawyers, are here. But what is the daily grind of being a Legal Aid attorney really like? I would like to address that topic.

When you become a Legal Aid lawyer, you think that you are going to be the champion of poor people who are dying to meet you, who are thrilled with your representation, who are innocent victims of society, who are indigent. And then, slowly, these ideals get chipped away.

The first thing you notice is that not everyone is innocent. When you start at Legal Aid you develop a big caseload and, yet, you soon realize that in this city of eight million people in the naked city, there are only three stories. People find guns and gold jewelry in garbage cans. Guns are found everywhere. They are under cars, in trash cans, and even under doormats. Women who are allegedly raped, in reality, are giving sex for crack. These are the types of stories that you hear in each and every case. Slowly you begin to realize that maybe this prosecutor is not railroading every client, and that maybe, in some cases, your client is guilty.

As you gain experience as a Legal Aid lawyer, you represent clients with cases which are more serious, more violent; clients who have long and violent records. Gideon apparently was a fifty-two year old man who was used up beyond his years. *He* was only a con artist as far as I understand. Well, how about the

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245. This section of the conference was presented by Paula Semmes Deutsch — Senior Trial Attorney, The Legal Aid Society, Criminal Defense Division; J.D., Brooklyn Law School, 1975; Recipient of 1987 Orison S. Marden Award.

guy who was caught extracting a chicken fork from the belly of his six month pregnant wife? What about the guy you're representing who raped fourteen women, anally, orally, and vaginally over a several hour period? Or the guy who's got ten burglaries, who left his fingerprints everywhere, whose M.O. is to smother his victim, one of whom had a heart attack as a result. Or the guy who took a young Orthodox Jewish girl, a virgin, across the river in her own car and raped her repeatedly? How do you feel representing these guys? Gideon was a piece of cake next to them.

Not only as a Legal Aid lawyer do you fight with District Attorneys, who want to hide evidence, who do not want to listen to your impassioned pleas, and with judges who are interested only in moving cases quickly, half the time you are also fighting with your own clients. You get up early so that you can meet your investigator at 7 a.m. You go out there and speak to all the witnesses so as to learn what that case is really about. You come back with the information and talk to your client. What is his reaction? Your client is hostile and angry at you, funneling all of the frustrations which he feels about the "system," about being incarcerated in a disgusting environment, at you, the one person who is trying to help him.

One person, a young man named Billy, became my client when the attorney previously assigned to him left due to burn out. Billy called several times a day with the same refrain, "I want to get out; I want to get out." He would not listen to my analysis of the case and when I would ask him pertinent questions such as 'How do we explain that you were caught in flight by an eye witness, identified by the complainant, and found with her jewelry in your pocket?", his answer was always the same, "I want to go home." I began to pay extra attention to Billy because I felt he was unable to cope with making a well thought-out decision as to his case.

One day I went upstairs to the ninth floor pens in Brooklyn. The ninth floor has a really charming interview room — there is a toilet in it that is always half filled with either food or feces. It smells but I thought that I was going to sit there at a table across from the client like a human being. Well, I don't know of any human being that can sit in that kind of atmosphere and like it. I asked the officer to get my client Billy, and of course

Billy did what he always does when I interview him: he cursed me out. I had it that day. I was short on patience. I said, "Okay, Billy this is it. The interview is over," and I asked the officer to take him out and get me another client whose name is Mr. Slaughter.

Mr. Slaughter was on lifetime parole for murder. Right now he is on trial in Staten Island for attempted murder, and after he finishes that trial, I am going to defend him against an armed robbery charge. Fortunately for Mr. Slaughter, the victim of the armed robbery just got arrested for selling drugs from his house. It was really wonderful. It dropped into our laps and we can weave it into the defense.

Sometimes you really have to take a lesson from people in your life as a Legal Aid lawyer. Mr. Slaughter came in immediately after Billy left. After I spoke to him about his case, he said, "Well, what's happening with Billy?" I said, "Gee, I don't know. I really don't. I'm really upset about him. He seems to be deteriorating in here." Mr. Slaughter said, "You know, the officer came up and told us to come downstairs for calendar calls and Billy wouldn't go. And I said, 'Come on, Billy, we got to go down.' And the officer said, 'Are you codefendants?' Billy went nuts. He said, 'I was arrested alone. He isn't my codefendant.' " Mr. Slaughter said, "I am really worried, something is happening with him."

I thought if Mr. Slaughter, who has been accused of attempted murder, who is on lifetime parole for murder, can have patience with somebody, maybe I can have an extra ounce. So I had the officer bring Billy back again. I sat him down and I said to him, "What's happening with your family? Is your family visiting you?" "No." "Have you had any visits since you were incarcerated a year ago?" He said, "No." I said, "Is that part of what's upsetting you?" He said, "Yes, I can't stand being here." He had calmed down at that point. Sometimes you have to take a lesson from your client or whomever will give you the lesson. As Mr. Slaughter was walking away, he turned around and smiled at me. I said, "Thanks. I appreciate your thought and I have learned from you."

There are also other things that occur as you come of age as a Legal Aid lawyer. Most Legal Aid lawyers initially believe that they are nobly representing the poor, the underprivileged, the

indigent, and the minorities of our society. It is true that most clients are Blacks — but so are their victims. Their victims aren't middle class or wealthy Black people. Their victims are poor people from the very same neighborhood, who may have a gold chain or a little change in their pocket or something that your client snagged. So how do you reconcile all that? You think you're representing someone who wants to be a little better looking by having nicer clothes or a status symbol, but he is ripping off other people in his neighborhood. That is not so nice.

After a while, it really begins to hurt. The people you are representing lie to you; they have done horrible things to other poor people in their own neighborhood and they frequently take out their frustrations on you. Just as you, yourself are feeling blue about what is happening, you realize that society at large is not to happy about what you're doing either. When I go to a cocktail party and someone says, "What do you do?" I reply "I am a lawyer." I hope that they don't ask me where I work." But inevitably they do and then they say, "How can you represent those people?" I have heard that question a million times as a Legal Aid attorney. Sometimes what really angers me is that I am feeling the same way myself especially when I am representing someone during trial who has committed a violent crime, who is cursing at me and making motions to relieve me as his counsel.

So why do we continue to do what we do as Legal Aid attorneys.

Sometimes a case, a client comes along that makes you forget all the other frustrations and makes you know why you have chosen to be a Legal Aid attorney. I am representing a fifteen year old boy now. His name is Rene and he was never in trouble with the law before. His own father was murdered during the robbery of the bodega where he works. He lives with his mother, a stepfather who is disabled due to mental illness, and his two siblings. The family is on welfare. Rene had been a behavior problem in school until the year prior to the incident for which he was arrested. He was placed in special class and with the help of teachers and guidance Counselors who took an interest in him, he became "Student of the Year."

One day he was walking home from the Community Center with three of his friends. They were joking around. Rene ran up

on the porch of a house, put a match to a piece of paper that was hanging in a broken window. The fire engaged pieces of plastic and material that were hanging behind the paper, the building "went up" in a flash and four people died.

Rene woke up to a nightmare—fifteen years old, never in trouble finding himself charged with numerous counts of Arson and Murder. Because of Legal Aid, Rene was able to get the legal, investigative and forensic services he needed. Eventually, the case was tried. Rene was acquitted on those counts which would've required his being sentenced in Supreme Court and his case was removed to Family Court. I was "paid off" for all of the hard work and all of the frustrations involved when, at the end of the case, Rene said to me, "Thank you, Paula, another lawyer wouldn't have worked so hard for me." Better than a bonus check.

So despite all the problems and frustrations, some times you feel good about being a Legal Aid attorney because of the Renes you represent and also because of the ideals you have and your beliefs that the constitution extends to everyone no matter how heinous is the crime of which they're accused. When you step into a courtroom to champion these rights of the accused, you know that you're championing the rights of everyone in Society.

B. Gideon's *Effect On Legal Aid Appellate Attorneys*[246]

Anthony Lewis spoke about the romance of *Gideon*. I think when I started with the Appeals Bureau, and that's where I started out in 1973, there was definitely a very romantic notion about *Gideon*. The sixties were still very much alive there. They are not alive anymore, but we still have an excellent Appeals Bureau. We have computer systems. We get the work out and the reversal rate, under the circumstances, is probably as good as could be expected. We have all the systems in place. We have brief banks. We have very knowledgeable attorneys.

Why is the practice difficult? I think over the years, I have

246. This section of the conference was presented by Susan Hofkin Salomon—Assistant Attorney in Charge, Criminal Appeals Bureau, The Legal Aid Society; Adjunct Instructor in Law in Professional Responsibility, Columbia University Law School; J.D., University of Pennsylvania Law School, 1970.

increasingly spent more and more time counselling our lawyers in their relations with their clients. We usually do not see our client face-to-face, so we do not have the opportunities for these wonderful personal interchanges that Paula has been speaking to you about. But we do communicate with them through the mail. We spend much of our time trying to calm down clients who want to tell us things that happened at their trial that were not reflected in the minutes, and sometimes we have to go and chase these things down. We have a burgeoning collateral attack process going on in the Bureau. We have clients who want to raise issues and we have to discuss these issues with them.

The Supreme Court decided *Jones v. Barnes*[247] a few years ago. In *Jones* the Court held it did not constitute ineffective assistance of counsel for an appellate lawyer to choose the issues to raise in a case, even when omitting some arguably colorable issues was contrary to the wishes of his client.[248] There were dissenting and concurring opinions in the case that cited ethical provisions.[249] I am very mindful of those ethical provisions. So are the lawyers in our office. There are also moral considerations and there are client-relation considerations.

It is a fiction, however, that through writing back and forth with people, who very often have not gone to school, we can intelligently discuss matters with them. We try. We have to do it. We also have to explain to these clients why we do not believe that the issues that they want to raise have merit, or why the issues might be harmful to their case. All of this takes time and with all of this there is still the fact that if the client only had money, he could vote with his feet and go to some other lawyer who would include all of these issues.

We have, however, the pull of getting the work out. We have the pull of wanting to keep the brief short. We have the pull every once in a while of antipathy when we think, "wait a minute, I am the lawyer in this case; the client is not." It is a little different in degree from the kind Paula was talking about, but it

247. 463 U.S. 745 (1983).

248. *Id.* at 754.

249. *Id.* at 754 (Blackmun, J., concurring); *Id.* at 755 (Brennan, J., dissenting); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1982), MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1982).

exists. So there is that pull, that constant exchange of letters and explanations of risks in cases which are very complicated. Try explaining these unbelievably complicated concepts to your friends. See if they understand that if they appeal a conviction and they win, they might go back on a retrial and get a higher sentence because a predicate felony determination may be reopened because collateral estoppel is not settled in this area.[250] This was a letter that I helped one of our new attorneys draft for a client. It is a fiction to believe that somebody is going to understand that without constant attention, without personal visits, which we cannot make in all of our cases because we do not have the funds. But precisely this fiction is indulged in every day. I personally feel that just the simple gesture of making personal visits to our clients would make a difference even if we had nothing to say. At least, they would know that there was an actual person there representing them, somebody with whom they could talk.

I think the clients as much as anybody may be aware of the change in circumstances; that maybe *Gideon* is no longer the romantic notion it once was. I think they understand that subliminally. I for one, however, am glad we have the lawyers that we have, and I hope we can educate the public that we need the very best people to protect all of us.

C. *The Role of Prosecutors and Trial Judges in Assuring That Defendents Receive Effective Assistance of Counsel*[251]

We are a long way from providing every defendant with effective assistance of counsel. Largely for lack of resources, many defendants do not get the kind of vigorous thoughtful representation that *Gideon* demands, or that happily, The Legal Aid Society in this city, in my experience, routinely provides. Because

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250. *See generally* United States v. Holzer, 840 F.2d 1343 (7th Cir.), *cert. denied*, 108 S. Ct. 2022 (1988); United States v. Diaz, 778 F.2d 86 (2d Cir. 1985), *cert. denied*, 109 S. Ct. 57 (1988); United States v. Cutting, 538 F.2d 835 (9th Cir. 1976), *cert. denied*, 429 U.S. 1052 (1977); United States v. Fitzgerald, 545 F.2d 578 (7th Cir. 1976).

251. This section of the conference was presented by Barbara D. Underwood — Visiting Professor of Law, New York University; J.D., Georgetown University, 1969; Law Clerk, Chief Judge David Bazelon, D.C. Circuit, 1969-71; Law Clerk, Justice Thurgood Marshall, 1971-72; Professor of Law, Yale Law School, 1972-84; Chief of Appeals and Counsel for the District Attorney, King's County District Attorney's Office, 1982-89.

of lack of experience, time, investigative assistance, energy, or competence, many defense counsel routinely fail to make arguments, raise defenses, raise issues on appeal where the record seems to demand it.

During the last seven or eight years, while doing appellate prosecution work in the city, I have become familiar with cases where *Anders*[252] briefs were filed when there were clear issues that should have been raised on appeal. I have seen cases where, at trial, the defendant's attorney failed to cross-examine a witness on a clearly important contradictory prior statement. In another case, the defense counsel failed to seek bail for a woman charged with killing her newborn child, and when the prosecution inquired about what bail the defendant could make, defense counsel replied that he didn't know, and that he didn't know why anyone was asking because bail was inappropriate in this case.

The question is what to do about this recurring problem. One thing, of course, is to put more resources into funding both institutional and private attorneys who are appointed for indigent defendants. I would not for a minute want to minimize the importance of this. I strongly favor more funding for these attorneys, as well as for the prosecutors and courts that need funds to make the system work. But we have to find ways to deal with problems that will occur before the Nirvana of adequate funding arrives. There are a couple of things we can do in the meantime.

One is to allocate the resources we have to the most serious or most difficult cases. I read recently — I hope it is true—that Legal Aid is planning to seek authorization for appointment to represent homicide defendants. It has been a mystery to me why that has not happened before. Prosecutors put their best attorneys and their most extensive resources into those cases. You don't have to believe that those prosecutors are wonderful, or those resources are extensive to conclude that the defense bar ought to be doing the same if there are to be fair trials in homicide cases. In cases of indigent defendants it quite frequently

252. Anders v. California, 386 U.S. 738 (1967). The Supreme Court held that appointed criminal appellate counsel may withdraw from the case only by filing a brief indicating that there are no issues in the case that might arguably support the appeal. *Id.* at 744.

just is not so. I look to The Legal Aid Society to do something about that. I hope you can.

The second thing we can to do in the meantime is to move away from a strict adversary model that says, if you put two competent gladiators in the ring, you can rely on the battle to produce truth or at least justice. We have to rely on judges and on prosecutors to intervene to prevent at least the most egregious failures of defense counsel. We already do that to some extent, but we are very ambivalent, as I suppose we have to be, about how that should work.

When trial judges intervene to ask questions, they are criticized for asking too many questions and for interfering too much in the course of the trial. Likewise, when prosecutors raise questions with the court or with defense counsel about whether a defense ought to be raised, or a document ought to be used differently, they are criticized for interfering, or for asking the court to interfere into the thought processes of defense counsel.

There are legitimate concerns raised when judges intervene or when prosecutors seek to second guess a defense. When they do so there is a real risk that they will undermine defense strategy. But we all know that this is not always so. Therefore we have rules that ask judges to intervene, but not too much; rules that require prosecutors to do justice as well as being adversaries.

We do not have a clear idea of how this can occur. I do not know either. I know, however, that my office sometimes opposes *Anders* briefs, and asks for lawyers to be appointed to raise points that we think are important. In particular cases, we have urged appellate lawyers or trial lawyers to investigate lines of defense that they have not investigated.

These requests have sometimes met with a chilling response. In one appeal, for instance, a defense attorney filed a brief claiming that the conviction should be reversed because the Court failed to hold a *Wade* hearing.[253] In preparing to re-

253. United States v. Wade, 388 U.S. 218 (1967) (postindictment lineup is a critical stage at which defendant and his attorney should have been notified of an impending lineup). *Wade* established the right of an accused to counsel at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate the accused's right to a fair trial. *Id.* at 226-27.

spond to that brief, we discovered that there was in fact a *Wade* hearing; we called the defense attorney and suggested that he might perhaps like to withdraw that point, review the minutes of the hearing, and make whatever challenges he might like. He said, in substance, "I filed my brief. I'm not writing anything more in this case." That problem needs attack on more than one front. There is a real danger that sometimes *Gideon* will only mean that there was a warm body on the side of the defense. In such a case, justice is not done. My point is that we have to worry not only about the principle of law that Gideon represents, but also about what actually happens.

I am sorry there aren't more prosecutors and judges here today to join in this celebration. I think that it matters a great deal to everybody who has anything to do with the criminal justice system that there be counsel for indigent defendants and that they be effective.

D. *Assistance of Counsel—Is it Effective?*[254]

I am just amazed today by the quality and the character of the people who came to the podium and who have committed themselves to this work. It's amazing, and I think it's somber for me because I think back to *Gideon* and I think back to the time the decision was made and how important it was in my life. I was eleven years old when this case was decided and, if I knew as much then about law as I know now, perhaps my case would have been solved more favorably. I was a juvenile delinquent, and in fact, just about the time the *Gideon* case was decided, I had the misfortune to be caught stealing a small item from a department store in my hometown. I thought that the best way to get out of that situation was to be my own lawyer. The first thing I did was to deny that I had stolen anything. When they asked me to show them my hands, I did and I dropped the item. So that did not work. My second line of defense was to leap out of the car once the police put me in it and run home so that they would never find me. I got in the car and realized that there

254. This section of the conference was presented by Charles Ogletree—Visting Professor, Harvard Law School; J.D., Harvard, 1978; Training Director, DC Public Defender Service, 1982-83; Trial Chief, DC Public Defender Service, 1983-84; Deputy Director, DC Public Defender Service, 1984-85.

were no door handles on the back door. So that did not work either. When I got home, my mother wasn't there but they told her and she was on her way home. I then came up with my third and fourth lines of defense. The third was to contact my Uncle Jabb and persuade him that I had just cause and that this was an error of my youth. I wanted him to offer a mitigating defense on my behalf. Uncle Jabb in his usual way did not make a commitment one way or the other. He felt that my defense was persuasive, but he would not represent me. My final line of defense was simply to meet my mother face to face, admit my guilt, and offer mitigation in terms of punishment but — with a little cushion. The cushion was two or three pairs of pants and two or three shirts to minimize the pain. I made my argument very eloquently. She listened patiently, asked me to undress, and then asked me to take a switch from the tree. She called the switch "the persuader." It would persuade me that I would not engage in crime in the future. So I went out and cut a small limb from a tree and she told me that was not persuasive enough. So I cut a larger limb and finally she was convinced that the branch was large enough to persuade me that crime would not pay. Certainly, I know today that I should have had a lawyer. I learned from that experience, so I celebrate *Gideon* in another way.

I also celebrate *Gideon* because I can remember as a law student reading cases like *Powell v. Alabama*[255] where black defendants faced the death penalty without lawyers to represent them. I remember *Brown v. Mississippi*,[256] where a deputy told the judge in court in response to an inquiry as to how severely a defendant was whipped: "Not too much for a negro; not as much as I would have done if it was left to me."[257] I can remember cases, decided well before *Gideon*, that clearly tolerated these injustices.[258] So I celebrate it.

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255. 287 U.S. 45 (1982).

256. 297 U.S. 278 (1935).

257. *Id.* at 284.

258. House v. Mayo, 324 U.S. 42, 46 (1944) (fact that petitioner pleaded guilty after the denial of his request for time to consult with counsel, does not deprive him of his constitutional right to counsel); *see, e.g.*, Betts v. Brady, 316 U.S. 455, 473 (1942) (refusal of state court to appoint counsel to represent indigent defendant at trial for robbery held not a denial of due process); Coates v. Maryland, 180 Md. 502, 511-12, 25 A.2d 676, 679-80 (1942) (where trial for robbery is fair and not a pretense or a sham, the non-appointment of counsel does not constitute a lack of due process of law).

I celebrate it because I have seen the Court expand the rights of defendants in other areas as well. Mr. Krash talked about the important extension of *Gideon* to the rights of juveniles. In *Miranda*,[259] the Court expanded *Gideon* by showing intolerance for continual police abuse of defendants in extra-judicial proceedings. So there is something to celebrate.

However, I also see the betrayal of *Gideon* when I read the Supreme Court's holding in *United States v. Cronic*.[260] In *Cronic* the Supreme Court said that a real estate lawyer with no trial experience, who had twenty five days to prepare to try a complicated case, provided a defendant with effective assistance of counsel. The betrayal is also evident in the Supreme Court's ruling in *Strickland v. Washington*.[261] In *Strickland* the Court held that a defendant received effective assistance of counsel despite the fact that his attorney gave up and failed to vigorously represent the defendant in a capital case. I felt *Gideon* had been betrayed in those cases. I question *Gideon* in three different instances: lack of effective assistance of counsel,[262] inadequate de-

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259. Miranda v. Arizona, 385 U.S. 436 (1966).

260. 466 U.S. 648 (1984). In *Cronic*, the Supreme Court rejected an *inferential approach* employed by the Tenth Circuit to determine the effectiveness of counsel. *Id.* at 667. The court of appeals found that the defendant, convicted of mail fraud charges in a check-kiting scheme, was denied his sixth amendment right to effective counsel, based not on specific errors by his lawyer but rather on circumstantial factors. *Id.* at 652-53. These included: (1) short pretrial preparation time; (2) inexperience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) accessibility of witnesses to counsel. *Id.* at 665-67. The Supreme Court held that the court of appeals erred in *inferring* ineffectiveness based on these circumstances—whether weighed individually or in totality—and reasoned that proof of *specific errors* by counsel were necessary to support a finding of ineffectiveness. *Id.* at 666-67.

261. 466 U.S. 668 (1984). Strickland pleaded guilty in a Florida trial court to an indictment that included three capital murder charges. *Id.* at 672. Due to numerous aggravating factors and no mitigating circumstances, Strickland was sentenced to death on all three murder charges. *Id.* at 674-75. He then sought collateral relief on the grounds of ineffective assistance of counsel. *Id.* at 675-78.

The Court held that effective counsel can only be questioned when the representation has been so undermined that the trial cannot be relied on to produce a just result. *Id.* at 677-78. In order to reverse a conviction, one must show such defective assistance of counsel as to be prejudicial to a just and fair trial. *Id.* at 678. The standard for judging counsel assistance is "reasonable effective assistance, considering all the circumstances." *Id.* The Court concluded that counsel's conduct was not unreasonable, and even if it were found to be, there would be insufficient prejudice to warrant setting aside his death sentence. *Id.* at 698-701.

262. *See generally* Colloquium, *Effective Assistance of Counsel For the Indigent Criminal Defendant: Has the Promise Been Fulfilled?*, 14 N.Y.U. REV. L. & SOC. CHANGE

fense of the poor,[263] and inadequate defense of death row inmates.[264] I question *Gideon* when I look at the difficult issues facing law firms and public defenders. I question *Gideon* because I see public defenders in Chicago, where there is no training program for lawyers going to court, having to meet their clients on the same day they plead them guilty, lacking the resources to investigate their cases. I read about cases in the District of Columbia, and I was involved in one, and in San Diego and states where public defenders who challenge the system are terminated because they insist on quality representation for every single client.[265] When they do that, they lose their jobs. I also read with great dismay the actions of law firms that are called upon to represent the indigent and claim, very interestingly, that they do not feel competent to represent someone in a criminal case. Yet these firms file the most eloquent and the most thoroughly documented briefs I have ever seen to persuade the court that lawyers should not be compelled to represent clients that are not of their choice because these lawyers lack competence in criminal matters.

Gideon has achieved some positive results. First, the silent voices, the millions of clients, most of them black and minority, have come to understand the difference a lawyer can make. It is an important achievement that people want a lawyer because they know it makes a difference.

The second thing I think *Gideon* has achieved is very personal; it happened to me about my seventh year of practicing as a public defender. I stood before a judge in a very serious case and the judge threatened me with contempt of court and with going to jail. For the first time in my life I felt prepared to go to jail. I felt good that I had done something worthwhile and important, and I was prepared that day to go to jail to represent this client because I thought the Constitution required me to do that and that the judge was wrong.

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1 (1986).

263. *See generally* McConville & Mirsky, *Criminal Defense of the Poor in New York City*, 15 N.Y.U. REV. L. & SOC. CHANGE 581 (1986-87).

264. *See generally* Tabak, *supra* note 149.

265. People v. McKenzie, 34 Cal. 3d 616, 629-33, 668 P.2d 769, 779-81, 194 Cal. Rptr. 462, 472-74 (1983) (counsel removed for refusal to participate in trial in protest of inadequate time to prepare).

Gideon can achieve much more, however, if the three forces in the courtroom decide to make it real. If one day, the judges turn around and say: "Wait a minute, this client is not properly represented in this case, and as a matter of justice, we can't go forward." If one day, the prosecutor stands up and says: "Wait a minute, I cannot conscientiously prosecute this person because he is being denied quality representation and therefore this is not a fair proceeding." And third, when a defense lawyer says: "I can no longer tolerate being part of this system of injustice that requires me to represent a client in a superficial and ineffective way and to have my name and my reputation attached to a miscarriage of justice day in and day out." When the judges, the prosecutors and defense lawyers stand up and say: "We will no longer allow these silent voices to remain silent. We will become voices for justice." I think then that *Gideon* would really be achieved.

I would like to see in the future our ability to adopt what Justice Black said in 1963 — that this noble ideal (of the right to counsel) cannot be realized if the poor man charged with a crime has to face his accusers without a lawyer to assist him.[266] It cannot, it never has been, and it never will be.

Through this session today I think we have taken an important step forward in saying that *Gideon* will be achieved when all of us make that choice and we are prepared to go to jail, if necessary. We are prepared to give our lives, give our time, and give our hearts to make sure that the most innocent, the most underprivileged, unemployed, uneducated individual actually receives effective assistance of counsel. When he stands before the court to face a sanction he will be represented not simply by a defense lawyer, but by a system that ensures fairness, justice, and equality.

Lawyers are not luxuries in a criminal case; they are necessities, and I hope that through this session we will understand that fundamental and important right and that all of us will see to it that *Gideon* in the future will be achieved in some measure.

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

E. *The Right to Counsel in the Federal Courts*[267]

When *Gideon v. Wainwright*[268] came down in March 1963, Judge Gene Nickerson and I were respectively County Executive and County Attorney in Nassau County. Despite the fact that we knew the county's budget would have to be stretched to pay for supplying attorneys at the public's expense in all criminal cases, we were delighted. Any attorney at all familiar with our pre-*Gideon* criminal justice system would have been embarrassed by the hypocrisy of a claim of equal justice because it was so divergent from the reality of justice denied to those who could not afford to pay a lawyer.

It was quite clear to me — I had taught criminal law at Columbia — that the old rule of *Betts v. Brady*[269] resting on case-by-case application of discretion and fairness would not do. A bright line was required not only out of decent respect for the sixth amendment, but because of institutional imperatives — budgets, personnel and routine procedures. The same kind of pressures required a clean and all inclusive *Miranda* rule that everyone could understand and apply. Constitutional rights often depend upon bureaucratic forms such as the warnings in various languages carried in the pockets of hundreds of thousands of police.

How has *Gideon* fared? Better in some places than others.

My impression is that it works better than we could have hoped for in my court. The Legal Aid Society has a devoted corps of first-rate full-time lawyers. They are assigned to most cases. When there are conflicts or other problems, the Criminal Justice Act Panel works. Judge Leo Glasser supervises it quite closely.

Pursuant to the Criminal Justice Act,[270] attorneys are selected from a special panel to represent financially eligible de-

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267. This section of the conference was presented by the Hon. Jack B. Weinstein — Judge, United States District Court, Eastern District of New York; LL.B., Columbia University, 1948; Professor of Law, Columbia University, 1952-67; Adjunct Professor, Columbia University, 1967 to present; Author of numerous articles for the bar association and legal journals, coauthored casebooks on Evidence, Civil Procedure, and New York Practice; Author, Weinstein's Evidence.

268. 372 U.S. 335 (1963).

269. 316 U.S. 455 (1942).

270. 18 U.S.C. § 3006A (1988).

fendants in various proceedings without cost. Habeas petitioners are represented by attorneys from this panel.

Twice a year new applicants are screened and appointed to the panel. Currently the panel is made up of some 120 able attorneys. Attorneys are on duty to take assignments for a specific period. Compensation is as follows:

1) Hourly rates:
   a) $60/hour for time before a court or magistrate.
   b) $40/hour for time spent out of court.
2) Maximum amount:
   a) felony cases — $3,500
   b) misdemeanors — $1,000
   c) all other matters, including habeas — $750
3) Waiving maximum amounts:
   amounts in excess of the maximum amounts can be obtained in complex cases if the court or magistrate certifies that additional payment is necessary to provide fair compensation and the chief judge of the circuit (or another circuit judge by delegation) approves it. These waiver provisions are liberally applied so that the approved fees can run into the tens of thousands of dollars in complex cases.
4) If counsel needs any kind of expert assistance it will be paid for.

The Second Circuit polices appeals and moves them along. The district court also hurries cases under the Speedy Trial Rules. Release on bail (except in drug cases) is the rule under the Bail Reform Act.[271] Speedy but fair justice tends to be available to all in our court.

My impression from handling habeas corpus cases attacking state convictions is that the state system (particularly its 18-B[272] component) does not work as well. Criminal appeals, for example, are sometimes terribly delayed because of inadequate monitoring of appointed counsel.

Overall, my impression is that, though the *Gideon* battle was won, the war for equal and effective justice is being lost.

On the civil counsel side we do poorly. I am chagrined about

271. 18 U.S.C. §§ 3141-3143 (1966).
272. N.Y. COUNTY LAW § 722 (McKinney 1972 & Supp. 1990).

this. Twenty-five years ago, as first chairman of Nassau Legal Services, I helped set up one of the first Office of Economic Opportunity legal delivery services with lawyers, social workers and fairly adequate funding. These services are now under severe pressure, partly because of the federal executive's unrelenting hostility. Publicly-funded civil legal services are grossly inadequate. Only part of the slack is covered by our excellent eastern district panel of volunteer attorneys and our Eastern District Foundation which pays some of the expenses of the attorneys.

On the criminal counsel side, the technical defenses of attorneys are essential but almost irrelevant to solving our terrible crime problems. The cry for more prisons, stiffer sentences and capital punishment represents largely political election year clap trap. Our society is breaking more and more into the haves and a permanent underclass of have-nots. Resources, even in hospitals, go less and less to those in need — a disproportionately large number of whom are drug dealers and violent criminals. The criminal justice system lacks the social services, the advice, and the help that is needed by those caught up in its machinery. The appointed lawyer is not a friend with a helping hand and advice on how to avoid future trouble. He or she is all too often an overworked technician without any real interest in the client as a person.

What needs to be done? What can be done? What broadening of ethical obligations to client needs should be considered by lawyers, by judges? What are our obligations to be advocates, in the legislatures and the media, revealing the virtual bankruptcy of our judicial system as a crime preventative agency? Can we, as Lincoln asked, continue to be a house divided against itself — so much in ignorance, poverty, despair and crime? What can be done to stop this terrible descent from shining ideals to tarnished reality? What is the role of attorneys and judges post-*Gideon*?

F. *The Right to Counsel in New York Today*[273]

Let me try to put you back in a mood of celebration by turning back to the way things stood in New York when Clar-

273. This section of the conference was presented by the Hon. Michael R. Juviler —

ence Gideon was being prosecuted and I was starting out as a prosecutor, and end with my perspective of the last nine years as a judge in a Criminal Term.

In 1963, murder was a capital offense in New York and defendants would have been facing the following situation with respect to the availability of counsel if they could not afford their own lawyer: The statute said that someone charged with a capital offense was entitled to a lawyer, who was to be paid $1,500, and if two lawyers were assigned, the total fee was $2,000.[274] The fee was the same whether or not the case went to trial and capital punishment was the potential punishment. As you can expect in a situation like that, most murder cases ended in a plea of guilty, and there was a built-in conflict of interest in the representation right off the bat.

The judges in New York City who administered this law were astute enough to realize, having read *Powell v. Alabama*,[275] that they could not assign all of the lawyers in the county to a defendant, but there was one judge in one celebrated case[276] who was very creative. He managed to assign eight different lawyers in the one case. When the case came to trial, four of them were still in it. Two of them reported sick, one of them was unaccounted for, and one of them said that he was not ready to try the case. So a new lawyer was assigned, and over the weekend, he prepared this capital case and the next Monday started to pick the jury. When the case got to the appellate division on a life sentence, the appellate division signaled what was going to happen to this kind of system in New York, much as the Supreme Court had signaled when it assigned Abe Fortas in *Gideon*. The appellate division assigned Whitman Knapp to represent the defendant,[277] and after argument sent the case back

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Judge, New York State Court of Claims and currently Acting Supreme Court Justice, New York Supreme Court. B.A., Swarthmore College, 1956; LL.B., Yale University School of Law, 1960; Assistant District Attorney, New York County 1960-74; Chief of Appeals, 1968-74; Counsel for New York State Office of Court Administration, 1974-79; New York City Criminal Court Judge, 1979-86.

274. Pre-*Gideon* New York Law on appointment of counsel was explicitly granted by N.Y. CONST. art. I, § 6.

275. 287 U.S. 45 (1932).

276. People v. Douglas, 19 A.D.2d 455, 244 N.Y.S.2d 55, (1st Dep't 1963).

277. *See, e.g.*, People v. Lynch, 2 Misc.2d 217, 155 N.Y.S.2d 572, *rev'd on other grounds*, 2 A.D.2d 854, 155 N.Y.S.2d 849 (1955); People v. Cunningham, 2 Misc.2d 164,

for a new trial.

At that time, The Legal Aid Society was the main provider of representation, and the quality of representation was excellent. A new system of backup was created shortly before *Gideon*, which is now known as the 18-B system.[278] In many cases sending those 18-B lawyers into court against the D.A.s was like sending an unarmed prisoner in against the gladiator. Then the *Gideon* case came along. On the surface it did not change the substantive law of New York, but it created a moral suasion and incorporated into New York law all of the precedents in the federal courts dealing with the effective assistance of counsel. At the same time, and within the years following, there was the revolution in criminal justice, which you are all familiar with, and the trial of the criminal case and the defense of it became very complicated, much more complicated now, of course, than it was twenty-five years ago. In addition, the caseloads have been growing enormously.

Nevertheless, I celebrate. Those of you who have appeared before me or are familiar with my records on appeal know that I apply very high standards of performance on both sides of the case. And I have no hesitation in saying that the representation supplied to the defendant in my court by The Legal Aid Society is superb.

The 18-B felony panel has created a homicide branch. The homicide cases now rarely plead out. Ninety-five percent of them go to trial. And, again, the general quality of representation is excellent. The 18-B non-homicide felony lawyers, on the average, are excellent. There are very big soft spots, which are being worked on, but I am comfortable, as (I hope) a conscientious judge, with the quality of representation in my court. When representation is not acceptable there is a lot I can do about it and a lot I do. I do not do it in front of the jury, but a lot can be done with respect to objections that are not made, with respect to requests to charge that are not made, things that are glaring, or not so glaring, defects that a judge can point out in conference to both sides, particularly to the defense, without

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134 N.Y.S.2d 212 (1954).

278. N.Y. COUNTY LAW § 722(a)(b) (McKinney 1965) allows for the defense of a misdemeanor, save but for "extraordinary circumstances."

prejudicing the trial in front of the jury.

We now have the profusion of drug cases, which is going to put much more pressure on all of us including the defense bar, but in the present state of affairs, on the average, I would say that in many cases, the gladiators who have come into my court well armed are the defense lawyers assigned to the defendant and the unarmed prisoners are the D.A.s. I am talking now not about the investigative tools that are at their disposal, but the skill and experience that they bring to very serious cases.