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How Americans Lost the Right to Counsel, 50 Years After 'Gideon'

By Andrew Cohen

You have a right to an attorney in a criminal case, even if you cannot afford one. The Supreme Court said so half a century ago. But today that precious right is systematically ignored or undermined.



Clarence Earl Gideon after his release from prison in 1963 (AP)

Next Monday, America will quietly mark one of the most profound anniversaries in its legal history. Exactly 50 years ago, on March 18, 1963, the United States Supreme Court unanimously announced in [*Gideon v. Wainwright*](#) that the Sixth Amendment guarantees to every criminal defendant in a felony trial the right to a lawyer. "Reason and reflection," Justice Hugo Black wrote, "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 to him."

The *Gideon* decision, heralded in its own time, has profoundly changed America's criminal justice system ever since. In the past half century since the ruling, the constitutional right to counsel has ensured that millions of criminal suspects -- the guilty, the innocent, and the somewhere-in-between -- have been aided by earnest, capable lawyers. The mandate of *Gideon* has forced prosecutors to be fairer and more honest in their dealings with defendants. It has burdened trial judges with additional

pretrial motions. As a result of all of that, in a justice system designed to test evidence rather than seek truth, the *Gideon* ruling undoubtedly has resulted in more accurate results at trial.

Over the past half-century, lawmakers have refused to fund public defenders' offices adequately. And, as it has become more conservative since 1963, the Supreme Court has refused to force them to do so.

There is, indeed, much to celebrate about *Gideon*. The story of the case -- that is, the story of Clarence Earl Gideon -- is remarkable in every way. It is also impossible to imagine it taking place in today's world of law and justice. Here was a lowly man, like the Gideon of the Old Testament, who achieved a mighty and mightily unexpected victory on behalf of his fellow citizens. Here was a petty thief in Florida who told a trial judge that he deserved a lawyer, who was convicted and sentenced without one, and who was in the end proven right by the United States Supreme Court.

In *Gideon*, the justices of the Warren Court reached out eagerly to protect a suspect's fair trial rights; prosecutors around the country urged them to do so; and when Gideon got his second trial, this time with a seasoned lawyer, his quick acquittal struck home the value of the right which had just been recognized. *Gideon* is famous as Supreme Court precedent, and

as popular narrative, because it is such an easy legal story to understand. And because all of us, at one point, may wonder what it feels like to be charged with a crime -- and to be all alone.

But 50 years later there is also much to mourn about *Gideon* and the Supreme Court standards that followed it. Today, there is a vast gulf between the broad premise of the ruling and the grim practice of legal representation for the nation's poorest litigants. Yes, you have the right to a court-appointed lawyer today -- the right to a lawyer who almost certainly is vastly underpaid and grossly overworked; a lawyer who, according to a Brennan Center for Justice report [published last year](#), often spends less than six minutes per case at hearings where clients plead guilty and are sentenced. With this lawyer -- often just a "[potted plant](#)" -- by your side, you've earned the dubious honor of hearing the judge you will face declare that this arrangement is sufficient to secure your rights to a fair trial.

Today, sadly, the *Gideon* ruling amounts to another unfunded mandate -- the right to a lawyer for those who need one most is a constitutional aspiration as much as anything else. And the reasons are no mystery. Over the intervening half-century, Congress and state lawmakers consistently have refused to fund public defenders' offices adequately. And, as it has become more conservative since 1963, the United States Supreme Court has refused to force legislators to do so. "I think the Court doesn't have the initiative to get involved in improving the administration of justice in every state," former Justice John Paul Stevens told me in late January. "The Court's really not the institution to get involved in that."

So today, the justices won't secure the basic fair trial rights they themselves recognized in *Gideon*. And today, elected officials see no political value in spending the money it would take to ensure that every American has an opportunity for equal justice. It's not that there aren't solutions to the problem of securing a meaningful right to counsel for all litigants. There are plenty of solutions floating around. The problem is the political and legal will to implement those policy choices -- to make good on the promise the Supreme Court made to America 50 years ago amid such hope and fanfare.

The 'guiding hand of counsel'

Someone broke into the Bay Harbor Poolroom in Panama City, Florida, in the early morning of Saturday, June 3, 1961. Some beer and wine were stolen, some Cokes, too, and coins from the jukebox. The take wasn't much -- far less than \$50, a petty larceny -- and shortly afterward Clarence Gideon was arrested and charged with the crime. He lived nearby, was a regular at the poolroom, had a history of criminal conduct and, crucially, an eyewitness swore Gideon had been inside the poolroom at the time of the crime. Two years later, in the [opening paragraphs](#) of the *Gideon* ruling, here's how Justice Hugo Black would describe what happened at trial:

Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to

deny your request to appoint Counsel to defend you in this case.

The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel.

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison

But the Florida judge was wrong. The law *did* permit him to give Gideon a lawyer even though the case was not a capital one. And the law *required* the judge at least to inquire into the possibility that Gideon's Sixth Amendment right to a fair trial would be violated in that case without the appointment of counsel. We know from the official transcript of the trial that Gideon's judge did not discuss this possibility with him. We do not know, because evidently no transcript ever was made, whether this judge had such a discussion with Gideon at the latter's arraignment.

By the time of Gideon's trial, the Supreme Court had created a flexible rule wherein a criminal defendant in state court, a defendant like Gideon, could get court-appointed counsel if he could establish a "special circumstance" that warranted the appointment. His age, his educational background, his mental history, his prior experience in court, the complexity of the case, and the severity of the charges -- all of these were factors Gideon's trial judge was required to consider, on the record, before reaching a decision about the defendant's request for a lawyer. Even Gideon's drinking habit, which evidently was significant and well-known in the tight-knit community of Panama City, might have been dispositive.

MORE ON *GIDEON*



**So You Want to
Learn More
About the
Gideon Case?**

The so-called "special circumstances" test had come down from the Supreme Court in a famous case styled *Powell v. Alabama*, a 1932 decision about the "Scottsboro Boys." The defendants were black teenagers, dubiously charged with raping two white teenagers in the Deep South, and [their trials had unfolded in a macabre way](#). Quickly convicted and sentenced to death, the hapless youths found help at the Supreme Court, which recognized that their fair trial rights had been denied. The decision to appoint counsel for the boys had been made in a "casual fashion" on the morning of trial rather than at the time of their arrest, the justices concluded.

The defendants had been entitled to court-appointed lawyers at the start of the case for what the justices called "vitally important ... consultation, thoroughgoing investigation and preparation" before trial." For the Court, Justice George Sutherland wrote:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him.

Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

In a capital case, the *Powell* court concluded, "where a defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law." It was an extraordinary liberal ruling from an extraordinarily

conservative court. But it applied only to capital cases. [Six years later](#), the Court extended the principle to non-capital cases in federal court. And in 1942, in a case styled *Betts v. Brady*, the justices extended that principle to non-capital cases in state court (which then, as now, handle the vast majority of criminal cases).

But the Supreme Court in *Betts* refused to recognize a right to counsel in *all* cases. Such a blanket rule, the justices concluded in 1942, was not "dictated by natural, inherent, and fundamental principles of fairness." This meant that trial judges were not required to appoint counsel unless "special circumstances" existed in a particular case. It also meant that defendants who sought a court-appointed lawyer but didn't get one could raise the issue on appeal. Twenty years after *Betts*, by the time Gideon's case came around, it was clear to most prosecutors, judges, and defense attorneys that this case-by-case approach to counsel was inefficient. For once in his life, Clarence Earl Gideon was in the right place at the right time.

'There may be no adversary system'

In America today, the legacy of *Gideon* may be visible in virtually every courtroom in every state on every day of the week. If you count federal, state, and county public counsel, there are approximately 15,000 court-appointed defenders representing millions of criminal suspects, defendants, and inmates all over the country. These lawyers are supported by thousands more administrative assistants. Tax dollars pay for virtually all of it. But despite the time and effort offered up by these advocates, and despite the constitutional mandate that no person should be deprived of an effective advocate, it is not enough.

There are simply too many criminal cases, too few lawyers to handle them, too little in public defense budgets, and far too little political power for reformers seeking to make good on *Gideon's* promise. The leading scholar in this area is probably Stephen B. Bright, [a visiting lecturer at Yale Law School](#) who also serves as president of the [Southern Center for Human Rights](#). In a forthcoming *Yale Law Journal* piece titled "Fifty Years of Defiance and Resistance to *Gideon v. Wainwright*," Bright joined another criminal justice expert, Sia M. Sanneh, a seasoned lawyer with the Equal Justice Initiative, to cogently describe the scope of the problem:

Every day in thousands of courtrooms across the nation, from top tier trial courts that handle felony cases to municipal courts that serve as cash cows for their communities, the right to counsel is violated. Judges conduct hearings in which people accused of crimes and poor children charged with acts of delinquency appear without lawyers. Many plead guilty without lawyers. Others plead guilty and are sentenced after learning about plea offers from lawyers they met moments before and will never see again. Innocent people plead guilty to get out of jail ...

Even when representation lasts for more than a few minutes, it is often provided by lawyers struggling with enormous caseloads, who practice triage as they attempt to represent more people than is humanly--and ethically--possible without the resources to investigate their clients' cases, retain expert witnesses, or pay other necessary expenses. As a result, they are unable to assess cases and give their clients informed, professional advice during plea negotiations that resolve almost all cases in 'system of pleas, not trials.'

In the rare cases that go to trial, they often cannot seriously contest the prosecution's cases, raise and preserve legal issues for appeal, or provide information about their clients that is essential for individualized sentencing. For the poor person accused of a crime, there may be no adversary system. Prosecutors may determine outcomes in cases with little or no input from defense counsel.

No one wants to pay for more public defenders. Or, better put, few people political power care enough about the gross injustices being done to poor people to spend more money trying to ensure they receive adequate representation. "Inadequate funding is the primary source of the systemic failure in indigent defense programs nationwide," concluded Harvard Law School student David A. Simon in a thoughtful [law review piece published a few years ago](#). "Of the more than \$146.5 billion spent annually on criminal justice, over half is allocated to support the police officers and prosecutors who investigate and prosecute cases, while only about two to three percent goes toward indigent defense."

Bright and Sanneh don't just blame lawmakers. "Many judges tolerate or welcome inadequate representation because it allows them to process many cases in a short time," they write. And the problem is made worse, they contend, because the "Supreme Court has refused to require competent

representation, instead adopting a standard of 'effective counsel' that hides and perpetuates deficient representation." Not only that, Simon adds, but the justices have "neglected to specify which level of government -- federal, state or local -- must serve as the guarantor" of the right to counsel nor the "method by which states should administer their public defender programs." No one is responsible, in other words, because everyone is in charge.

Earlier this month, echoing Justice Stevens, Bright told me via email that this problem isn't likely to be solved by a purely top-down approach from the Supreme Court or Congress. "There is a belief," Bright says, "that different approaches may be appropriate for different places." For example, he notes that Maine provides representation completely through assigning private counsel. So does San Mateo County, California, which provides representation through its bar association. But Colorado and other states have state-wide public defender programs that work well.

On the other hand, Bright notes, other states "like Alabama, California, Michigan, New York, and Texas have not put anyone in charge on a state-wide basis but have left selection and administration of a system to their counties." The result is unequal justice layered upon unequal justice, with the quality and level of legal representation depending entirely on the county where it is sought. And this fractional approach is a direct result of the concept of federalism -- of the Supreme Court's concerns about dictating too much to states and counties about how they should comply with the right to counsel.

The myth of Gideon

Over the years, the Gideon case has become more than just a story about the recognition of a right. It has come to represent an idea -- an ideal, really -- representing much of the best we like to believe about our Supreme Court, our justices, and our rule of law. Gideon's story is really a fable. A mighty court hears the cry of the lowliest man. It reaches down to help. It appoints for him one of the most learned counselors in all the land. The state is blunted. And eventually the man, the poor, dignified man, is redeemed. No wonder Henry Fonda wanted to play Gideon in the 1980 [television movie](#).

Anthony Lewis, writing at the time for the *New York Times* -- and, on this story, at the *New Yorker* -- is largely responsible

His prior trial

for this myth-making. His book *Gideon's Trumpet*, published in 1964, remains one of the best nonfiction works written about the Supreme Court and the American legal system. It was Lewis, click-clacking away on his typewriter as a correspondent covering the Court, at the right place at the right time, who first recognized the story the case might one day become. It was Lewis who gained access to all of the key players and whose coverage of the Court in 1963 earned him his second Pulitzer Prize.

"And all of it was sort of romantic," Anthony Lewis would say four decades later, speaking about the case of his lifetime.

"Right from the beginning it struck me" that "something important might well happen," [he told an interviewer in 1993](#), "and it was started by this prisoner's handwritten letter on stationary that said 'Approved Warden' or something like that." From the [state prison](#) in Raiford, Florida, Clarence Gideon had written the justices directly, asking them to overturn his larceny conviction and five-year prison sentence because he had not been given a lawyer at trial.

"It was astonishingly easy to see" Gideon himself, Lewis said of a visit to the prison before the inmate's case was decided by the justices. "The warden and the others were delighted to have me meet him. He was sort of a favorite. He was a harmless old chap." Gideon was also, to use more modern parlance, a habitual criminal. Thirty years earlier, in 1932, he and some confederates had broken into an armory and stolen guns to rob a bank. Their car got stuck in the mud -- and Gideon served five years in federal prison. He had also been prosecuted under state law in Missouri. He was a fellow, in other words, who had seen the insides of a lot of courtrooms and who knew the value of a lawyer.

experience, Lewis came to understand, had given Gideon "a firm idea that people were entitled to lawyers before they were convicted. That was engraved in him. It was an obsession."

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INSTITUTION _____ CELL NUMBER _____
NAME _____ NUMBER _____

In The Supreme Court of The United States
Washington D.C.
Clarence Earl Gideon }
Petitioner }
vs. }
H.G. Cochran, Jr, as }
Director, Division of }
of corrections State }
of Florida }
Petition for a writ
of Certiorari directed
to The Supreme Court
State of Florida.

No. 890 Misc.

OCT. TERM 1961

U. S. Supreme Court

To: The Honorable Earl Warren, Chief
Justice of the United States
Comes now the petitioner, Clarence
Earl Gideon, a citizen of the United States
of America, in proper person, and appearing
as his own counsel, who petitions this
Honorable Court for a Writ of Certiorari
directed to The Supreme Court of The State
of Florida, To review the order and Judge-

Gideon wrote his petition to the Supreme Court for a writ of *certiorari* on five pages of prison stationery. (U.S. National Archives/Flickr)

This trial experience, Lewis came to understand, had given Gideon "a firm idea that people were entitled to lawyers before they were convicted. That was engraved in him. It was an obsession." Lots of prisoners have obsessions about the law. Courthouses are flooded with prisoner complaints and lawsuits chronicling many of those obsessions. But within two years of his conviction, and just about one year after reaching out to the Supreme Court, Gideon's obsession would dictate the law of the land. And the man serving a five-year prison sentence for breaking and entering a poolroom would become one of the most famous Supreme Court litigants of all time.

'Not a system based on a rule of law'

None of us can plead ignorance or even say that we are surprised by the injustice occurring in our name all across the country. For decades, Professor Bright and other lawyers and human rights advocates have been compiling lists of Americans whose rights to counsel has been effectively denied despite the Supreme Court's pronouncement in *Gideon*. The American Bar Association, which has been sounding the alarm for decades now, [concluded 10 years ago](#), on the 40th anniversary of the Gideon ruling, following an intense series of hearings, that "thousands of persons are processed through America's courts each year either with no lawyer at all or with a lawyer who does not have the time, resources, or in some case the inclination to provide effective representation." The ABA Report continued:

All too often, defendants plead guilty, even if they are innocent, without really understanding their legal rights or what is occurring. Sometimes the proceedings reflect little or no recognition that the accused is mentally ill or does not adequately understand English. The fundamental right to a lawyer that Americans assume apply to everyone accused of criminal conduct effectively does not exist in practice for countless people across the United States.

That was 10 years ago. If anything, the problem in the intervening decade has gotten worse because of state budget cuts to public defender programs. So there is the story of the Texas man, charged with murder, who sat in jail for eight months before he was given an attorney. There is the story of the New York woman whose husband died because she wasn't able to take him to dialysis -- because she

couldn't make bail, because she wasn't promptly given a court-appointed lawyer. And there is the [story](#) of a Mississippi woman who spent 11 months in jail, charged only with shoplifting, before a judge appointed an attorney to represent her.

Fifty years after *Gideon*, things are bad most everywhere in America. But they are particularly bad in the South. State officials in Texas have [routinely refused](#) to adequately fund county programs for the defense of the poor. In Georgia, juvenile suspects are herded through court like cattle. In one case to which Bright pointed, a 17-year-old accused of stealing a go-cart was asked by his judge if he was satisfied with his public defender. Confused, the teen said, "I don't have one." At the last minute, an overworked public defender told the judge that he represented the young man. The judge then sentenced the teenager to five years probation, and ordered him to pay a \$300 fine, \$500 in restitution, and a \$50 public defender fee. Can this be consistent with *Gideon*? Surely not.

These stories advocates have compiled -- and thousands more unfolding each year -- do not arise in a vacuum. They are instead the purposeful result of state laws and policies that undercut the premise of *Gideon* at every turn. Some states [require](#) criminal defendants to consult with prosecutors about a plea deal before an "application for appointment of counsel" may be pursued. Other states have "capped" the amount court-appointed lawyers may charge in serious cases. Some states do not give capital defendants any counsel at all for their post-conviction review. Only a few provide counsel for post-conviction review in non-capital cases. Others simply recycle public defenders whose competency is in doubt.

This winter, a poignant documentary titled [Gideon's Army](#) won rave reviews at the Sundance Film Festival. The film, which will air this summer on HBO, was directed and produced by Dawn Porter, an attorney who sought to chronicle the despair of indigent cases. "The average caseload for a public defender in Miami Dade County, Florida, at any one time," the film's promotional material reveals, "is 500 felonies and 225 misdemeanors." The film shows us dedicated young attorneys, in Georgia and elsewhere, drowning in a sea of work, struggling to do the right thing on behalf of their clients. As Bright puts it:

The cost of this one-sided system is enormous. Innocent people are convicted and sent to prison while the perpetrators of crime remain at large. Important issues, such as the system's pervasive

racism -- from stops by law enforcement officers to disparate sentencing -- are ignored. People are sentenced without consideration of their individual characteristics, allowing race, politics, and other improper factors to influence sentences.

Over 2.2 million people -- a grossly disproportionate number of them African Americans and Latinos -- are in prisons and jails at a cost of \$75 billion a year. An additional five million people are on probation, parole, or supervised release. Over 70,000 children are held in juvenile facilities.

'This noble ideal'

It was all a lot simpler in Gideon's day. The [criminalization](#) of America had not yet begun. The federal courts were not yet overrun by drug cases. State prisons were not teeming with millions of prisoners ([2.3 million by this count](#)). And by the time he wrote his letter from the state penitentiary the justices he had written to had come to realize that the rule they had declared in *Betts* was unworkable. By deciding right-to-counsel cases on a case-by-case basis, too many state court judges were refusing to appoint counsel to too many indigent defendants. And too often federal judges were vacating convictions in those cases and sending the cases back to state courts for new trials. It was a self-defeating cycle.

So Gideon's famous letter found a very receptive audience at the Supreme Court. And then the justices appointed Abe Fortas, one of the best attorneys of his time, to represent the prisoner before the Supreme Court. And then Florida appointed a bright young lawyer named Bruce Jacob, an honorable man then and now, to handle the appeal. And then, when he invited attorneys general from other states to chime in on the scope of the right to counsel, to advise the Court about a national consensus, Jacobs was astonished to learn that officials in 22 states (including a young Walter Mondale) wanted the justices to *expand* the right. Gideon may have thought he was alone in his quest. But he had more allies than he knew.



The Warren Court in 1962 (AP)

This helps explain why the oral argument in the case, in January 1963, seemed more like a coronation. Jacobs, appearing before the Court for the first time, was nervous. Later, he would recall, he counted [92 questions thrown at him](#) during the first 30 minutes of his argument. Meanwhile Fortas, who had previously appeared before the justices, was relaxed and confident. Later, Justice William O. Douglas would write that Fortas' argument was probably the best single argument the justice had heard in his 36 years on the Court. Fortas has told colleagues that he wanted a unanimous ruling from the Court and that's precisely what he got.

Justice Black, who had dissented in *Betts v. Brady*, wrote the *Gideon* opinion. The 1942 case was overruled, he declared, and the right to counsel would now be a constitutional right recognized in all felony cases. No longer would defendants too poor to pay for their own lawyers have to convince judges that they were mentally ill or illiterate or drunk or otherwise incapable of representing

themselves. No longer would trial judges have to guess at how much undue prejudice such defendants were likely to cause themselves by acting as their own counsel at trial. Echoing the tone and tenor of Justice Sutherland's poignant passage in *Powell*, the case concerning the "Scottsboro boys," Justice Black wrote:

Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries.

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

The ruling was great news to Gideon. But it didn't exonerate him. It merely declared that he had been entitled to a lawyer when he was first tried. So he was released from prison and promptly re-tried -- this time, with a lawyer, Gideon was acquitted. He was acquitted because his lawyer was able to cast reasonable doubt upon the accuracy and credibility of the main witness against him. He was acquitted because his lawyer knew which questions to ask of other witnesses, and which jurors to remove from the panel, and which objections to make to the questions asked by the prosecutor. In the end, the lawyer Gideon fought so hard to have in his corner performed at trial the way a good lawyer should on behalf of his client. And Gideon was free.

The broken promise

During oral argument in *Gideon*, Abe Fortas had scolded the justices for their "failure to remember

what happens downstairs" in criminal cases, an allusion to the rough-and-tumble world of police interrogations and prosecutorial mischief. It was an astute observation -- and a predictive one. Two decades later, in a 1984 case styled *Strickland v. Washington*, the Court forgot the "downstairs" truths to many criminal cases. The justices issued a decision that subsequently denied an effective right to counsel to millions of criminal defendants. "If *Gideon* offers the promise of justice winning out over poverty," the constitutional scholar David Cole wrote years later, "*Strickland* breaks that promise, allowing the forces of inequality to triumph as only the empty symbol of equality survives."

David Leroy Washington, the defendant in the *Strickland* case, was given a court-appointed lawyer. But Washington was sentenced to death following a penalty phase hearing at which his lawyer did little to present any mitigating evidence to try to save his client's life. Following Washington's conviction, his new lawyers alleged on appeal that he had been denied the "effective assistance" of counsel. Because lower courts had come up with different standards in assessing the boundaries of the right to counsel under *Gideon*, and because those standards in many ways were contradictory, the justices accepted the case for review.

In the end, as Cole would write, the Supreme Court chose "the most difficult existing test for defendants to meet with respect to ineffective assistance claims." To show "ineffective assistance," a defendant under *Strickland* has to show that his lawyer's work was outside the range of professional competence and that he, the client, had been prejudiced by it. Not only that, but the justices in *Strickland* stressed that the range of competence was to be viewed broadly, giving great deference to the work of the lawyer, and that the showing of prejudice was to be viewed narrowly, giving little credit to the harm caused to the client.

Since the Strickland decision, the Supreme Court has recognized some "ineffective

The decision immediately undercut both the premise and the promise of *Gideon*. In many significant ways, the justices had returned to the federalism principles that had animated their pre-*Gideon* rulings -- from now on, state judges would again have broad discretion to evaluate right-to-counsel cases. The *Strickland* court, Cole wrote, "was evidently driven by concerns about an avalanche of such claims if the standard were too easy

assistance" claims, but it has tolerated the individual injustices described above and thousands more.

to meet. But the Court seems to have wholly overlooked the danger on the other side of the scale; namely, that atrocious lawyering would be executed as 'effective' because the Court set the bar for 'effective' so low."

The practical results of the *Strickland* decision were immediately apparent -- and devastating to defendants whose constitutional rights were prejudiced by it. "Courts have

declined to find ineffective assistance where defense counsel slept during portions of the trial, where counsel used heroin and cocaine throughout the trial," Cole says, and "where counsel allowed his client to wear the same sweatshirt and shoes in court that the perpetrator was alleged to have worn on the day of the crime, where counsel stated prior to trial that he was not prepared on the law or facts of the case, and where counsel appointed in a capital case could not name a single Supreme Court opinion on the death penalty."

Cole chronicled the failings of *Strickland* many years ago. In the intervening years, the Supreme Court has recognized [some](#) "ineffective assistance" claims, and denied [many others](#), but it has tolerated the individual injustices described above and thousands more. When I asked former Justice Stevens about the Court's current jurisprudence on this topic, he said he believed that states were responsible for adequately funding indigent defense work. The problem is that neither he nor his colleagues on the Court in the years since *Strickland* have ever punished any state for failing to do so. Today, *Gideon*, decided in 1963, seems as much an anachronism as Camelot itself.

Fixing the problem

In 1993, on the 30th anniversary of the ruling, Anthony Lewis, speaking at American University, candidly [recalled](#) his own feelings while working on *Gideon's Trumpet*. "I was naïve about the promise of equal justice," he explained. "I assumed that our political system would vindicate the rights established in *Gideon v. Wainwright*, but we are far from doing that, in my judgment." Similarly, Bruce Jacob, the young Florida state attorney who lost the *Gideon* case in 1963, would say later: "I hoped that legislatures would meet the challenge. That was at a time in my life when I still believed that legislators want to do the right thing."

One way to accomplish the necessary reform is for civil libertarians to file [expensive lawsuits](#) forcing state officials to own up to their constitutional obligations under *Gideon*. Another is to convince those same officials to see the adequate funding of indigent defense services as an investment. The more states spend on public defenders, the better those public lawyers will be able to represent their clients. And the better they represent their clients, the [less government will have to spend on jail costs](#). Never mind the constitutional commands that demand fairness and justice, it is a matter of simple economics. The more government invests at the beginning of criminal cases, the less it will have to invest at the end.

Smart people already are trying to work on the problem. Earlier this year, for example, the Criminal Justice Section of the American Bar Association [urged](#) Congress to establish a federally-funded Center for Indigent Defense Services "for the purpose of assisting state, local, tribal and territorial governments in carrying out their constitutional obligation to provide effective assistance of counsel." The idea behind this push for more federal involvement is simple -- and based on the disparate funding at the state and local level that is largely responsible for the injustices noted above and all the rest.

But it's not only about money. Through the American Bar Association, lawyers and judges also are working on solutions that candidly acknowledge "budget priorities on both the federal and the state levels make it unlikely that any imminent influx of new resources will be available for public defense." The title of this proposal is [National Indigent Defense Reform](#) and it is notable because it, too, suggests that lawyers and others have all but given up on this Supreme Court as it is currently constituted to return meaning to the premise and the promise of *Gideon*.

Fifty years ago, a simple, uneducated man -- "the poorest and least powerful of men," Lewis called *Gideon* -- asked the justices for help and got it. Such a response from the current Court is virtually unthinkable. The fact today is that there are two levels of justice in America, one for the rich and one for the poor -- the very essence of the unequal justice that *Gideon* was supposed to end. As Bright pointedly puts it, "it is better to be rich and guilty than poor and innocent" in America today.

In the end, 50 years after one of the most glorious chapters in the history of the Supreme Court, we tell ourselves that we are a nation of laws, and we praise ourselves for rulings like *Gideon*, and we extol the

virtues of the Constitution in theory, but the truth is we are just lying to ourselves and each other when we pretend that there is equal justice in America. Either there is a right to counsel or there isn't. And if there is such a right, we all have an obligation to ensure it is recognized -- not just in the history books, and not just in a television movie, and not just in a dusty law book, but in the everyday lives of our fellow citizens.

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