Book Review Colloquy

The Architects of the *Gideon* Decision: Abe Fortas and Justice Hugo Black

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Anthony Lewis's riveting account of *Gideon v. Wainwright*[1] is one of the best books ever written about a Supreme Court case.[2] It is certainly the most widely read.[3] For half a century, it has inspired countless young men and women to pursue careers in the legal profession and in public service.[4]

Apart from Clarence Earl Gideon, there are two principal figures in *Gideon's Trumpet*: Abe Fortas and Justice Hugo Black. These two men may justly be described as the architects of the *Gideon* decision. Fortas was the lawyer appointed by the Supreme Court to represent Gideon in his appeal; he wrote the brief and made the oral argument on Gideon's behalf.[5] Justice Black wrote the Court's opinion sustaining Gideon's claim that he was denied his constitutional rights by reason of the trial court's refusal to appoint counsel to represent him.[6] Lewis clearly had high regard for both Fortas and Black.

In this Essay, I will discuss the problems that confronted the advocate and the Justice in the *Gideon* case and the manner in which each of them resolved those issues.

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1. 372 U.S. 335 (1963).

2. ANTHONY LEWIS, GIDEON'S TRUMPET (1964). The only book about a Supreme Court case of comparable excellence that comes readily to mind is Richard Kluger's superb account of *Brown v. Board of Education*. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (Vintage Books 2004) (1975).

3. *See* Adam Liptak, *Anthony Lewis, Supreme Court Reporter Who Brought Law to Life, Dies at 85*, N.Y. TIMES, Mar. 25, 2013, http://www.nytimes.com/2013/03/26/us/anthony-lewis-pulitzer-prize-winning-columnist-dies-at-85.html ("[*Gideon's Trumpet*] has never been out of print since it was published in 1964.").

4. *See id.* (quoting Yale Kamisar as saying, "There must have been tens of thousands of college students who got it as a graduation gift before going off to law school").

5. LEWIS, *supra* note 2, at 48, 133–34, 169.

6. *Gideon*, 372 U.S. at 336, 345.

I. The Advocate

It is the practice of the Supreme Court when it agrees to review an *in forma pauperis* petition, as it did in Gideon's case,[7] to appoint a member of the Supreme Court bar to represent the petitioner.[8] The Court provides no explanation for its choice of counsel,[9] and accordingly, one is forced to speculate on why Fortas was chosen. Fortas was a close friend of Justice Douglas dating back to their time together at the Yale Law School in the early 1930s, and Fortas knew a number of other Justices.[10] I believe it is fair to say that the Court regarded the *Gideon* case as important, and it wanted an eminent advocate to present the argument on behalf of the petitioner. Fortas met that specification. Measured by any standard, he was one of the best lawyers of his generation.

In June 1962, when he was appointed by the Court as counsel in the *Gideon* case, Fortas was fifty-two years old and a senior partner in the Washington, D.C., law firm Arnold, Fortas & Porter.[11] Fortas graduated from the Yale Law School in 1933.[12] He was an outstanding student and the editor in chief of the *Yale Law Journal*.[13] Immediately after his graduation, he was offered an appointment to the Yale faculty,[14] a unique tribute. Fortas remained only briefly in New Haven and left Yale to join the Roosevelt Administration in Washington.[15] He worked together with William O. Douglas at the Securities and Exchange Commission, with Jerome Frank at the Agricultural Administration Department, and with Harold Ickes at the Department of the Interior.[16] At age thirty-two, he became Under Secretary of the Interior Department.[17] There were many exceptionally able lawyers in the New Deal Administration, and Fortas was one of the stars.

After World War II ended, Fortas left the government, and in 1946 he joined his former Yale Law School professor Thurman Arnold in private practice in Washington.[18] Fortas was the quintessential Washington lawyer.

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7. LEWIS, *supra* note 2, at 34.

8. *See* SUP. CT. R. 39; LEWIS, *supra* note 2, at 44.

9. LEWIS, *supra* note 2, at 47.

10. *Id.* at 50, 52.

11. *Id.* at 48–50. For a biography of Fortas, see generally LAURA KALMAN, ABE FORTAS (1990). Two years after the *Gideon* decision, in July 1965, Fortas was nominated by President Johnson to be an Associate Justice on the Supreme Court. *Id.* at 241, 244. He was promptly confirmed by the Senate. *See id.* at 248. He resigned his seat on the Court in May 1969. *Id.* at 373. He died in April 1982 at age 71. *Id.* at 400–01.

12. LEWIS, *supra* note 2, at 50.

13. *Id.*

14. KALMAN, *supra* note 11, at 25.

15. *Id.* at 26–27.

16. *See id.* at 45–47; LEWIS, *supra* note 2, at 50.

17. LEWIS, *supra* note 2, at 50.

18. KALMAN, *supra* note 11, at 125–26.

He specialized in securities and antitrust issues, but he represented parties before many different administrative agencies involving a variety of issues, and he advised clients with respect to legislative matters.[19] Fortas was not a trial lawyer, but he was an excellent appellate advocate. At the time of his appointment as Gideon's attorney, Fortas was among the best known lawyers in Washington.

One factor that may have influenced the Supreme Court's appointment of Fortas as Gideon's counsel was that Fortas was well-known as a public interest, or pro bono, lawyer. Fortas was extensively engaged in his firm's pro bono representation of government employees in the loyalty and security proceedings during the McCarthy era.[20] Government employees could be questioned and dismissed from their government jobs on the basis of organizations they had joined while in college, magazines they had read, or friendships they had formed as young persons.[21] Those proceedings involved significant issues of freedom of speech and freedom of association as well as questions of due process presented by the refusal of loyalty boards to permit government employees to confront adverse witnesses.[22] In the atmosphere that then prevailed, it took considerable moral courage to represent such persons; many lawyers declined to do so because of concerns that they would be shunned by their clients as communist sympathizers.[23]

There was another matter that enhanced Fortas's reputation as a pro bono lawyer. In 1953, Fortas was appointed by the U.S. Court of Appeals for the D.C. Circuit to represent an indigent petitioner in an appeal that raised the issue of the standard of responsibility that should be applied in criminal cases, that is, the manner in which the defense of insanity should be defined.[24] Fortas urged the court of appeals to abandon the test that had been formulated in England in the 1840s, the so-called M'Naghten Rule, which required the trial court in a proceeding where the accused pleaded insanity to determine whether the defendant knew the difference between right and wrong.[25] That test was then still followed by most U.S. courts,

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19. *Id.* at 152–54.

20. *See id.* at 183 (noting that Fortas was passionate about loyalty cases and that this type of public-interest work was most important to Fortas). As examples of cases on which Fortas worked, see Bailey v. Richardson, 182 F.2d 46, 48 (D.C. Cir. 1950), and Peters v. Hobby, 349 U.S. 331, 332 (1955).

21. *See* KALMAN, *supra* note 11, at 130.

22. *See id.*

23. *Id.* at 129–30.

24. *Id.* at 178–80.

25. *Id.* at 178–79; *see also* Durham v. United States, 214 F.2d 862, 869 (D.C. Cir. 1954) ("It has been ably argued by counsel for Durham [, Fortas,] that the existing tests in the District of Columbia for determining criminal responsibility, *i. e.*, the so-called right-wrong test supplemented by the irresistible impulse test, are not satisfactory criteria for determining criminal responsibility."), *abrogated by* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc).

including those in the District of Columbia.[26] Fortas urged the Court to substitute a test that was consistent with the insights of modern psychiatry and that would permit psychiatrists to tell the jury everything they had learned about the accused.[27] In the widely discussed *Durham v. United States*[28] case, the court of appeals established a new standard of criminal responsibility—whether the offense charged is a product of mental disease—and ignited a debate about the insanity defense that continues to this day.[29]

A day or so after he was appointed by the Supreme Court in late June 1962 to represent Gideon, Fortas summoned me to his office; he told me of his appointment, and he asked me to assist him in the research and the writing of the brief on Gideon's behalf.[30] I had been privileged to work with Fortas previously on many matters from the time I became an associate in the firm in 1953. We had the responsibility as Gideon's lawyers to assert every legitimate argument supported by the record that we could make in order to secure reversal of his conviction, but Fortas made clear from the outset that he wanted to convince the Supreme Court to establish the principle that an indigent person is entitled under the Constitution to the assistance of counsel in any felony prosecution.

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In order to appreciate the problems Fortas confronted in representing Gideon, it is essential to bear in mind the status under constitutional law in 1962 of the government's duty to furnish a lawyer to indigent defendants in federal and state criminal prosecutions.

There was a fundamental difference between the duty to do so in the federal courts and the duty to do so in the state courts. The Supreme Court had ruled in 1938, in *Johnson v. Zerbst*,[31] that the federal courts were

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26. *See* KALMAN, *supra* note 11, at 178.

27. *See Durham*, 214 F.2d at 872 (noting that the objection to the old test was that it relied on a particular symptom and adopting a new test that allows fact-finders to take all relevant scientific information into account); KALMAN, *supra* note 11, at 179 (discussing the same).

28. 214 F.2d 862 (D.C. Cir. 1954).

29. *Id.* at 874–75; *see also, e.g.*, Morris B. Hoffman & Stephen J. Morse, *The Insanity Defense Goes Back on Trial*, N.Y. TIMES, July 30, 2006, http://www.nytimes.com/2006/07/30/opinion/30hoffman.html (noting that the debate over the proper scientific inquiry into insanity continues).

30. Two other individuals were named in the brief filed on behalf of Gideon as assisting Fortas: Ralph Temple, an associate, and John Ely, a third-year law student at Yale and a summer law clerk in 1962. LEWIS, *supra* note 2, at 122, 129; *see also* Brief for the Petitioner at 47, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155). (The brief was filed under the case's initial name, *Gideon v. Cochran*.) In a footnote to the brief, Fortas "acknowledge[d] the valuable assistance rendered in connection with this brief" by Ely. *Id.* at 47 n.* Two other associates at Arnold, Fortas & Porter, James Fitzpatrick and Bruce Montgomery, contributed helpful memoranda. LEWIS, *supra* note 2, at 121, 129.

31. 304 U.S. 458 (1938).

required by the Sixth Amendment to provide a lawyer for an indigent defendant in all criminal prosecutions.[32] If they failed to do so, the judgment was void.[33] The state courts, however, were required to appoint counsel only in cases involving the death penalty.[34] That principle dated from the Court's decision in 1932 in the Scottsboro case, *Powell v. Alabama*.[35] In all other state felony cases—that is, in all noncapital cases—there was no such constitutional requirement imposed on the state courts. This doctrine was confirmed by the Supreme Court in 1942 in *Betts v. Brady*,[36] where the majority held that in a state criminal prosecution of an indigent defendant that did not involve the death sentence, the constitutional right to the assistance of a lawyer depended on whether there were special circumstances in the case such that, without counsel, the defendant's conviction would be regarded as fundamentally unfair.[37]

It developed in subsequent cases that "special circumstances" meant such things as whether the accused person was mentally incompetent,[38] or was a juvenile,[39] or illiterate,[40] or if the proceeding was unusually complex.[41] In such cases, a lawyer had to be furnished by state courts to indigent defendants. However, in all other state felony cases—the *Betts* case, for example, involved a prosecution for robbery[42]—there was no constitutional requirement that the state court supply counsel to a poor person,[43] and countless defendants were convicted and imprisoned after a trial where they didn't have a lawyer.[44] *Gideon* was just such a case.

In constructing the argument on Gideon's behalf, Fortas had to deal basically with two problems. The first issue was how to address an adverse precedent, *Betts v. Brady*. When the Supreme Court granted certiorari in the *Gideon* case, it asked the lawyers for both sides to discuss in their briefs and oral argument whether the court should reconsider *Betts v. Brady*.[45]

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32. *Id.* at 467–68.

33. *Id.*

34. *See* Powell v. Alabama, 287 U.S. 45, 71 (1932).

35. 287 U.S. 45 (1932).

36. 316 U.S. 455 (1942).

37. *Id.* at 462, 473.

38. *E.g.*, McNeal v. Culver, 365 U.S. 109, 114 (1961); Massey v. Moore, 348 U.S. 105, 108 (1954); Palmer v. Ashe, 342 U.S. 134, 137 (1951).

39. *E.g.*, Uveges v. Pennsylvania, 335 U.S. 437, 441–42 (1948); De Meerleer v. Michigan, 329 U.S. 663, 665 (1947).

40. *E.g.*, Carnley v. Cochran, 369 U.S. 506, 511 (1962).

41. *E.g.*, Chewning v. Cunningham, 368 U.S. 443, 447 (1962); *Uveges*, 335 U.S. at 441.

42. *Betts*, 316 U.S. at 456.

43. *Id.* at 473.

44. *See* Anthony J. Lewis, *Supreme Court Extends Ruling on Free Counsel*, N.Y. TIMES, Mar. 18, 1963, http://query.nytimes.com/mem/archive/pdf?res=F50A1FF93B54157A93CBA81788D85F478685F9.

45. Gideon v. Cochran, 370 U.S. 908, 908 (1962). The name of the case was changed to *Gideon v. Wainwright* when H.G. Cochran, Jr., resigned as director of the Florida Division of

Fortas had to respond to that directive in his brief. If the Court adhered to *Betts*, Gideon's appeal would fail. In order for Gideon to prevail, Fortas had to distinguish *Betts* or convince the Court that *Betts* should be overruled.

The second basic issue that confronted Fortas involved federalism, or states' rights. A decision by the Supreme Court that counsel had to be appointed by the state courts for an indigent person in every felony prosecution would constitute an intervention by the Court in the state's administration of criminal justice. It would impose economic costs on the states by requiring them to pay for defense lawyers.

I shall discuss in turn how Fortas dealt with each of the foregoing problems. We carefully studied the trial record in Gideon's case. It was skimpy. It was clear to us that Gideon was disadvantaged at his trial by the lack of a lawyer, but there were no special circumstances in his case in terms of the Court's precedents. It was a run-of-the-mill, plain-vanilla case involving a charge of breaking and entering. Gideon was a fifty-year-old man who was neither illiterate, mentally incompetent, nor inexperienced in criminal prosecutions. There was no solid basis for distinguishing the *Betts* ruling.

As of 1962, it was obvious, for several reasons, that the decision in *Betts v. Brady* was on wobbly legs. In the first place, four of the Justices—Chief Justice Warren and Justices Black, Douglas, and Brennan—had expressly stated in cases decided during the preceding two terms of the Supreme Court that they felt the *Betts* case should be overruled.[46] The special circumstances test was subjective and ambiguous, and it provoked endless litigation to define its contours.[47] In the second place, the Supreme Court had selected Gideon's handwritten petition for review from hundreds of *in forma* petitions submitted to the Court;[48] it was like plucking a needle from a haystack. The Court was plainly on the look out for a case like that presented by Gideon's petition. The Court's order granting certiorari in Gideon's case was in itself a strong indication that at least four members of the Supreme Court believed that the failure of a state court to appoint a lawyer for an indigent defendant in an ordinary felony case raised a serious and substantial question.[49] Finally, and perhaps most significantly, the Court's request that counsel discuss whether the Court's holding in *Betts v.*

Corrections and was replaced by Louie L. Wainwright during the pendency of the case. LEWIS, *supra* note 2, at 185.

46. *See* Carnley v. Cochran, 369 U.S. 506, 517–20 (1962) (Black, J., concurring) (opinion joined by Chief Justice Warren); *id.* at 520 (Douglas, J., concurring); McNeal v. Culver, 365 U.S. 109, 117 (1961) (Douglas, J., concurring) (opinion joined by Justice Brennan).

47. *See Carnley*, 369 U.S. at 517–18 (Black, J., concurring).

48. *See* LEWIS, *supra* note 2, at 33 (observing that the Court received about fifteen hundred *in forma pauperis* petitions during the term the case was decided).

49. *See id.* at 41.

Brady should be reconsidered was an unmistakable signal that the *Betts* decision was in a terminal stage. Fortas recognized that it was his responsibility to furnish the Court with arguments and reasons that would support a decision overturning the ruling in *Betts v. Brady*.

In his brief, Fortas attacked the *Betts* decision head-on. He urged that it should be overruled.[50] He challenged the major premise of the *Betts* decision, namely that a defendant can have a fair trial without the assistance of counsel.[51] He stressed that in every criminal prosecution a fair trial requires the assistance of defense counsel.[52] A layman simply cannot effectively defend himself.[53] He cannot evaluate such matters as the validity of the indictment or the charge against him, whether a search and seizure was lawful, whether a confession is admissible, whether he was mentally competent at the time of the offense, and so on.[54] He is at a loss in dealing with questions of evidence, how to examine witnesses, or how to make a closing argument.[55] As Justice Douglas put it, a criminal jury trial confronts a layman with "a labyrinth he can never understand nor negotiate."[56]

Fortas next argued that there was no legitimate basis for the distinction that had been made by the Supreme Court between the need for counsel in capital and in noncapital cases in the state courts.[57] He pointed out that the necessity for a lawyer in noncapital cases might even be greater than in death sentence cases because of the complexity of the issues.[58] The distinction was irrational.

Fortas then turned to the issue that was central, namely federalism, or states' rights. In the early 1960s, the Justices of the Supreme Court were deeply divided about whether the various provisions of the Bill of Rights relating to criminal procedure—historically, limitations only on the powers of the national government—were also applicable to the states.[59] Doctrinally, the issue was whether various provisions in the Bill of Rights—such as the prohibitions against self-incrimination or double jeopardy, or in the *Gideon* case, the Sixth Amendment's guarantee of the right to the assistance of counsel—were incorporated into or absorbed by

50. Brief for the Petitioner, *supra* note 30, at 7, 11.
51. *Id.* at 7.
52. *Id.* at 7, 13–14.
53. *Id.*
54. *See id.* at 7.
55. *See id.* at 7–8.
56. Carnley v. Cochran, 369 U.S. 506, 524 (1962) (Douglas, J., concurring).
57. Brief for the Petitioner, *supra* note 30, at 22–25.
58. *Id.* at 22–23.
59. *See* MELVIN I. UROFSKY, THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY 158, 159 (2001) (describing how the debate about whether to incorporate all of the Bill of Rights or just some of them extended into the 1960s and was one of the great constitutional debates of the time).

the provision of the Fourteenth Amendment that no person shall be deprived by a state of liberty "without due process of law."[60] Justice Black wrote a famous dissenting opinion in 1947 in *Adamson v. California*[61] maintaining that the Fourteenth Amendment was designed to make all of the Bill of Rights applicable against the states.[62] But the majority of the Court did not agree with him.[63] As of 1962, the Court had selectively applied only a few of the provisions of the Bill of Rights to the states.[64] Viewed in one way, the question presented in Gideon's case was whether the Due Process Clause of the Fourteenth Amendment incorporated the Sixth Amendment's provision that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."[65] The Court had never decided that issue.

Fortas did not want to get caught up in a cross fire among the Justices as to whether the Sixth Amendment's guarantee of the right to counsel was incorporated or absorbed into the Fourteenth Amendment. He was concerned that some Justices would have agreed it was incorporated, whereas other Justices would have disagreed. Instead, he made the straightforward argument that the Due Process Clause of the Fourteenth Amendment, standing on its own bottom, so to speak, considered independently of the Sixth Amendment, required that counsel be appointed by state courts for an indigent defendant in every felony prosecution in order to guarantee a fair trial.[66]

In this connection, Fortas made two points:

First, he pointed out that the ruling he advocated would not be a significant intrusion on states' rights.[67] It would not entail a revolutionary change in state practices if the Supreme Court were to rule that a lawyer had to be supplied by the state courts to indigent defendants in all felony cases. As of 1962, forty-five states required that a lawyer be furnished to an

60. U.S. CONST. amend. XIV, § 1.

61. 332 U.S. 46 (1947).

62. *Id.* at 71–72 (Black, J., dissenting).

63. *Id.* at 54 (majority opinion) ("Nothing has been called to our attention that either the framers of the Fourteenth Amendment or the states that adopted intended its due process clause to draw within its scope the earlier amendments to the Constitution.").

64. For cases where the Court had incorporated provisions of the Bill of Rights to the states, see, for example, *Robinson v. California*, 370 U.S. 660, 667 (1962) (Eighth Amendment, cruel and unusual punishment); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (Fourth Amendment, exclusion of evidence obtained by unreasonable search and seizure from a criminal trial); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (First Amendment, freedom of speech). For a case where the Court did not incorporate a Bill of Rights provision, see, for example, *Palko v. Connecticut*, 302 U.S. 319, 328 (1937) (Fifth Amendment, double jeopardy).

65. U.S. CONST. amend. VI.

66. Brief for the Petitioner, *supra* note 30, at 7, 13.

67. *Id.* at 28–32.

indigent defendant in all felony cases.[68] They did so either pursuant to state constitutional provisions, state supreme court decisions, or state court rules. Moreover, even in the five outlier states, such as Florida, which did not follow that practice, a lawyer was appointed for poor persons in all capital cases.[69] If Fortas's position were to be approved by the Court, the states would be required to appoint a lawyer for an indigent defendant in every felony prosecution, but the states would retain freedom in devising methods to assure compliance with that requirement. An amicus brief supporting Fortas's position joined by twenty-two state attorneys general[70] strengthened his argument on this point about states' rights.

Next, Fortas had the brilliant insight that the special circumstances rule impaired the values of federalism by creating friction between the state and federal courts.[71] Following many state criminal prosecutions where an indigent person was convicted without the assistance of a lawyer, a petition for habeas corpus would be filed by the prisoner in a federal district court alleging a denial of constitutional rights for that reason.[72] The district court judge would then review the state court proceedings under the special circumstances test; that is, the federal court would decide whether the defendant had been denied a fair trial in the state court because he was not furnished with counsel.[73] As Fortas observed, that practice involved federal court supervision of state courts in an ad hoc way—that is, case by case—and in an ex post facto manner—that is, review of each case in an historical, backward-looking fashion.[74] A rule requiring that counsel be appointed in every case would be much less intrusive on state rights.

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68. *Id.* at 30. Fortas cited Justice Douglas's appendix in *McNeal v. Culver*, 365 U.S. 109, app. at 120–22 (1961) (Douglas, J., concurring), for the proposition that thirty-seven states required the appointment of a lawyer for destitute defendants in all felony cases. Brief for the Petitioner, *supra* note 30, at 30. Of the remaining thirteen states, eight typically provided counsel when it was requested. *Id.*; *see also* Yale Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962), *cited in* Brief for the Petitioner, *supra* note 30, at 30.

69. Brief for the Petitioner, *supra* note 30, at 30; *see also McNeal*, 365 U.S. app. at 121–22 (Douglas, J., concurring) (pointing out that Alabama, Florida, Mississippi, and South Carolina all required the appointment of attorneys for indigent defendants accused of capital felonies). With regard to the fifth state—North Carolina—the Douglas appendix points to *State v. Davis*, 103 S.E.2d 289 (N.C. 1958), which states that in North Carolina there is no requirement that defendants be afforded attorneys in cases not involving capital felonies. *McNeal*, 365 U.S. app. at 122; *Davis*, 103 S.E.2d at 291.

70. Brief for the State Government Amici Curiae at 1, Gideon v. Wainwright, 372 U.S. 335 (1963) (No. 155).

71. Brief for the Petitioner, *supra* note 30, at 8–9, 33–34.

72. *Id.* at 33.

73. *See id.*

74. *Id.* at 9, 34.

Fortas's superb oral argument was recorded, and it is readily available.[75] In his autobiography, Justice Douglas, who sat on the Court for thirty-four years, stated: "In my time probably the best single legal argument was made by Abe Fortas in 1963 in *Gideon v. Wainwright* . . . ."[76] Making due allowance for the fact that Fortas and Douglas were good friends, that is high praise indeed.

II. The Justice

Following the oral argument on January 15, 1963,[77] and the Court's conference where the vote on the case was taken, Chief Justice Warren assigned the writing of the Court's opinion to Justice Black.[78] It was a most appropriate designation. Black had written the opinion of the Court in 1938 in *Johnson v. Zerbst*, when the Court ruled that the federal courts were obliged by the Sixth Amendment to provide counsel to indigent defendants in all cases.[79] He had written a dissent from the majority opinion in *Betts v. Brady* in 1942.[80] And he had made clear in cases decided in the spring of 1962 that he felt the *Betts* decision should be overruled.[81]

In considering how to draft his opinion for the Court, Black faced at the outset the same issue that confronted Fortas, namely, how to deal with the precedent of *Betts v. Brady*. The question was whether the *Betts* decision should be followed, distinguished, or overturned. Black's view, supported by a majority of the other Justices, was that *Betts* was erroneous and should be overruled.[82] He acknowledged that the "facts and circumstances of the two cases [*Betts* and *Gideon*] are so nearly indistinguishable [that] the *Betts v. Brady* holding if left standing would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel."[83] He thought that in *Betts* the Court had made an abrupt break with its own well-considered precedents. As he put it: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for

75. Oral Argument, *Gideon*, 372 U.S. 335 (No. 155), *available at* http://www.oyez.org/cases/1960-1969/1962/1962_155.

76. WILLIAM O. DOUGLAS, THE COURT YEARS: 1939–1975, at 187 (1980).

77. *Gideon*, 372 U.S. at 335.

78. *See* LEWIS, *supra* note 2, at 182, 187 (noting that by tradition, the Chief Justice assigns the case to a particular Justice to be written, and that assignment fell to Justice Black).

79. 304 U.S. 458, 458, 462–63 (1938).

80. 316 U.S. 455, 474 (1942) (Black, J., dissenting).

81. *E.g.*, Carnley v. Cochran, 369 U.S. 506, 517–18 (1962) (Black, J., concurring).

82. *Gideon*, 372 U.S. at 339.

83. *Id.*

him. This seems to us to be an obvious truth."[84] He accordingly concluded that *Betts* should be overruled.[85]

Black also had to deal with the issue that Fortas had finessed; that is, Black was obliged to specify the constitutional law rationale for the decision. He had to confront the divergent views of different members of the Court with respect to the incorporation issue. Black made clear in his opinion that he was guided in interpreting the Due Process Clause of the Fourteenth Amendment, applicable to the states, by the provision with respect to the right to counsel in the Sixth Amendment that was applicable to the federal government.[86] As he put it, "the fundamental nature of the right to counsel" was confirmed by the Sixth Amendment, and fundamental rights protected against federal infringement are safeguarded against state action.[87] In short, Black incorporated the Sixth Amendment into the Fourteenth Amendment, and thus the right to counsel was made applicable to the states in the same manner as it was applicable to the federal government.

Black's opinion in *Gideon* is typical of many opinions that he wrote. It is brief, free of legal jargon, and intelligible to a layman as well as a lawyer.

There are two separate themes in Black's opinion in *Gideon*:

First, Black's opinion reflects the view that in our adversary system of justice an individual needs a lawyer to prepare and present his defense. Black knew from personal experience how important it is to have a lawyer at one's side in the courtroom. He had been a county prosecutor, a police court judge, and a trial lawyer in the early years of the century in Birmingham, Alabama.[88]

Second, his *Gideon* opinion reflects Black's profound empathy for those who are poor and disadvantaged. It was simply unacceptable to him that a man should be denied a fair trial because he was poor. For Hugo Black, defense "lawyers in criminal courts are necessities, not luxuries."[89]

In his biography of Justice Black, Roger Newman described the scene at the Supreme Court on the morning of March 18, 1963, when the opinion in the *Gideon* case was announced. Newman wrote:

> When [Chief Justice] Warren called on [Justice Black] on the bench, he leaned forward and spoke in an almost folksy way, reading sections of his [*Gideon*] opinion. Happiness, contentment, gratification filled his voice. "When *Betts v. Brady* was decided," he

84. *Id.* at 344.
85. *Id.* at 339.
86. *Id.* at 342–43.
87. *Id.*
88. Earl Warren, *A Tribute to Hugo L. Black*, 85 HARV. L. REV. 1, 1 (1971).
89. *Gideon*, 372 U.S. at 344.

> said a few weeks later, "I never thought I'd live to see it overruled." . . . It was indeed a moment of supreme satisfaction, one of the highlights of [Justice] Black's years on the Court.[90]

As a matter of constitutional law, the *Gideon* decision was significant for several reasons. In the first place, it closed a gap in the law with respect to the duty of state courts to furnish counsel to indigent defendants, previously limited to capital cases. After *Gideon*, it could be said that every person charged, either in a federal court or in a state court, with a criminal offense that could lead to imprisonment is entitled by the Constitution to have a lawyer's assistance.

The *Gideon* decision was also consequential because it was a key link in the effort by the Warren Court to reform the administration of criminal justice in the state courts and to establish the principle that the rules of law in criminal cases required by the Constitution should be the same in both the state and federal courts. One of the principal things the Warren Court sought to do was to make the nation's criminal justice system more protective of the rights of poor persons and black persons.[91] This was to be accomplished, in part, by extending to the state courts the procedural rights in criminal proceedings provided for by the Bill of Rights, which previously had applied only in the federal courts. In the *Gideon* case, the court held that the Sixth Amendment's guarantee of the assistance of counsel applied to the states pursuant to the Fourteenth Amendment. In a series of cases decided in the decade that followed the *Gideon* decision in 1963, one after another of the provisions of the Bill of Rights, such as the privilege against self-incrimination,[92] the right to confront adverse witnesses,[93] the right to an impartial jury trial,[94] and the prohibition against double jeopardy,[95] were made applicable to the state courts pursuant to the Due Process Clause. The *Gideon* case was a critical step in this process.

At various events in 2013 commemorating the fiftieth anniversary of the *Gideon* decision, some commentators invariably observed that the high expectations surrounding the *Gideon* decision have not been fulfilled.[96] Regrettably, that is true. The *Gideon* decision invigorated the movement for public defenders, and it improved the representation of indigent defendants to a considerable extent, but it is incontrovertible that a great many accused persons in the state courts are still not adequately or

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90. ROGER K. NEWMAN, HUGO BLACK 528 (1994).

91. *See* Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 10 (1993).

92. Malloy v. Hogan, 378 U.S. 1, 6 (1964).

93. Pointer v. Texas, 380 U.S. 400, 406 (1965).

94. Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

95. Benton v. Maryland, 395 U.S. 784, 787 (1969).

96. *See, e.g.*, Ethan Bronner, *Right to Lawyer Can Be Empty Promise for Poor*, N.Y. TIMES, Mar. 15, 2013, http://www.nytimes.com/2013/03/16/us/16gideon.html.

competently represented.[97] The same observation about hopes not fully realized could be made concerning the Supreme Court's great decision in the school desegregation case, *Brown v. Board of Education*.[98] That point does not diminish either the luster or the enduring importance of either the *Brown* or *Gideon* decisions. To the contrary, it should be taken as a wake-up call that there is unfinished business, and it should renew our commitment to fulfilling the aspirations for a just society reflected by these landmark decisions.

There are several reasons why defendants are still not adequately represented, especially in various state courts.

First, the *Gideon* decision contemplated that the legislature in each state would appropriate funds to cover the cost of furnishing lawyers to indigent defendants.[99] But neither the *Gideon* opinion, nor any subsequent opinion by the Supreme Court, provided any mechanism or procedure for enforcing this mandate.[100] Moreover, the Court did not specify a level of required expenditures or any standard of adequacy.[101] If a state legislature fails to appropriate the necessary funds, there is no established procedure for making it do so. Many public defender's offices throughout the country are underfunded and understaffed.[102] The budget crisis in many states has aggravated the problem.[103]

Second, there have been profound changes since 1963 in the criminal law system that have increased the burden of providing lawyers for indigent defendants. A great many activities, especially in the area relating to drugs, have been criminalized by statute with the result that many more persons are now prosecuted,[104] leading to even greater financial pressures and an increased need for legal assistance. The incarceration rate in our country

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97. *See id.*

98. 347 U.S. 483 (1954).

99. *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (noting that the state legislatures spend vast sums of money trying defendants but never explicitly stating the mechanism by which sums of money would be allocated to defend the same defendants). Abe Fortas also made a point to mention the variety of ways in which a state could fund the new programs. Brief for the Petitioner, *supra* note 30, at 34–35.

100. *See* Erwin Chemerinsky, Remarks, *Lessons from* Gideon, 122 YALE L.J. 2676, 2685–86 (2013).

101. *See id.* at 2686 (noting that "states often will choose the most inexpensive way to meet [the] obligation" of providing a lawyer to all criminal defendants); *see also* Strickland v. Washington, 466 U.S. 668, 689 (1984) ("[T]he purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation . . . .").

102. Eric Holder, U.S. Att'y Gen., Address at the ABA's National Summit on Indigent Defense (Feb. 4, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html ("Across the country, public defender offices and other indigent defense providers are underfunded and understaffed."); *see also* Chemerinsky, *supra* note 100, at 2683 (recognizing that underpaid public defenders lack proper incentives to provide the desired standard of representation).

103. Chemerinsky, *supra* note 100, at 2679, 2684.

104. *See id.* at 2686.

now exceeds the amount of incarceration in Russia.[105] The rate of imprisonment of black men has reached astronomical levels.[106] It is estimated that if present rates of imprisonment continue, half of all black men with no college education will spend some time in prison.[107] That level raises serious moral issues.

Third, at the time of the *Gideon* decision in 1963, roughly one-third of all persons charged were involved in trials.[108] But at present, nineteen out of every twenty felony convictions are the product of a plea bargain.[109] One of the major challenges that now confronts us is how courts can ensure defendants are competently represented in a process dominated by plea bargaining that occurs behind closed doors and without a record.

Fourth, another factor that has weakened the promise of *Gideon* is that the Supreme Court compromised the principle of adequate and effective representation in 1984 in the *Strickland v. Washington*[110] case. The Court established a presumption that defense counsel are competent, and it required a defendant who complains of ineffective assistance of counsel to show that the outcome of the trial would have been different if he were competently represented.[111] Applying this exacting standard, the courts have sustained inadequate representation.[112]

Finally, the strict procedural requirements that have developed as a precondition to obtaining habeas corpus have foreclosed, to a significant extent, federal court supervision of the quality of legal representation in the state courts.[113]

There is a basic underlying factor—there is a political reality—that accounts for the failure of many states to fully implement the *Gideon* decision. There is no effective political constituency for the right to counsel

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105. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 327 n.61 (2011).

106. *See* Adam Gopnik, *The Caging of America: Why Do We Lock up so Many People?*, NEW YORKER, Jan. 30, 2012, http://www.newyorker.com/arts/critics/atlarge/2012/01/30/120130crat_atlarge_gopnik?currentPage=all.

107. *See id.*

108. *See* STUNTZ, *supra* note 105, at 32.

109. *See id.*

110. 466 U.S. 668 (1984).

111. *Id.* at 689, 694.

112. *See, e.g.*, Muniz v. Smith, 647 F.3d 619, 624 (6th Cir. 2011) (denying appellant's claim of ineffective assistance of counsel, despite the fact that his lawyer was literally asleep for parts of the trial, because the defendant could not show a probability that the result would have been different if his lawyer was awake).

113. *See, e.g.*, Smith v. Murray, 477 U.S. 527, 529 (1986) (upholding the dismissal of a habeas corpus petition on the grounds that the petitioner waived his constitutional claim by not pressing it on direct appeal); Lefkowitz v. Fair, 816 F.2d 17, 24 (1st Cir. 1987) (dismissing a habeas corpus petition because the petitioner was not in custody at the time of the filing); Brown v. Cuyler, 669 F.2d 155, 161 (3d Cir. 1982) (denying habeas corpus review because of a failure to exhaust state remedies).

of indigent persons in criminal cases.[114] The persons most deeply prejudiced by the absence of an effective system of representation are, for the most part, poor people and are disproportionately people of color from low-income communities without resources and who lack political clout.[115]

If the *Gideon* decision is to be effectively implemented, various things need to be done by Congress, by the state legislatures, by the federal and state courts, and by lawyers and citizens.

First, Congress needs to pass legislation decriminalizing various activities that can be better addressed outside the criminal courts. The announcement by Attorney General Eric Holder that the Department of Justice will no longer prosecute low-level, nonviolent drug suspects for offenses that carry mandatory minimum sentences, and who instead will be given drug treatment and community service,[116] is a step in the right direction.

Second, an adequately staffed, adequately funded public defender office should be established in every state. The state legislatures need to be shown that it is considerably more economical to pay for defense lawyers than to incur the enormous costs associated with confining persons in prison who should not be there.[117] The supreme court in each state should be encouraged to be more aggressive in requiring adequate representation of indigent defendants.

Third, the U.S. Supreme Court should reexamine the standard it formulated in the *Strickland* case governing adequate representation and should apply a more realistic standard to claims of incompetent representation. That is especially true with respect to advice concerning the collateral consequences of a guilty plea, such as access to public housing or denial of the right to vote.[118] The Supreme Court's ruling in *Padilla v. Kentucky*[119]—that defendants who are immigrants must be advised of consequences of a guilty plea, especially the risk of deportation[120]—is a hopeful development.

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114. *See* Chemerinsky, *supra* note 100, at 2686.

115. *See id.* at 2691–92.

116. Eric Holder, U.S. Att'y Gen., Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

117. *See* STUNTZ, *supra* note 105, at 278–79 (noting that it is considerably more cost effective to police and prevent crime than it is to prosecute crime and keep people locked up, especially when considering that the "bulk of [the] cost takes the form of broken lives, jobs never held, and marriages and families never formed," which suggests that keeping people out of the prison system who do not belong—no matter what method used—is cost efficient).

118. Gabriel J. Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 699–700 (2002).

119. 559 U.S. 356 (2010).

120. *Id.* at 374.

Fourth and finally, the effective implementation of *Gideon* will require the strong support of bar associations, law schools, and private law firms united with other groups who recognize the importance of counsel for the defense.

If those things are done, the high ideal of the *Gideon* decision that every person in our country who is charged with a criminal offense should be effectively represented by counsel will be more fully realized.