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Lamentations, Celebrations, and Innovations: *Gideon* at 50

John D. King*

What does one name a symposium for the 50th anniversary of *Gideon v. Wainwright*? *Celebrating* the right to counsel? *Lamenting* the right to counsel? *Observing* the right to counsel? Few cases are as simultaneously lamented and celebrated as *Gideon*, the case that established the right to appointed counsel in felony cases. On the one hand *Gideon* is famously and rightly celebrated as an effort to increase the fairness of the criminal justice system and to ensure that criminal convictions are obtained only through “fair trials before impartial tribunals in which every defendant stands equal before the law.”¹ The reality of the right to counsel, however, has never lived up to *Gideon*’s promise.

Mark Twain is said to have described law as “a system that protects everybody who can afford to hire a good lawyer.” No observer of the criminal justice system today would argue that the right to appointed counsel works well. As the country’s criminal justice system has exploded in size and scope in the half century since *Gideon*, the systems of indigent criminal defense have failed entirely to keep pace.

Stories abound of overburdened public defenders and criminal defense lawyers failing to provide meaningful and effective representation. In one particularly egregious example, a Texas lawyer slept through part of his client’s 1996 capital trial.² Despite the inadequacy of the representation in that trial,

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

2. Lincoln Caplan, *The Right to Counsel: Badly Battered at 50*, N.Y. TIMES, Mar. 9, 2012.

the Texas Court of Criminal Appeals upheld the defendant's death sentence. The system is indeed broken.

The Supreme Court's mandate that all states provide counsel to those accused of serious crime comes up today against the backdrop of scarcity among the states. When *Gideon* was decided, fewer than half of all criminal defendants were indigent; today, more than 80 percent are.³ A criminal justice system that incarcerated 217,283 people in 1963 today incarcerates approximately 2.3 million.⁴ The war on drugs has exacerbated already high levels of incarceration, with a particularly devastating impact on communities of color. As a result, states increasingly face higher rates of prosecution and correspondingly higher demands for indigent criminal defense. As resources are inevitably spread thin, the promise and legacy of *Gideon* have suffered, in some cases significantly.

The contributors to the *Gideon* symposium tackle head-on a variety of challenging issues with regard to *Gideon*'s legacy and the rights to counsel today. How does a system fulfill its obligation to provide effective assistance of counsel when resources are so limited and political will is in short supply? To what extent, if at all, is triage an appropriate response to the practical difficulties of implementing the right to appointed counsel? Should we focus on preserving the core of *Gideon*'s protections as opposed to expanding its scope? And what does the future hold for *Gideon* and its legacy?

The Washington and Lee Law Review hosted a symposium devoted to these questions and themes on November 8 and 9, 2012. An eclectic group of experts and scholars put forth a variety of challenging and conflicting ideas. Among the presenters were not only legal academics but also criminal defense practitioners, including representatives from the National Association of Criminal Defense Lawyers. Together, these voices comprise some of the most critical and insightful

3. Paul Butler, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 17, 2013.

4. See U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, BULLETIN NCJ-85861: PRISONERS 1925-81, at 2 tbl.1 (1982); see also *World Prison Brief*, INT'L CENTRE FOR PRISON STUDIES, http://www.prisonstudies.org/info/worldbrief/wpb_country.php?country=190 (last visited Apr. 5, 2013) (on file with the Washington and Lee Law Review).

reflections on the true meaning of *Gideon* in 2013, a discourse that both celebrates and laments this groundbreaking decision and proposes innovative developments that could yet fulfill its promise.