

Turning Celebrated Principles Into Reality

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No constitutional right is celebrated so much in the abstract and observed so little in reality as the right to counsel.

While leaders of the judiciary, legal profession and government give speeches every Law Day about the essential role of lawyers in protecting the individual rights of people accused of crimes, many states have yet to create and fund adequately independent programs for providing legal representation. As a result, some people — even people accused of felonies — enter guilty pleas and are sentenced to imprisonment without *any* representation. Others languish in jail for weeks or months — often for longer than any sentence they would receive — before being assigned a lawyer. Many receive only perfunctory representation — sometimes nothing more than hurried conversations with a court-appointed lawyer outside the courtroom or even in open court — before entering a guilty plea or going to trial. The poor person who is wrongfully convicted may face years in prison, or even execution, without any legal assistance to pursue avenues of post-conviction review.

United States Supreme Court justices give speeches decrying the poor quality of legal representation and acknowledging the likelihood that innocent people have been executed, but continue to apply a standard of representation that makes a mockery of the right to counsel. Last Term, the Court upheld death sentences in one case in which the lawyer had represented the victim of the murder that his client was convicted of committing and another in which the lawyer gave no closing argument at the penalty phase. The United States Court of Appeals for the Fifth Circuit, sitting *en banc*, was sharply divided over whether the right to counsel is violated when the one lawyer appointed to defend the accused in a capital case sleeps during the trial. After a panel held it did not, the *en banc* court reversed, but 5 of the 14 judges on the court dissented and would have allowed the defendant to be executed.

And, as the 40th anniversary of the Supreme Court’s historic decision in *Gideon v. Wainwright*¹ approaches, the Attorney General of the United States takes the position that anyone he labels an “enemy combatant” can be denied a lawyer and held incommunicado indefinitely.

For far too many people accused of crimes, the right to counsel is meaningless and unenforceable. The 40th anniversary of *Gideon* requires a sober assessment of just how far short most governments have fallen in meeting their constitutional responsibilities under *Gideon*. It also requires a candid recognition of the tremendous resistance to *Gideon* by some prosecutors, judges, legislators, governors, lawyers and lay people, the indifference of many others, and the enormous difficulty of protecting the rights of people without a constituency in an era when public policy is driven by campaign contributions and courts are unwilling to protect individual rights. And it requires a recommitment to making the right to counsel a reality, and a careful appraisal of new ways of seeking that goal, such as greater use of impact litigation in both the state and federal courts.

The 40th anniversary of *Gideon* is also an occasion for recognizing the dedication and commitment of attorneys who have proudly and capably defended poor people accused of crimes. Many lawyers work long hours under the burden of overwhelming caseloads and the immense pressure of being responsible for the lives and liberty of too many fellow human beings. Many are not adequately compensated and are routinely denied necessary investigative and expert assistance. They endure the hostility of judges, prosecutors and segments of the public for doing their job. These heroes in the struggle to achieve equal justice carry on, day after day, year after year, providing a zealous defense for the poorest and most powerless people in our society, making good on *Gideon* even though the larger society has failed to do so.

This is also an occasion for recognizing the programs that provide the accused with representation by capable lawyers who are trained, supervised, adequately compensated and provide the investigative and expert assistance needed to represent people properly. These programs provide examples of how to reduce the gap between rhetoric and reality and achieve equal justice.

1. *Gideon v. Wainwright*, 372 U.S. 335 (March 18, 1963).

Principles celebrated but not enforced

President William Howard Taft told the Virginia Bar Association early in the 20th century, “Of the questions that are before the American people, I regard no one as more important than the administration of justice. We must make it so that a poor [person] will have as nearly as possible an equal opportunity in litigating as the rich [person], and under present conditions, ashamed as we may be of it, that is not the fact.”

The situation was even more shameful than the President acknowledged. Many states in the South had not only failed to provide lawyers to people accused of crimes, but leased convicted prisoners to plantations, railroads, turpentine camps, or other private interests that needed cheap labor.² When a work force was needed, men would be arrested for vagrancy and other minor crimes, convicted and leased. African Americans were sent to prison on almost any pretext. Many convicts were worked to death. One historian has observed that “[t]he South’s economic development can be traced by the blood of its prisoners.”³

Although convict leasing was replaced by prisons in the late 19th and early 20th centuries, many states did not provide lawyers for poor people accused of crimes except in capital cases. And in those cases, the accused often received only token representation. In the 1920s and 30s, many communities replaced lynchings, which were giving them a bad reputation, with quick trials where the accused were provided only perfunctory representation before being sentenced to death and executed. These proceedings “retained the essence of mob murder, shedding only its outward forms.”

A half century after President Taft’s speech, the United States Supreme Court, speaking through Justice Hugo Black, expressed the same sentiment he had in *Griffin v. Illinois*, declaring, “[t]here can be no equal justice where the kind of trial a [person] gets depends on the amount of money he [or she] has” in holding that the government must provide a transcript to a convicted defendant for purposes of appeal.⁴

2. See David M. Oshinsky, *WORSE THAN SLAVERY: PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE* 35-37, 40-50, 55-81 (1996).

3. *Id.* at 60.

4. *Griffin v. Illinois*, 351 U.S. 12 (1956).

A few years later in response to Clarence Earl Gideon's hand-written petition, the Court held that the government must also provide a lawyer for the accused in felony cases. The Court observed, "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 him," before concluding, "lawyers in criminal cases are necessities, not luxuries."⁵

A decade later, the Court expressed its concern about "assembly line justice," where pleas were accepted without adequate attention to the individual defendant, in *Argersinger v. Hamlin*.⁶ Emphasizing the importance of a lawyer in helping defendants decide whether to plead guilty or go to trial, the Court held that no imprisonment may be imposed unless the accused was represented by counsel. The Court called upon the legal profession to expand the availability of counsel "so that no person accused of crime must stand alone if counsel is needed."⁷

But these principles are more easily stated by the Supreme Court than implemented by legislatures and enforced by the courts. Many members of the legal profession have been far more responsive to the extraordinary income that can be generated through the practice of law than to the Supreme Court's call to expand the availability of counsel to the poor.

Realization of *Gideon* and its progeny requires structure, resources, independence and a standard of representation enforced by the courts. While the Supreme Court has set the standard of representation so low as to be virtually meaningless, some states have created independent programs and some have adequately funded them. For example, Florida promptly responded to *Gideon* with the creation of public defender offices in each judicial circuit. The outstanding work of two veteran attorneys in preventing a wrongful conviction for murder is featured in the Academy Award-winning documentary, *Murder on a Sunday Morning*. However, 40 years after *Gideon*, many jurisdictions lack all four of these essential elements.

Resistance to Gideon

While some states have implemented the right to counsel recognized in *Gideon*, others have resisted. For example, Georgia's legislature rejected a proposal for

5. *Gideon*, 372 U.S. at 344.

6. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

7. *Id.* at 36.

statewide funding for indigent defense in 1976 after being told by the state's prosecutors that it was "the greatest threat to the proper enforcement of the criminal laws of this state ever presented." The opposition of Georgia's judges and prosecutors delayed any state funding for years and has prevented to this day the creation of an independent, adequately funded system for providing indigent defense in Georgia.

Thirty years after *Gideon*, a judge of the Texas Court of Criminal Appeals decried its "mischievous results" and lamented that the decision deprived Texas of "its sovereignty in right to counsel matters for indigent defendants," arguing that a case-by-case assessment of whether the accused needed counsel was "better reasoned and more true to principles of federalism."⁸ This statement is particularly remarkable because at the time Texas had done virtually nothing to implement *Gideon*, leaving the responsibility for the representation of indigents to its counties.

Many state and local governments have been concerned chiefly with cost, not the quality of the defense or the fairness of their process for people accused of crimes. When they have examined factors other than costs, many evaluate indigent defense programs not from the standpoint of ensuring fair trials, but with an eye to increasing administrative convenience in moving dockets.

The need for structure, organization and training for prosecutors, judges, and clerks is universally acknowledged. Courts and prosecutors offices are usually organized by judicial districts, have full-time staffs and associations or other organizations for providing training and mutual support. But no such structure exists in many states for providing defense services.

For example, Texas, which has 254 counties, and Georgia, which has 159 counties, leave primary responsibility to their counties to provide representation for those who cannot afford lawyers. In some counties, there may be different approaches to providing counsel in different courts. Such a hopelessly fragmented system cannot and does not deliver a consistent quality of legal representation. In addition, both states for many years left funding entirely to the counties, and now provide the counties with only a small percentage of the total cost of indigent defense.

Resistance to providing counsel was renewed last year when the Supreme Court held in *Alabama v. Shelton* that lawyers must be provided in cases in which the defendant

8. See *Ex parte Jordan*, 979 S.W.2d 61 (Tex. Crim. App. 1994) (McCormick, P.J., dissenting).

is placed on probation but faces imprisonment for a violation of probation.⁹ Judges on some municipal and other courts that handle petty offenses without providing lawyers announced their intention to carry on business as usual, by extracting waivers of counsel, finding a “loophole” in the decision, or even disregarding it.

But more jurisdictions are overcoming the resistance to *Gideon*. Arkansas established a state-wide, state-funded public defender system five years ago, and Virginia is now establishing public defender and capital defender offices. Still, resistance continues in states such as Mississippi, where a bill to create a state-wide defender system passed the State Senate in 1997, but was blocked in the House. Mississippi still leaves the representation of indigents up to each county.

And a bad situation is deteriorating in many places. Legislators pass crime bills which include greater appropriations for law enforcement, crime laboratories and prosecutors, producing more arrests and prosecutions, but fail to provide adequate funding for indigent defense, causing the system to become even more out of balance.

Justice on the cheap

In the absence of adequate funding to attract competent lawyers to defend the poor, some jurisdictions still conscript unwilling lawyers to defend the poor. When their turn comes, the tax lawyer and the real estate lawyer are assigned a criminal case. This is much like assigning a dentist a patient who needs brain surgery, but courts operate on the fiction that anyone licensed to practice law can handle any kind of case even though ethical considerations require lawyers to decline cases they cannot competently handle. A Georgia lawyer who practices real estate law from his home filed suit last year seeking to prohibit the court in his county from appointing him to represent children accused of crimes because he was not competent to defend them.

Other jurisdictions contract with one or more attorneys to represent all the indigent defendants for a fixed price. The lawyer is allowed to maintain a private practice, thus creating a disincentive for the lawyer to devote much time to indigent clients. Some jurisdictions award the contracts to the lawyer who submits the lowest bid. A family of lawyers who contracted with four counties in Georgia to provide representation for the past 20 years handled felony cases at an average cost of less than \$50 per case. In another county, a contract lawyer came to court with responsibility for 94 people set for trial on the same day. Most cases were resolved with hastily arranged plea deals; none were tried.

9. *Alabama v. Shelton*, 122 U.S. 1764 (2002).

While some jurisdictions provide competent representation through a public defender or an assigned counsel program, many fail to fund them adequately, leaving underpaid lawyers with staggering caseloads and insufficient resources for investigation and experts. Some states pay assigned counsel such low rates that attorneys make less than the minimum wage in some cases.

Judges assign lawyers to defend the accused in many states. Ensuring competent counsel is not always the highest priority for judges appointing lawyers. A study of homicide cases in Philadelphia revealed that judges there appointed attorneys to defend cases based on political connections, not on legal ability. In a survey of Texas judges, over half said that judges they knew based their appointments in criminal cases in part on whether the attorneys were political supporters or had contributed to the judge's political campaign. A quarter of the judges admitted that *their own* decisions in appointing counsel were influenced by these factors. Another survey of Texas judges found that almost half admitted that an attorney's reputation for moving cases quickly, *regardless of the quality of the defense*, was a factor that entered into their appointment decisions.

And providing zealous representation is not always the highest priority for lawyers who are dependent upon judges for business. An experienced criminal defense lawyer in Houston said, "The mindset of a lot of court-appointed lawyers is to please the judge, to curry favor with the judge by getting a quick guilty plea from the client. Then everybody's happy."

No justice at all

As a result of the failure of many states to meet their constitutional obligations under *Gideon*, it is generally acknowledged that the kind of justice one receives depends very much on the amount of money one has, contrary to Justice Black's statement in *Griffin v. Illinois* and the phrase "Equal Justice Under Law" engraved on the Supreme Court building.

The difference is evident from the start. A person who can afford to retain a lawyer usually does so within hours of arrest, and the lawyer may secure the client's release shortly thereafter. People who cannot afford a lawyer may spend weeks or months in jail before being assigned a lawyer. Those who can afford a lawyer receive individual representation. Those who cannot afford a lawyer are often processed through the courts with only a few minutes of a lawyer's time.

But of far greater consequence of inadequate representation is the ultimate outcome of the case. The exoneration of over 100 people previously sentenced to death and the release of even more people as a result of DNA evidence has demonstrated the most drastic consequence of inadequate representation — conviction of the innocent. In many courts, it is far better to be rich and guilty than poor and innocent.

Governor George Ryan declared a moratorium on executions in Illinois in 2000 because between 1987 and 2000, the state had released 13 people from death row who had been exonerated, while executing 12. Four of those exonerated were represented at trial by attorneys who were later disbarred or suspended.¹⁰ Dennis Williams was represented at his first trial by an attorney who was later disbarred and at his second trial by a different attorney who was later suspended. Williams was convicted twice of the 1978 murders of a couple from Chicago's south suburbs before being exonerated by DNA evidence.

One-third of the lawyers who represented people sentenced to death in Illinois have been disbarred or suspended. One of the lawyers, a convicted felon and the only lawyer in Illinois history to be disbarred twice, represented four men who were sentenced to death. He handled those cases after being disbarred once and then reinstated despite concerns about his emotional stability and drinking.

The same poor quality of representation by lawyers has led to wrongful convictions throughout the country. Some lawyers were not qualified to handle criminal cases.

Gary Drinkard was sentenced to death in Alabama at a trial where he was represented by a lawyer who did collections and commercial work, another who handled foreclosures and bankruptcy cases, and a recent law graduate. Drinkard was imprisoned for seven years, five of them on Alabama's death row, before receiving a new trial at which he was represented by criminal defense lawyers with experience in defending capital cases. After they proved that he was at home on the night the murder was committed with a back injury so severe that it would have been impossible for him to commit the crime, he was acquitted and released.

In some cases, the system gets what it pays for. Frederico Martinez-Macias was represented at his capital trial in Texas by a court-appointed attorney paid only \$11.84

10. Ken Armstrong & Steve Mills, *Inept Defense Cloud Verdicts*, CHICAGO TRIBUNE, Nov. 15, 1999, at 1.

per hour.¹¹ After a full investigation and development of facts regarding his innocence by *pro bono* lawyers from Skadden, Arps, Slate, Meagher & Flom, Martinez-Macias won federal *habeas corpus* relief. A grand jury refused to re-indict him, and he was released after nine years on death row.

Numerous other wrongful convictions exposed through DNA evidence are described by Barry Scheck, Peter Neufeld and Jim Dwyer in their important book, *Actual Innocence* (2000). Unfortunately, for many people convicted in the criminal courts, there is no biological evidence for DNA testing and no volunteer lawyer who steps forward to take the case.

But even if the accused is guilty of a crime, the knowledge and skills of counsel are essential to protect the integrity of the process and ensure that courts make well informed decisions on issues ranging from bail to sentence. For example, lawyers appointed to defend Horace Dunkins in Alabama did not present evidence that he was mentally retarded, and lawyers appointed to defend Robert Sawyer in Louisiana did not present evidence of his mental illness. The juries did not have this critical information when they determined sentence. Nevertheless, both were executed.

The quality of legal representation tolerated by some courts shocks the conscience of a person of average sensibilities. But poor representation resulting from lack of funding and structure has become a part of the culture of the courts, and it has been accepted as the best that can be done with the limited resources available.

For example, judges in Houston, Texas repeatedly appointed, over 40 years, a lawyer known for hurrying through trials like “greased lightning,” to represent indigent defendants. Ten people represented by the lawyer were sentenced to death. In at least two of those cases, the lawyer slept during parts of the capital trial.

In Calvin Burdine’s case, the clerk of the court testified that “defense counsel was asleep on several occasions on several days over the course of the proceedings.” The lawyer’s file on the case contained only three pages of notes. Most people caught sleeping on the job in any line of work are fired. But Houston judges continued to appoint Burdine’s trial lawyer, the late Joe Frank Cannon, to capital and other criminal cases, and the Texas Court of Criminal Appeals found that a sleeping

11. *Martinez-Macias v. Collins*, 979 F.2d 1067 (5th Cir. 1992).

attorney was sufficient “counsel” under the Sixth Amendment.¹²

A United States District Court, making the unremarkable observation that “sleeping counsel is the equivalent of no counsel at all,” granted Burdine *habeas corpus* relief,¹³ but a panel of the Fifth Circuit reversed the grant of *habeas corpus* relief.¹⁴ The court, sitting *en banc*, held in a 9-5 decision that Burdine was entitled to a new trial.¹⁵ When Burdine returned to Houston for retrial, the trial judge refused to appoint the lawyer who had represented him for 15 years in post-conviction proceedings and instead appointed a lawyer who had no familiarity with Burdine or his case.

The same lawyer who slept during Burdine’s trial slept during the trial of Carl Johnson, but both the Texas Court of Criminal Appeals and the Fifth Circuit upheld the conviction and sentence. Neither court published its opinion. Carl Johnson was executed in 1995.¹⁶

How can trial judges preside over cases in which the lawyer for a person facing the death penalty sleeps? A Houston judge who presided over the case of George McFarland answered, “The Constitution doesn’t say the lawyer has to be awake.”¹⁷ The Texas Court of Criminal Appeals upheld the death sentence imposed on McFarland, rejecting his claim that he was denied his right to counsel over the dissent of two judges who pointed out that “[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense.”¹⁸

Of course, most lawyers do not sleep during trial. But the bitter division of a federal court over whether sleeping during a capital trial violates the Sixth Amendment sadly

12. *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995).

13. *Burdine v. Johnson*, 66 F. Supp. 2d 854, 866 (S. D. Tex. 1999).

14. *Burdine v. Johnson*, 231 F.3d 950 (5th Cir. 2000).

15. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc).

16. David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C.L. REV. 691, 711 (1996).

17. John Makeig, *Asleep on the Job, Lawyer Says*, Houston Chron., Aug. 14, 1992, at A35.

18. *McFarland v. Texas*, 928 S.W.2d 482 (Tex. Crim. App. 1996).

demonstrates how little regard the courts have for the right to counsel. Harold Clarke, then Chief Justice of the Georgia Supreme Court, aptly described the efforts of Georgia and many other states in providing counsel for the poor: “[W]e set our sights on the embarrassing target of mediocrity. I guess that means about halfway. And that raises a question: Are we willing to put up with halfway justice? To my way of thinking, one-half justice must mean one-half injustice, and one-half injustice is no justice at all.”¹⁹

Most fundamental right

The right to counsel is the most fundamental constitutional right because an attorney is needed to protect the client’s rights and marshal the evidence necessary for a fair and reliable determination of guilt or innocence and, if guilty, a proper sentence. But who asserts the right to counsel for a defendant who cannot afford counsel and has no knowledge of the legal system?

The lawyer who submits the lowest bid for a county’s indigent defense business is not necessarily capable of defending criminal cases. In courts where lawyers are appointed by judges, it is no secret that judges do not always appoint the best and brightest to defend the poor. In part, this is because judges do not want to impose on those members of the profession who have more financially lucrative things to do. Many judges also appoint lawyers who try cases rapidly, instead of zealously, in order to move their dockets.

The indigent defendant represented by an incapable lawyer may not even know he has a right to something better than the lowest bidder, the lawyer who takes the “greased lightning” approach to handling cases, or a lawyer who is so undercompensated, so overworked or so incompetent that adequate representation cannot be provided.

Even those who recognize that their lawyers are not adequate may not complain out of fear that the quality of the representation will deteriorate even more if they voice a complaint. And there is the equally valid fear that the next lawyer appointed by the same judge may be even worse.

The difficulty of enforcing the right to counsel is illustrated by the plight of an African-American man, Gregory Wilson, who faced the death penalty in Covington, Kentucky. The judge presiding over the case had difficulty finding a lawyer for

19. Chief Justice Harold G. Clarke, *Annual State of the Judiciary Address*, reprinted in *FULTON COUNTY DAILY REPORT*, Jan. 14, 1993, at 5.

Wilson, because a Kentucky statute limited compensation for defense counsel in capital cases to \$2500.

When the head of the local indigent defense program suggested to the judge that more compensation was necessary to obtain a lawyer qualified for such a serious case, the judge suggested that the indigent defense program rent a river boat and sponsor a cruise down the Ohio river to raise money for the defense.

The judge eventually obtained counsel by posting a notice in the courthouse asking any member of the bar to take the case with the plea “PLEASE HELP. DESPERATE.” The notice said nothing about qualifications to handle a capital case. The judge appointed two lawyers who responded.

This method of selecting counsel did not produce a “dream team.” The lead counsel can charitably be described as well past his prime. The lawyer did not have an office, but practiced out of his home, where a Budweiser beer sign was visible. The police had recently pried up the boards in his living room floor and recovered stolen property. The telephone number he gave Wilson was for a bar called “Kelly’s Keg.” The other lawyer, who had volunteered to assist lead counsel, had no felony trial experience.

Wilson, realizing that the lawyers were not up to the task of defending a capital murder case, repeatedly objected to being represented by the lawyers. He repeatedly asked the judge that he be provided with a lawyer who was capable of defending a capital case. The judge refused and proceeded to conduct a trial that was a travesty of justice. Lead counsel was not even present for much of the trial. He cross-examined only a few witnesses, including one witness whose direct testimony he missed because he was out of the courtroom. Wilson was sentenced to death.

What more could Gregory Wilson do to enforce his Sixth Amendment right to counsel? He objected. He complained about the lawyers appointed by the judge, who were clearly incapable of defending a capital case. He asked for a real lawyer. But even these efforts were insufficient to enforce the right to counsel.

Supposedly, the right to counsel can be protected *after* the defendant has received ineffective assistance and been convicted. The defendant, perhaps an innocent person whose life may have been destroyed by the ordeal of trial and jail, can assert a claim of ineffective assistance of counsel. But the Catch-22 for most poor people is that they cannot prove an ineffectiveness claim without a competent lawyer.

The U.S. Supreme Court has held that indigents are not entitled to a lawyer for state post-conviction proceedings, where claims of ineffective assistance are often raised.²⁰ Even if the defendant is provided a lawyer to raise a claim of ineffectiveness, the court that failed to provide competent counsel at trial is unlikely to provide any more competent counsel for post-conviction proceedings.

Exzavious Gibson, a man with an I.Q. of less than 80 who was condemned to die by Georgia, had no lawyer in the state post-conviction proceedings and was unable on his own to challenge the effectiveness of his court-appointed lawyer. Gibson's evidentiary hearing started as follows:

The Court: Okay. Mr. Gibson, do you want to proceed?

Gibson: I don't have an attorney.

The Court: I understand that.

Gibson: I am not waiving my rights.

The Court: I understand that. Do you have any evidence you want to put up?

Gibson: I don't know what to plead.

The Court: Huh?

Gibson: I don't know what to plead.

The Court: I am not asking you to plead anything. I am just asking you if you have anything you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.²¹

20. *Pennsylvania v. Finley*, 481 U.S. 551 (1987). The Court has held that even in capital cases, there is no right to counsel in post-conviction proceedings. *Murray v. Giarratano*, 492 U.S. 1 (1989).

21. *Gibson v. Turpin*, Super. Ct. of Butts Co., Ga., No. 95-V-648, Transcript of hearing of Sept. 12, 1996, at 2-3.

Nevertheless, the court went ahead with the hearing. The state was represented by an assistant Attorney General who specialized in capital *habeas corpus* cases. After his former attorney had been called as a witness against him, Gibson was asked if he wanted to cross-examine:

The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

The Court: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.²²

Gibson tendered no evidence, examined no witnesses, and made no objections. The judge denied Gibson relief by signing an order prepared by the Attorney General's office without making a single change.

A few states, unlike Georgia, provide inmates with representation in post-conviction proceedings even though the Constitution does not require them to do so. Some inmates are fortunate to have capable lawyers represent them *pro bono* or by a public interest program. But poor people convicted of crimes in many state criminal courts lack any access to lawyers to file post-conviction petitions challenging the effectiveness of the representation they received. For them, there is simply no remedy for the denial of their most fundamental right.

22. *Id.* at 67.

The Supreme Court's failure to enforce the right to counsel

Even those who obtain new and competent counsel to bring claims of ineffective assistance may not receive relief because of the standard established by the Supreme Court in *Strickland v. Washington*.²³ Although the Supreme Court held in *Gideon* that a poor person facing felony charges “cannot be assured a fair trial unless counsel is provided for him,” the courts have since held that the lawyer need not be aware of the governing law,²⁴ sober,²⁵ or even awake.²⁶

Judge Alvin Rubin of the Fifth Circuit put it bluntly:

The Constitution, as interpreted by the courts, does not require that the accused, even in a capital case, be represented by able or *effective* counsel... . Consequently, accused persons who are represented by “not-legally-ineffective” lawyers may be condemned to die when the same accused, if represented by effective counsel, would receive at least the clemency of a life sentence.²⁷

Supreme Court justices have expressed concern about the adequacy of representation in capital cases and noted the relationship between the adequacy of representation and the risk of unreliable verdicts and sentences. Justice Ruth Bader Ginsburg has said that she has “yet to see a death case, among the dozens coming to the Supreme Court on eve of execution petitions, in which the defendant was well represented at trial”

23. 466 U.S. 668 (1984).

24. See Stephen B. Bright, Counsel for the Poor: *The Death Sentence Not for the Worst Crime But for the Worst Lawyer*, 103 YALE L. J. 1835, 1839 (1994); *A Lawyer Without Precedent*, HARPER'S, June 1997, at 24, 26) (transcript of lawyer testifying he was not aware of any case from any court).

25. See Jeffrey L. Kirshmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425, 455-60 (1996).

26. See *McFarland v. Texas*, 928 S.W.2d 482 (Tex. Crim. App. 1996) (upholding death sentence even though lead defense counsel slept during trial); David R. Dow, *The State, the Death Penalty, and Carl Johnson*, 37 B.C. L. REV. 691, 694-95 (1996) (describing the case of Carl Johnson, who was executed even though his defense counsel slept during portions of the trial).

27. *Riles v. McCotter*, 799 F.2d 947, 955 (5th Cir. 1986) (Rubin, J., concurring).

and that “[p]eople who are well represented at trial do not get the death penalty.”²⁸ Justice Sandra Day O’Connor, expressing similar concerns, has said that “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”²⁹

Yet the Court has refused to adopt minimum standards or even explain to a nation that is increasingly concerned about the conviction of innocent people, and the poor quality of legal representation in criminal cases in general and capital cases in particular, how the Constitution permits the current unequal, unfair, arbitrary and discriminatory state of affairs to continue. The Court has denied scores of petitions of people who received deplorable representation and upheld death sentences in one case in which the lawyer had represented the victim of the murder that his client was convicted of committing,³⁰ and another in which the lawyer gave no closing argument at the penalty phase.³¹

Keeping alive the dream of equal justice

Forty years after *Gideon*, many state legislatures are still unwilling to create the structure and pay the price for adequate representation; the Supreme Court is unwilling to enforce the right to counsel by adopting a standard of competence; and many of those responsible for the justice system resist implementing *Gideon*, regarding it an unfunded mandate from the federal government, or are indifferent to the scandalous quality of legal representation provided to those who cannot afford a “real lawyer.”

There is a temptation to give up hope that many poor people who face the loss of life or liberty will ever receive adequate representation, and to concede that perhaps the time has come to sandblast the words “Equal Justice Under Law” off the Supreme Court building and acknowledge that we have country-club justice for the wealthy

28. Ruth Bader Ginsburg, *In Pursuit of the Public Good: Lawyers Who Care*, Joseph L. Rauh Lecture at the David A. Clarke School of Law of the University of the District of Columbia (Apr. 9, 2001) http://www.supremecourtus.gov/publicinfo/speeches/sp_04-09-01a.html.

29. Justice Sandra Day O’Connor, Remarks at the Meeting of the Minnesota Women Lawyers (July 2, 2001).

30. *Mickens v. Taylor*, 122 S.Ct. 1237 (2002).

31. *Bell v. Cone*, 122 S.Ct. 1843 (2002).

and plantation justice for the poor.

But even though equal justice has never been achieved, it is the most fundamental aspiration of our legal system. It represents the kind of legal system we would like to have and the kind of society we aspire to be. On the 40th anniversary of *Gideon*, lawyers should ask themselves whether they have done enough to keep alive the promise of equal justice and what more they can do.

They can bring lawsuits. Many states comply with the United States Constitution only when ordered to do so by federal courts. It was only through federal court orders that the schools were desegregated, the prisons made slightly less brutal, the mental health institutions improved a bit, and other changes in the status quo grudgingly achieved. It is clear that litigation in both state and federal courts and perseverance over many years will be required to implement *Gideon* in many jurisdictions. The great Georgia lawyer, Edward T. M. Garland, after bringing one such suit, promised that another would be “coming soon to a courthouse near you.”

A suit brought by Garland and others resulted in the creation of a public defender office in Coweta County, Georgia. In the two years prior to the suit, over half of the defendants in *felony* cases were processed through the court without lawyers. Two suits in Fulton County, which includes Atlanta, resulted in continuous representation of people from arrest to indictment, reduction in the time between arrest and court appearances for people accused of misdemeanors, and the provision of public defenders to people facing misdemeanor charges. Improvements in indigent defense programs in Connecticut and other states have been achieved through litigation. In Mississippi, several counties are suing the state, seeking to require it to fund indigent defense.

A single public defender, Rick Teissier, challenged the excessive caseloads and lack of investigative assistance in his office in New Orleans. The Louisiana Supreme Court found that caseloads were so excessive and investigative resources so limited that clients were “not provided with the effective assistance of counsel the Constitution requires,” required pretrial hearings on whether lawyers could effectively handle the number of cases assigned to them, and prohibited prosecutions from going forward in cases where effective assistance could not be provided due to a lawyer’s workload and lack of resources.³²

32. See *State v. Peart*, 621 So. 2d 780, 790 (La. 1993).

Lawyers must also speak out. They must not be silent about the failure to provide equal justice or apologists for a system which fails to provide competent representation. They must bear witness to the deficiencies of the system in the hope of prompting state legislatures and courts to take their eyes off the embarrassing target of mediocrity and to take aim at a full measure of justice for all citizens. They must be at the legislature representing those who do not have a constituency and arguing for the structure, funding and independence that is necessary for the adversary system to work.

More law schools must follow the example of Harvard, New York University, Georgetown and other schools which have outstanding clinical programs educating students and serving the poor in many areas. These programs not only teach students how to defend people accused of crimes, but they also educate students about the desperate need for legal services of those whose lives or liberty is at stake in the legal system.

Individual lawyers must provide zealous representation to some poor people, even if the government fails in its larger responsibility of providing legal services to everyone. As a result of the efforts of some dedicated lawyers, some innocent people will avoid wrongful conviction; some troubled youths will be diverted to drug, alcohol, mental health, job training and other programs instead of prisons; some will live instead of being put to death by the government, and others will receive professional advice and zealous advocacy through what is to them the strange and foreign land of the criminal justice system.

These efforts demonstrate a recognition of the preciousness of life, liberty, fairness and adherence to the Bill of Rights in a time and a culture of misplaced values and indifference to injustice. They set an example that reminds us that achieving equal justice for all is not beyond the grasp of this wealthy society. And for the defendants who are fortunate to be represented by these lawyers, the promise of *Gideon v. Wainwright* will be realized.

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