Gideon's Trumpet. By Anthony Lewis.

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GIDEON'S TRUMPET is a study in depth of the case of Gideon v. Wainwright in which the United States Supreme Court held that an indigent defendant in a state criminal prosecution has an unqualified right to the appointment of counsel.

In August, 1961, Gideon was tried and convicted in a Florida court of the felony of breaking into the Bay Harbor Poolroom in Panama City, Florida, with the intent to commit a misdemeanor. Unarguably indigent, his request for court-appointed counsel was refused. Gideon's reply is classic proof of Holmes' proposition that "ignorance is the best of law reformers." The United States Supreme Court," he told the court, "says I am entitled to be represented by counsel" (p. 10). Gideon was, of course, as wrong in this statement as he was in contending, after reversal of his conviction, that a new trial on the original charge would constitute double jeopardy. For Betts v. Brady, decided in 1942, had held that the Due Process Clause of the Fourteenth Amendment required the states to appoint counsel for indigent defendants only where special circumstances would render the defendant's trial without counsel fundamentally unfair. Counsel was unconditionally required only in capital cases. Gideon's petitions for habeas corpus to the Florida Supreme Court and for certiorari to the Supreme Court claimed no "special circumstances" and the crime of which he was convicted was non-capital. Thus the order granting certiorari need hardly have asked, as it did: "Should this Court's holding in Betts v. Brady . . .

2 HOLMES, THE COMMON LAW 78 (1881).
4 316 U.S. 455 (1942).
5 Including youth, illiteracy, mental deficiency, the defendant's prior experience with criminal proceedings, and the complexity of the applicable law.
7 Denied without opinion. Record, p. 47.
be reconsidered?" Three weeks later Gideon’s motion for appointment of counsel, solicited by the Clerk’s Office, was granted, and Mr. Abe Fortas, of the Washington firm of Arnold, Fortas and Porter, became Gideon’s attorney.

About the time of these events, one may suppose, Gideon’s case came to the attention of Mr. Anthony Lewis, Supreme Court correspondent for the New York Times and winner of two Pulitzer Prizes. If he then contemplated using Gideon’s case as a vehicle for an examination of the role of the Supreme Court, he must have been delighted with what his research revealed regarding Gideon and his trial. Both were distinguished chiefly by their ordinariness; the tale to be told lay elsewhere. Thus, GIDEON’S TRUMPET is only incidentally the account of an embattled indigent’s struggle and ultimate triumph against overwhelming odds. True, Gideon gained his right to counsel, a new trial, his freedom and a place in the sun in Volume 372 of the United States Reports. This is merely the frosting. Mr. Lewis’ contribution is the description, simply and accurately, of the adversary and adjudicative processes by which the Supreme Court decides fundamental questions of public policy. Gideon’s role is to illustrate and, at times, to dramatize this description.

Mr. Lewis must at times have felt that he had come down somewhere near the center of the “seamless web.” The granting of Gideon’s petition requires an explanation of the Supreme Court’s jurisdiction and the Court’s power to grant or withhold it. “The claim that Gideon presented to the Supreme Court was, in sum, one that the court could hear. Whether the court would hear it was another and very different question” (p. 22). It also calls for, and receives, a discussion of judicial review and the Court’s power to declare unconstitutional the laws and actions of other branches and units of government (pp. 80-82). This discussion in turn prompts an account of the continuing debate as to the propriety of the use of that power, the meaning and role of “judicial restraint” (pp. 82-86).

Supreme Court review of Gideon’s state court conviction also raises the question of the weight of the “federalism” argument in

8 370 U.S. 908 (1962). Professor Kamisar, in reviewing this book, faults Mr. Lewis for failing “to make plain that on the eve of Gideon, the Betts rule had been eroded almost to the vanishing point.” Kamisar, Book Review, 78 Harv. L. Rev. 478, 480 (1964). Relying upon Chewning v. Cunningham, 368 U.S. 443 (1962), he concludes that “once the Supreme Court took (Gideon’s) ... case, the question was not whether Gideon would win, but only how?”—whether by the overruling of Betts, or by the application of the “special circumstances” doctrine to require counsel in Gideon’s case. Kamisar, supra at 482.
9 To forestall the possibility, the chief deputy clerk’s “recurrent nightmare, that some prisoner will want to argue his own case,” p. 46.
constitutional adjudication and its manifestation in the perennial dialogue regarding the applicability of the Bill of Rights to the States.\(^{11}\) It is saying quite a lot to say that the conflicting viewpoints are impartially reported (pp. 86-94). Supreme Court supervision of state criminal procedure is traced from *Moore v. Dempsey\(^ {12}\) through *Mapp v. Ohio\(^ {13}\) to *Pay v. Noia\(^ {14}\) and *Douglas v. California\(^ {15}\) decided the same day as *Gideon v. Wainwright.

The special history of the Court’s treatment of the right-to-counsel issue receives more detailed scrutiny. Drawing heavily upon the language of the opinions and contemporary comment, Mr. Lewis sketches, with masterful simplicity, the development of the right to counsel from *Powell v. Alabama\(^ {16}\) to the present (pp. 105-17).

From what has been said it is clear that *Gideon’s Trumpet* is an excellent introduction for the non-lawyer to the judicial institution in our governmental scheme,\(^ {17}\) but that fails adequately to explain its review in this publication.

Of particular interest to the lawyer is the account\(^ {18}\) of the development of petitioner Gideon’s frontal assault on *Betts v. Brady*. The first hurdle involved the propriety of mounting such an attack at all, for if the trial transcript (not yet included in the record) indicated the presence of Bettsian “special circumstances,” Fortas could not, in fairness to his client, jeopardize the latter’s chance for a reversal by reaching for a broader rule. On Fortas’ request the Court ordered the trial transcript included in the record (p. 128). It showed, as the Court was to find, that “Gideon conducted his defense about as well as could be expected from a layman.”\(^ {19}\)

\(^{11}\) To which dialogue Mr. Justice Douglas’ concurring opinion in *Gideon* added a new note. Observing that since the adoption of the Fourteenth Amendment ten justices had at one time or another “felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights,” but had never “commanded a Court,” he added, “and what we do today does not foreclose the matter.” 372 U.S. at 345-46.

Mr. Justice Douglas did claim victory on a related issue: that the fundamental “rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.” 372 U.S. at 347. On this latter point, and for a critical evaluation of Mr. Justice Black’s opinion for the Court, see Ismel, *Gideon v. Wainwright: The "Art" of Overruling*, [1963] SUPREME COURT REVIEW 211, 271 n.337.

\(^{12}\) 261 U.S. 86 (1923).

\(^{13}\) 367 U.S. 643 (1961).


\(^{15}\) 372 U.S. 335 (1963).

\(^{16}\) 287 U.S. 45 (1932).

\(^{17}\) “For alas, they know too little of that subject. American journalism, on the whole, does a poor job of accurately reporting court-doings. Our lawyers have made little effort to explain to the laymen, in intelligible terms, the workings of our judicial system. The resultant public ignorance is deplorable.” FRANK, COURTS ON TRIAL 1 (1930).

\(^{18}\) Principally, Chapters Four, Nine and Eleven.

\(^{19}\) 372 U.S. at 337.
Gideon's brief was the product of the efforts not only of Fortas but of several other members of Arnold, Fortas and Porter. Through their memoranda the reader is treated to a rare view of an important but often obscure aspect of the appellate process. One witnesses the evolution of petitioner's brief as the seeds of questions and ideas, subjected to the germinative power of imagination and exhaustive research, yield first memoranda and avenues for further study and finally the assertive legal propositions that are the trademark of appellate briefs. The irony of this outpouring of legal talent for the cause of one whom the Constitution said needed no lawyer is magnificent. Sole responsibility for Florida's brief fell to a single assistant attorney general, youthful (twenty-six) Bruce R. Jacob. On the state that had pitted Gideon against an experienced prosecutor, the tables were neatly turned.

Save for those unflinchingly devoted to the underdog, the account of the states' response to Jacob's plea for help, in the form of amicus curiae briefs, is delightful. Not only did he enlist but two states—Alabama and North Carolina—to his cause, but his letter engendered a reaction, sparked by Minnesota and Massachusetts, that grew into a brief amicus curiae signed by the attorneys general of twenty-three states, all urging that *Betts v. Brady* be overruled (p. 146-50).

The basis for the *Betts* decision had been that although the appointment of counsel for indigent defendants in federal criminal courts was required by the Sixth Amendment, it was not one of those "fundamental rights" of due process made obligatory upon the states by the Fourteenth Amendment. The federal system required that the states be as nearly free as possible from control by the national government in their administration of criminal justice. Fortas knew that if he was to succeed he had to rationalize the appointment of counsel in state criminal proceedings with the demands of federalism. His solution was to turn the federalism argument on its head. Far from protecting the states from intervention by the national government in the control of their criminal procedure, the *Betts* doctrine, calling for a case by case appraisal of "special circumstances" that often were not apparent until after conviction, had become a prime source of such intervention (pp. 126-27, 171-72). Every case in which an uncounseled defendant was convicted became an opportunity for federal-state abrasion, and the Supreme Court had not failed to find "special circumstances" in any case coming before it since 1950 (pp. 114, 172).

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Although it is not properly within the scope of this review of
Mr. Lewis' work, I cannot withhold the comment that Mr. Fortas'
admittedly compelling argument simply begs the question. Certainly
federal-state conflicts can be eliminated by adoption of a uniform
national rule. This is not, however, a solution to such conflicts,
but a negation of them. Logically extended, it would resolve the
problems of the federal system by supplanting it with a unitary one.
Moreover, even in its limited application, its effect is less to elimi-
nate such conflicts than to shift the arena in which they arise. Case
by case concern for whether the record exhibits those "special cir-
cumstances" required under Betts becomes case by case concern with
whether the trial of a particular "petty offense" requires counsel (p.
173); or whether the defendant effectively waived his right; or
whether the right had attached at the time of the alleged denial.

In the first introduction of his reader to the Supreme Court, Mr.
Lewis sounds a theme to which he is to return in the most important
chapter of the book. The theme is that "'however much one could
criticize the Supreme Court of the United States, it endured and
deserved its place in our political structure because it did its own
work.'" (p. 29). Having recounted the processes that culminated
in the Court's reversal of Gideon's conviction, and having managed,
in one succinct chapter, to describe in detail the federal, state and
private reception of the new principle therein announced (pp. 191-
207), the author addresses himself to the larger question of the
justification of these examples of the Supreme Court's power. "Why
should nine appointed lawyers play so large a role in a country that
calls itself a democracy? Is it appropriate that the Supreme Court,
rather than elected legislators, should reform the country's criminal
procedure or its race relations?" (p. 211). What follows is as
thoughtful a discussion as can be found anywhere in the popular
writings about the Court. He finds partial, but negative, justification
for judicial power in its "function as a forum for those without a
political voice" (p. 212); the indigent, the imprisoned, the disfran-
chised, the minority. But, "the great role of the Supreme Court can
only be justified, in the end, by the process it brings to bear on
public problems—by the distinctive characteristics of the judicial
process" (p. 213).

21 Just as President Johnson's proposed "changes in the Taft-Hartley Act including
Section 14-B" (the enabling section for state "Right-to-Work" laws) will "reduce
conflicts that for several years have divided Americans in various states." N.Y.
Times, Jan. 5, 1965, p. 16, col.6 (city ed.).
23 See Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378
24 Quoting Justice Brandeis.
Chief among these characteristics recurs the notion that the Court does its own work and each justice bears responsibility for what is done. "Why this characteristic of the judicial process is important is hard to explain, but anyone who has ever tried to grope his way through the faceless bureaucracy of government and pin down responsibility for a mistake will understand" (p. 213). It is not simply the fact of individual responsibility, but what the justices are responsible for—a fair hearing and a principled opinion—that distinguishes the Court’s work. "What is given to the justices is the opportunity not to command but to persuade. The . . . ability to perceive great moral truths and to articulate them in a way that excites the imagination of the citizen . . . is as important to the Supreme Court as the power of sword or purse to the other branches of government" (pp. 219-20).

The epilogue recounts Gideon’s retrial and resultant acquittal. The expected anticlimax is considerably enlivened by Gideon’s quixotic refusal to be represented by two Florida Civil Liberties Union attorneys. Their report, subtitled "How the Florida Civil Liberties Union Wasted $300, and How Two Attorneys Each Traveled over 1200 Miles and Killed an Otherwise Perfectly Enjoyable July Fourth Weekend," philosophically concludes: "In the future the name ‘Gideon’ will stand for the great principle that the poor are entitled to the same type of justice as are those who are able to afford counsel. It is probably a good thing that it is immaterial and unimportant that Gideon is something of a ‘nut’ . . ." (pp. 227-28).

GIDEON’S TRUMPET is not contemporary legal history: it makes no pretense at a critical evaluation of the political and social, as well as constitutional, problems described within its covers. It is an accurate, impartial and highly readable account of the judicial process.

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