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Gideon Was a Prisoner: On Criminal Defense in a Time of Mass Incarceration

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> If an obscure Florida convict named Clarence Earl Gideon had not sat down in his prison cell with a pencil and paper to write a letter to the Supreme Court, and if the [C]ourt had not taken the trouble to look for merit in that one crude petition among all the bundles of mail it must receive every day, the vast machinery of American law would have gone on functioning undisturbed.
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> But Gideon did write that letter, the [C]ourt did look into his case; he was retried with the help of a competent defense counsel, found not guilty and released from prison after two years of punishment for a crime he did not commit . . . .[1]

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1. Robert F. Kennedy, Attorney General, Address to the New England Conference on the Defense of Indigent Persons Accused of Crime (Nov. 1, 1963), http://www.justice.gov/ag/rfkspeeches/1963/11-01-1963Pro.pdf.

I. Introduction

When I joined the Philadelphia public defender's office thirty years ago, *Gideon v. Wainwright*[2] was only a couple of decades old. Frankly, I don't recall giving much thought to the case; the right to counsel seemed well established. Maybe that's because the Defender Association of Philadelphia was well established. Created in 1934, by the time I got there it already had a long and successful history of providing zealous defense to the indigent accused.[3] Or maybe twenty years seems like a long time when you're only in your twenties yourself.

I have been a criminal defense lawyer and criminal clinic director in New York, Massachusetts, Maryland, and the District of Columbia since then, and can't help but note the increasingly muted sound of *Gideon's Trumpet*[4] as the criminal justice system has grown beyond all imagination. The United States has so ramped up criminal punishment that we currently incarcerate more people than any other country in the world—by far.[5] As of the latest count, there are nearly 2.3 million people in prisons and jails in the United States.[6] As one commentator observed, we

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2. Gideon v. Wainwright, 372 U.S. 335 (1963).

3. *See* Defender Ass'n of Phila., *History* (2013), http://www.philadefender.org/history.php (last visited Apr. 2, 2013) ("The Defender Association of Philadelphia is an independent, non-profit corporation which was created in 1934 by a group of Philadelphia lawyers who were dedicated to the ideal of high quality legal services for indigent criminal defendants.") (on file with the Washington and Lee Law Review).

4. *See generally* ANTHONY LEWIS, GIDEON'S TRUMPET (1964) (providing an incredibly thorough account of Gideon's remarkable journey through the U.S. justice system). For an excellent made-for-television version of the book, starring a brilliant Henry Fonda as Clarence Earl Gideon, see GIDEON'S TRUMPET (Hallmark Hall of Fame Productions & Worldvision, 1980).

5. *See* David Cole, *Can Our Shameful Prisons be Reformed?*, N.Y. REV. BOOKS, Nov. 19, 2009, at 41, *available at* http://www.nybooks.com/articles/archives/2009/nov/19/can-our-shameful-prisons-be-reformed/?pagination=false (noting that the per capita rate of incarceration in the United States is six times greater than Canada's, eight times greater than France's, and twelve times greater than Japan's—and we have a forty percent lead on our closest competitors, Russia and Belarus).

6. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BJS BULL NO. NCJ 236319, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2010, at 3 tbl.1 (Dec. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/cpus10.pdf (reporting that as of December 31, 2010, there are 748,728 people in jail and 1,518,104 in prison in the United States). Moreover, there are currently about 7.1 million people under

have the highest rate of incarceration "in the history of the free world."[7]

This ought to be a cause for shame—and alarm. Jails and prisons literally dot the landscape in twenty-first century America—public facilities and private, federal and state, adult and juvenile—especially in places far away from where prisoners used to live.[8] New prisons and jails continue to be built notwithstanding the current economic downturn,[9] or a downturn

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the supervision of the criminal justice system in the United States—either in jail or prison or on probation or parole. *Id.* This number has actually declined 1.3% from 2009, but is still at a historical high, even by recent standards. *Id.*

7. PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 25 (2009). Butler refers to the United States as "Incarceration Nation," calls our criminal justice system "out of control," and argues that "[w]e define too many acts as crimes, punish too many people far longer than their crimes warrant, and . . . have too much incarceration." *Id.* at 26.

8. *See* Sadhbh Walshe, *How Prison Undoes Family Values*, GUARDIAN (Mar. 28, 2012, 5:50 PM), http://www.guardian.co.uk/commentisfree/cifamerica/2012/mar/28/how-prison-undoes-family-values (last visited Apr. 2, 2013) ("[H]alf the prison population [is] in institutions that are between [one hundred] and [five hundred] miles from inmates' actual homes . . . .") (on file with the Washington and Lee Law Review); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REP. NO. NCJ 182335, INCARCERATED PARENTS AND THEIR CHILDREN 5 (Aug. 2000), http://www.bjs.gov/content/pub/pdf/iptc.pdf ("A majority of parents in both State (62%) and Federal (84%) prison were held more than one hundred miles from their last place of residence.").

9. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REP NO. NCJ 222182, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2005, at 2 (Oct. 2008), http://bjs.ojp.usdoj.gov/content/pub/pdf/csfcf05.pdf (reporting a 9% increase in state and federal adult correctional facilities between 2000 and 2005, almost all of which were private prisons); *see also* Carneades, *Private Prisons: A Reliable American Growth Industry*, SEEKING ALPHA (Aug. 21, 2009), http://seekingalpha.com/article/157536-private-prisons-a-reliable-american-growth-industry (last visited Apr. 2, 2013) (suggesting that investors put money into private prison companies because of continued growth) (on file with the Washington and Lee Law Review).

in crime.[10] The idea of a "prison-industrial complex" is no longer leftist hyperbole.[11] If you build it they will come.[12]

Looking back, *Gideon*'s time seems almost quaint. In 1961, there were just over 200,000 prisoners in the United States—less than a tenth of the current figure.[13] Back then, it was conceivable that a prisoner could mail a hand-written petition for a writ of certiorari to the U.S. Supreme Court—in pencil—and have someone read it.[14] The number of such hand-written pleas must have skyrocketed these past five decades, along with incarceration rates. Yet, I can't think of another U.S. Supreme Court case prompted by a prisoner's pro se plea since *Gideon*.[15]

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10. *See* U.S. Dep't of Justice, *Uniform Crime Reports: Preliminary Annual Uniform Crime Report,* FED. BUREAU INVESTIGATION, *January–December, 2011*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2011/preliminary-annual-ucr-jan-dec-2011 (last visited Apr. 2, 2013) (reporting that violent crime rates have dropped in the U.S. and are nearing a historic low) (on file with the Washington and Lee Law Review).

11. *See* Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC (Dec. 1998), http://www.theatlantic.com/magazine/archive/1998/12/the-prison-industrial-complex/304669/ (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review); *see also New Incarceration Figures: Thirty-Three Consecutive Years of Growth*, SENTENCING PROJECT (Dec. 2006), http://www.sentencingproject.org/doc/publications/inc_newfigures.pdf. (documenting record growth in the U.S. criminal justice system since 1973); Cody Mason, *Dollars and Detainees: The Growth of For-Profit Detention*, SENTENCING PROJECT 1 (July 2012), http://sentencingproject.org/doc/publications/inc_Dollars_and_Detainees.pdf (documenting massive growth in the private federal detention of immigrants and noting that as of 2010, one in every thirteen U.S. prisoners was held in a for-profit facility).

12. FIELD OF DREAMS (Gordon Company 1989). In the movie, the central character hears a voice that says, "If you build it, he will come," which he interprets to mean he should build a baseball diamond in a corn field. *Id. See also* Earl Smith & Angela Hattery, *If We Build It They Will Come: Human Rights Violations and the Prison Industrial Complex*, 2 SOCIETIES WITHOUT BORDERS 273, 273 (2007) (exploring the human rights violations and economic exploitations of the contemporary U.S. prison system).

13. *Trends in U.S. Corrections: State and Federal Prison Population, 1925–2010*, SENTENCING PROJECT (May 2012), http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.; *see* BUREAU OF JUSTICE STATISTICS, *supra* note 6, at 3 (noting that there are roughly 2.3 million people in prisons and jails in the United States).

14. *See* LEWIS, *supra* note 4, at 35 (noting the number of clerks who read Gideon's petition before it was sent on to the Court).

15. *See generally* Thomas C. O'Bryant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 299 (2006) (discussing from the

The criminal law, too, has changed. It is far more complicated, with new statutory crimes unknown to the common law and a maze of state and federal sentencing law.[16] Criminal procedure has changed as well: there are now as many obstacles and exceptions as there are protections for the criminally accused.[17]

If Clarence Earl Gideon had difficulty defending himself fifty years ago, he would now find the task virtually impossible. The stakes are considerably higher now, too: given his age and prior felony record, Gideon could have been facing a natural life sentence.[18]

As we mark the fiftieth anniversary of this landmark decision—so full of promise, so doomed to fail[19]—part of me wants

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perspective of a jail house lawyer the near-impossibility of prisoners obtaining a writ of habeas corpus without the assistance of counsel).

16. *See generally* JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 88–125 (4th ed. 2007) (providing an introduction to criminal statutes, as well as their governing principles and interpretation).

17. *See generally* RONALD N. BOYCE ET AL., CRIMINAL LAW AND PROCEDURE 1251–1322 (11th ed. 2010) (discussing exceptions and limitations to procedural rights for defendants under the Burger, Rehnquist, and current Courts).

18. Because Gideon had four prior felony convictions, *see* LEWIS, *supra* note 4, at 157, he would have been eligible for Florida's "Three Strikes" law, which doubles any sentence. Fla. Dep't of Corrections, *Criminal Punishment Code Scoresheet Preparation Manual* 8, 9 (Aug. 31, 2011), http://www.dc.state.fl.us/pub/sen_cpcm/cpc_manual.pdf (noting that a defendant with one or more previous capital felonies shall have the number of points afforded for any subsequent sentence doubled—Florida's "Three Strikes" law). Gideon could also have been charged with burglary—a plausible and more serious charge than breaking and entering: "home-invasion." *Id.* at 44.

19. *See* Anthony Lewis, *The Silencing of Gideon's Trumpet*, N.Y. TIMES MAG. (Apr. 20, 2003), http://www.nytimes.com/2003/04/20/magazine/the-silencing-of-gideon-s-trumpet.html?pagewanted=all&src=pm (last visited Apr. 2, 2013) (discussing the "endless failures to bring the promise of *Gideon* to life") (on file with the Washington and Lee Law Review); *see also* Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty are at Stake*, 1997 N.Y.U. ANN. SURV. AM. L. 783, 816 [hereinafter Bright, *Rationing and Denial*] ("Courts not only tolerate indefensible representation that results from underfunded systems, but contribute to it by appointing lawyers who are not capable of handling the cases assigned and denying the resources needed to present a defense."); Dennis E. Curtis & Judith Resnik, *Grieving Criminal Defense Lawyers*, 70 FORDHAM L. REV. 1615, 1620 (2002) ("The central obstacle to adequate representation of indigent criminal defendants is, of course, lack of adequate funding. Poor training, perverse incentives, and massive caseloads all stem from the lack of resources devoted to criminal defense."); Peter A. Joy, *Rationing Justice by*

to reminisce about the past, another part wants to look to the future. I suppose that's what anniversaries provoke.

Accordingly, this Article has two somewhat different parts. In Part II, I tell the story of an insufficiently sung hero in *Gideon*: W. Fred Turner, the lawyer who represented Gideon after the U.S. Supreme Court gave him a new trial. In Part III, I discuss the importance of being a criminal defense lawyer for both the accused and convicted—especially prisoners—in a time of mass incarceration. My hope is, by the end, these two parts will come together.

II. W. Fred Turner[20]

People tend to think of Washington legal giant Abe Fortas as Gideon's lawyer, not Panama City trial lawyer W. Fred Turner. There is good reason for this: *Gideon* was a groundbreaking, law-changing Supreme Court decision and Fortas argued the case before the Court.[21] When Fortas was asked by the Court to handle the case—itself an extraordinary thing—he had been a Yale law professor, Washington power broker, and founder of a

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Rationing Lawyers, 37 WASH. U. J.L. & POL'Y 205, 205 (2011) ("[T]here are serious issues about the quality of such legal representation when courts accept as effective assistance of counsel legal representation that falls below any reasonable standard.").

20. This Part of the Article could not have been written without Anthony Lewis' classic account of the *Gideon* case, LEWIS*, supra* note 4, and an invaluable 2003 essay by Bruce Jacob, in which he interviews W. Fred Turner. *See* Bruce R. Jacob, *Memories of and Reflections About* Gideon v. Wainwright, 33 STETSON L. REV. 181, 181 (2003) [hereinafter Jacob, *Memories and Reflections*] (containing an extensive account of the *Gideon* saga via interviews with W. Fred Turner); *see also* Bruce R. Jacob, *Remembering* Gideon*'s Lawyers*, CHAMPION, June 2012, at 16, 20–21 [hereinafter Jacob, Gideon*'s Lawyers*], http://www.law.stetson.edu/news/wp-content/uploads/2012/08/Jacob-article-on-Gideon-p16-22_june2012_jacob.pdf (recounting W. Fred Turner's role in Gideon's retrial and borrowing from the previous article). To my knowledge, there are no other detailed accounts of Turner's representation of Gideon. *See* Wolfgang Saxon, *W. Fred Turner, 81; Defended Indigent in Key Trial*, N.Y. TIMES, Nov. 26, 2003, http://www.nytimes.com/2003/11/26/us/w-fred-turner-81-defended-indigent-in-key-trial.html. (last visited Apr. 2, 2013) (noting that W. Fred Turner died on November 23, 2003 in his home in Panama City, Florida) (on file with the Washington and Lee Law Review).

21. *See* LEWIS, *supra* note 4, at 48–56 (recounting Fortas's appointment); *id*. at 169–74 (recounting Fortas's Supreme Court argument).

prominent white shoe law firm.[22] He would later join the Court himself, ultimately resigning after only four years because of an ethics scandal.[23]

Of course, Fortas had plenty of help preparing the case. Like Turner, these lawyers have not been fully recognized for their part in *Gideon*. Chief among them was Abe Krash, Fortas' partner at Arnold, Fortas and Porter.[24] But others conducted important research, helped decide strategy, and contributed to the brief, including associates Ralph Temple and Bruce Montgomery, law student (and later professor) John Hart Ely, and Professor Yale Kamisar.[25]

When the Supreme Court ruled in Gideon's favor there was cause for celebration. But the case didn't end there.[26] Instead, the Court sent the case back to Panama City, Florida for retrial on the original charges of breaking and entering a poolroom with intent to commit petty larceny.[27] Gideon, who had already been in prison for two years, remained

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22. *See id*. at 48–49 (noting that the firm was Arnold, Fortas and Porter—now Arnold and Porter).

23. *See* Andrew Glass, *Abe Fortas Resigns from Supreme Court, May 15, 1969*, POLITICO (May 15, 2008, 4:12 AM), http://www.politico.com/news/stories/0508/10346.html (last visited Apr. 2, 2013) (on file with the Washington and Lee Law Review). While on the Court, Fortas was known for progressive decisions in juvenile justice, extending due process rights in juvenile delinquency proceedings. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (ruling in favor of students' First Amendment speech in school so long as the activities do not "materially or substantially disrupt the work and discipline of the school"); *In re* Gault, 387 U.S. 1, 1 (1967) (extending due process rights to juveniles in juvenile courts); Kent v. United States, 383 U.S. 541, 561–62 (1966) (extending the right to counsel to juveniles in juvenile court).

24. *See* Jacob, Gideon*'s Lawyers*, *supra* note 20, at 19–20 (noting that Krash was the principal lawyer with Fortas on the *Gideon* Supreme Court brief and describing Krash as "a truly great lawyer" and "a gentleman in every sense").

25. *See* LEWIS, *supra* note 4, at 120–33.

26. *See id*. at 223 ("Resolution of the great constitutional question in *Gideon v. Wainwright* did not decide the fate of Clarence Earl Gideon.").

27. *See id.* (quoting the Supreme Court as stating "[t]he judgment is reversed and the cause is remanded to the Supreme Court of Florida for action not inconsistent with this opinion").

incarcerated on $1,000 bail.[28] He was determined to be vindicated at trial and obtain his freedom.[29]

Now that Gideon had won the right to trial counsel, he needed one. There was never any expectation that Fortas or his associates would try the case; they were appellate not trial lawyers.[30] Fortas had suggested that a local Florida lawyer who had signed the American Civil Liberties Union amicus brief on Gideon's behalf represent him at trial,[31] an idea that Gideon initially went along with. He wrote to the lawyer, "humbly" asking for his help, while at the same time grumbling that he would not receive a fair trial no matter who represented him.[32] The ACLU lawyer agreed to represent Gideon, enlisting an experienced criminal lawyer as co-counsel.[33]

The two served as Gideon's counsel for a couple of months—driving out to the Florida State Prison at Raiford[34] to see him, interviewing witnesses, and meeting with him again when he was transported to the local jail.[35] To their surprise, Gideon announced on the eve of trial that he no longer wanted their services.[36] He apparently didn't trust

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28. *Id*. at 227.

29. *See id*. at 226–27 (quoting Gideon as saying that "[i]t has been more than two years now since this crime is *alleged* to have been committed, and if I'm going back to the petitionary for the same crime I want to do it my way. I want to file my own motions." (emphasis added)).

30. *See id*. at 224 ("Soon after the decision Abe Fortas wrote Gideon suggesting that in the future a local Florida lawyer should represent him.").

31. *See id*. ("This lawyer was Tobias Simon of Miami . . . .").

32. *See id*.

33. *See id*. at 225 (noting that this lawyer was Irwin J. Block, a former chief assistant prosecutor in the Miami/Dade County State's Attorney's Office).

34. *See Florida State Prison*, FL. DEP'T CORR. (Dec. 2012), http://www.dc.state.fl.us/facilities/region2/205.html (last visited Apr. 2, 2013) (indicating that Raiford is about 130 miles from Tallahassee) (on file with the Washington and Lee Law Review). Interestingly, Abe Fortas and his colleagues never met with Gideon while he was incarcerated. The lawyers communicated with their client through written correspondence and a phone call when the Supreme Court ruled in his favor. Abe Krash, Remarks at American University's Symposium: Answering *Gideon*'s Call Outside the Courtroom: Collaborative Policy Reform Strategies to Protect the Sixth Amendment Right to Counsel and Ensure a Fair and Equitable Justice System (Mar. 18, 2013).

35. *See* LEWIS, *supra* note 4, at 224–25.

36. *See id*. at 226; *see also* Jacob, *Memories and Reflections*, *supra* note 20,

them.[37] Some of Gideon's hostility was due to his unhappiness at remaining in prison after winning such a huge case before the Supreme Court. He believed he should not have to face another trial under the double jeopardy clause of the Fifth Amendment and the statute of limitations.[38] He didn't understand that a new trial won by a prisoner on appeal violates neither of these things.[39]

Gideon also felt—with some reason—that it was unfair for him to be tried by the very same court that had been overruled by the Supreme Court. He worried that the trial judge might hold it against him.[40] Nobody likes to be wrong, especially judges.

Gideon had reason, too, to feel that these lawyers may not have been right for the job. One was a civil liberties lawyer, not a criminal defender,[41] and the other was a career prosecutor who had only recently left the State Attorney's Office in Miami where he was second-in-command.[42] Gideon needed a "champion . . . [a]gainst a 'hostile world,'"[43] someone who would not hesitate to

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at 257 (noting that the ACLU had volunteered to represent Gideon at his retrial). In *Gideon's Trumpet*, Anthony Lewis quotes from the transcript of a conference held in the trial judge's chambers at which the two lawyers, prosecutors, and Gideon were present. When asked by Judge McCrary whether he wanted Mr. Simon and Mr. Block to represent him, Gideon said: "No, I don't want them to represent me." Then he repeats: "I DO NOT WANT THEM." LEWIS, *supra* note 4, at 226 (noting that the court reporter used capitals).

37. *See* LEWIS, *supra* note 4, at 226.

38. *See id*. at 224, 227 (quoting Gideon as stating, "I want to plead my own case, I want to make my own plea, I do not want them to make any plea for me").

39. *See id*. (noting that Gideon's first two trial motions, stated that "a new trial was barred by the rule against double jeopardy and by Florida's two-year statute of limitations on his alleged crime").

40. *See id*. at 225 (quoting Gideon as stating during the chambers conference, "'I want to file for an order to move my case from this court'"). Gideon further stated that: "'I can't get a fair trial in this court; it's the same court, the same judge, everything, and everybody connected with the court is the same as it was before and I can't get a fair trial here . . . .'" *Id*. at 225–26.

41. *Id*. at 223–24; *see supra* note 31 and accompanying text.

42. LEWIS, *supra* note 4, at 225; *see supra* note 33 and accompanying text.

43. ABA Standards, *The Defense Function*, *in* AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, 109–10 (1971); *but see* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 55 (2000) ("Bar rhetoric that casts the lawyer as a 'champion against a hostile world' seems out of touch with most daily practice."); ABA Standards, *Defense Function*

take his side against powerful forces. When the two lawyers failed to win back Gideon's trust, trial judge Robert L. McCrary, Jr. excused them.[44]

More than a decade before the Supreme Court held there was constitutional right to do so,[45] Gideon made some noise about wanting to try his own case.[46] But Judge McCrary—who, like many judges, had little appreciation for irony—would not allow it.[47] When asked whether there was a local lawyer to his liking, Gideon immediately said there was: W. Fred Turner.[48] The judge then appointed Turner.[49]

It was generous of Judge McCrary to ask Gideon whom he wanted to represent him. He didn't have to.[50] When a prosecutor suggested that the brand new public defender for the judicial circuit that included Panama City assist Turner, Gideon demurred. He preferred a private criminal lawyer acting alone.[51] The judge agreed to let Turner handle Gideon's case on his own.[52]

Turner had his hands full from the start; Gideon was not the easiest client. According to Tobias Simon, his previous lawyer, Gideon came from "the bottom of society's barrel,"[53] was "something of a nut,"[54] and had a "maniacal distrust and suspicion" bordering on "insanity."[55] This harsh appraisal might

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Standards, *in* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTING FUNCTION AND DEFENSE FUNCTION 119–126 (3d ed. 1993) (failing to include any "champion against a hostile world" language, language which has been removed from the ABA Standards).

44. *See* LEWIS, *supra* note 4, at 225–26.

45. *See* Faretta v. California, 422 U.S. 806, 807 (1975) (finding a constitutional right to represent oneself).

46. *See* LEWIS, *supra* note 4, at 225–26 (quoting Gideon as stating "I want to plead my own case").

47. *Id*. at 226.

48. *Id*.

49. *Id*.

50. The *Gideon* decision did not give indigent defendants the right to an attorney of their choosing, just to an attorney. *See* Peter W. Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73, 77–78 (1974).

51. LEWIS, *supra* note 4, at 226.

52. *See id*.

53. *Id*.

54. *Id*. at 228 (internal quotation marks omitted).

55. *Id*.

have been sour grapes—it came after the lawyer's dismissal from a high profile case—or a reflection of Simon's inexperience dealing with seasoned criminal defendants.

In his classic account of the case, Anthony Lewis offers a more generous description—and a more insightful one:

> Gideon was a fifty-one-year-old white man who had been in and out of prisons much of his life. He . . . bore the physical marks of a destitute life: a wrinkled, prematurely aged face, a voice and hands that trembled, a frail body, white hair. He had never been a professional criminal or a man of violence; he just could not seem to settle down to work, and so he made his way by gambling and occasional thefts. Those who had known him, even the men who had arrested him and those who were now his jailers, considered Gideon a perfectly harmless human being, rather likeable, but one tossed aside by life.[56]

Lewis notes that, notwithstanding his age and circumstances, "a flame still burned" in Gideon: "He had not given up caring about life or freedom; he had not lost his sense of injustice."[57] Lewis acknowledges that Gideon's passionate feeling of having been wronged by the State of Florida was regarded as "irrational" by some—the dismissed trial lawyers, for instance—but where they found him prickly and pigheaded, Lewis saw an admirable persistence.[58] Gideon was probably all of the above.

Gideon had drafted a pile of motions—full of legal jargon and with little merit—which he wanted to file.[59] He had spent time in the prison law library, and had learned just enough law to get it wrong.[60] Judge McCrary warned Gideon not to interfere with his new lawyer or try to take over his own defense.[61] Turner did the same when he saw Gideon's valise full of motions. He said he

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56. *Id*. at 5–6.

57. *Id* at 6.

58. *See id.* (noting that Gideon "had the determination to try to do something about it").

59. *See id*. at 226–27.

60. *See* Arturo A. Flores, *Bounds and Reality: Lawbooks Alone Do Not a Lawyer Make*, 77 LAW LIBR. J. 275, 278–81 (1984–1985) (discussing the practical limitation for prisoners attempting to learn the law, including lack of experience).

61. LEWIS, *supra* note 4, at 228.

would represent Gideon, but only if Gideon "stop[ped] trying to be the lawyer and . . . let [him] handle the case."[62]

In order to work more effectively with Gideon, Turner asked that the trial be postponed for a few weeks, noting the "many, many legal problems" in the case.[63] He wasn't asking for much—especially in view of his late arrival as counsel. But Judge McCrary refused.[64] The new trial was to begin on August 5, 1963,[65] five months after the Supreme Court ruling[66] and almost two years exactly after the first trial.[67]

Turner dug right in. Fortunately, Gideon was now at the Bay County Jail—the local detention facility—and not a far-off prison.[68] Turner met with his client frequently, learned what mattered most to him, and earned his trust.[69] More than anything else, Turner learned that Gideon "desperately wanted an acquittal" and felt he "'couldn't do any more time' in prison."[70]

Although Turner had insisted on being in charge, he took time to explain things to Gideon, involving him in pretrial and trial strategy. He persuaded Gideon to abandon the idea of a venue change to Tallahassee, saying: "'Look, I know everybody in this county. If we go to Tallahassee, no one knows me. Do you want me to argue your case before a jury none of whom know me or before a jury here in Panama City where two out of three jurors know me?'"[71] He agreed to argue several pretrial motions, including those Gideon had drafted, even though he knew they would be denied.[72]

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62. Jacob, *Memories and Reflections*, *supra* note 20, at 259 (internal quotation marks omitted).

63. LEWIS, *supra* note 4, at 228.

64. *Id.*

65. *Id.*

66. *See id.* at 186–92 (recounting the announcement of the *Gideon* decision on Monday, March 18, 1963).

67. *See id.* at 57 (stating that Gideon was initially tried on August 4, 1961).

68. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 259.

69. *See id.* (describing how Gideon originally wished to transfer his case to Tallahassee but Turner convinced Gideon otherwise, demonstrating the level of faith Gideon had begun to place in Turner).

70. *Id.*

71. *Id.* (internal quotation marks omitted).

72. *See* LEWIS, *supra* note 4, at 228 ("On August 1st the judge denied a series of motions including Gideon's own, *presented by Turner*, to dismiss the

Turner was right about keeping the case in Panama City. His familiarity with the area helped level the playing field. As Gideon had feared, when the trial started on August 5, 1963, it was in the very same courtroom where Gideon had been convicted two years before, and with the very same judge and prosecutor. Worse, there were now two additional lawyers at the prosecutor's table: the chief state attorney and another assistant.[73] It was significant that when the first six prospective jurors were placed in the jury box Turner knew four of them.[74] He immediately struck two—the first, a teetotaler with no sympathy for drinkers like Gideon, the second, a man who "would convict his own grandmother."[75] These two were replaced by jurors Turner also knew.[76]

Ahead of his time, Turner believed in jury research before it was a recognized field of expertise.[77] For Turner, jury selection was key—indeed, he thought a "criminal case was won or lost the moment the jury was chosen."[78] He made it his business to know as much as possible about each prospective juror in the cases he tried[79]—to "know who they are, what they think."[80] Once, when he tried a case in an unfamiliar town, he took a friend with him who had been raised there. The friend stood in the back of the courtroom and signaled whether a juror was a "kind-hearted, generous person who might be sympathetic to the defendant, or a

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charges." (emphasis added)). Gideon's motions made two points: "[t]hat a new trial was barred by the rule against double jeopardy and by Florida's two-year statute of limitations on his alleged crime." *Id.* at 227. In both cases Gideon was incorrect, a "new trial won by a prisoner as a result of his own appeal is not double jeopardy under American law" and the "statute of limitations does not . . . apply when an appeal results in a new trial." *Id.* at 224, 227.

73. *Id*. at 229.

74. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 259.

75. *Id*. (internal quotation marks omitted); LEWIS, *supra* note 4, at 230.

76. Jacob, *Memories and Reflections*, *supra* note 20, at 259–60.

77. *See generally* NJP LITIGATION CONSULTING (formerly National Jury Project), JURYWORK: SYSTEMATIC TECHNIQUES (Elissa Krauss et al. eds., 2d ed. 2012–2013); *see also* NJP Litig. Consulting, *Our Consultants: Diane Wiley* (2011), http://www.njp.com/consultants_Diane_Wiley.html (last visited Apr. 2, 2013) (recounting Diane Wiley's founding of the National Jury Project in 1973) (on file with the Washington and Lee Law Review).

78. Jacob, *Memories and Reflections*, *supra* note 20, at 258.

79. *See id*.

80. LEWIS, *supra* note 4, at 230 (internal quotation marks omitted).

'law and order' type who was likely to vote in favor of the prosecution."[81]

Sometimes his methods were more intuitive than scientific. He claimed, for instance, that he "often selected jurors by looking at their shoes."[82] A person with shoes that appeared "spit shined" was too finicky and not likely to understand the point of view of an impoverished defendant who may have made some mistakes in life.[83] There is something appealingly old-fashioned—although not entirely outdated—about this approach to jury selection. Since Gideon's time, voir dire has become increasingly limited; as a result, relatively little is known about prospective jurors.[84] Looking at a person's clothing, including the shoes, is not a bad idea.

In Gideon's re-trial, Turner had done his homework by going over the jury list before trial.[85] He managed to select a jury in which three of the final six[86] were gamblers—factfinders who might be more open to Gideon's claim that the large quantity of change found on him was from gambling, not theft.[87] By all accounts, Turner was pleased with the final jury composition.[88]

He had also thoroughly investigated the case, aided by his own knowledge of some of the key prosecution witnesses.[89] This

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81. Jacob, *Memories and Reflections*, *supra* note 20, at 258.

82. *Id*. (internal quotation marks omitted).

83. *Id.*

84. *See* Abbe Smith, *"Nice Work If You Can Get It": "Ethical" Jury Selection in Criminal Defense,* 67 FORDHAM L. REV. 523, 525–28 (1998) (recounting two race-laden felony trials in which judges limited voir dire).

85. *See* LEWIS, *supra* note 4, at 230.

86. Gideon was tried by a jury of six white men at his initial trial, *id*. at 57, and at his re-trial, *id*. at 229. This was a proper felony jury under Florida law at the time for all noncapital crimes. *See* FLA. STAT. § 913.10 (1963); FLA. R. CRIM. P. 3.270 (requiring a jury of six men for noncapital trials).

87. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 260. When he was arrested, Gideon had $25.28 in quarters, dimes, nickels, and pennies in his pockets. *Id*. at 264; LEWIS, *supra* note 4, at 233.

88. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 260; LEWIS, *supra* note 4, at 229–30.

89. *See* LEWIS, *supra* note 4, at 230–31, 238 (noting that "Turner had spent three full days before trial interviewing witnesses" and investigating the case, including picking pears with the mother of the chief prosecution witness, Henry Cook, to see what he could find out about the witness and driving out to Apalochicola to try to find the other young men who had been in the car with Cook).

was one of the benefits of small town criminal practice.[90] In what would be recognized as a clear conflict-of-interest today,[91] he had previously represented the chief prosecution witness, a young man named Henry Cook,[92] whom Turner would claim was responsible for the poolroom break-in.[93] His previous representation of Cook, and knowledge of his juvenile and adult criminal record, "proved to be extremely helpful in Gideon's defense."[94]

At trial,[95] the defense theory was clear:[96] Henry Cook and his friends broke into the poolroom, not Clarence Earl Gideon.[97] Cook

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90. *See id*. at 238 ("[I]n a small town like Panama City . . . part of a lawyer's job is to know everyone.").

91. *See* FLA. STAT. § 4-1.7 (2012)

> [A] lawyer shall not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to . . . a former client . . . [unless] the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . and . . . each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

Turner disclosed to Gideon that he had once represented Cook and "asked whether this bothered him," Gideon said "no." Jacob, *Memories and Reflections*, *supra* note 20, at 258. Turner had also represented Gideon's wife in an action against Gideon to obtain child support, but this did not bother Gideon either. *Id*. But it does not appear that Turner obtained Cook's consent to represent Gideon, which would be required under current ethics rules. *See* FLA. STAT. § 4-1.7 (2012) (requiring that, in a conflict-of-interest between a lawyer's present and former client, a lawyer may represent both as long as "each affected client gives informed consent").

92. Jacob, *Memories and Reflections*, *supra* note 20, at 258–59, 265; LEWIS, *supra* note 4, at 238.

93. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 265 (discussing Turner's background and trial approach); LEWIS, *supra* note 4, at 230–38 (discussing Turner's trial strategy).

94. Jacob, *Memories and Reflections*, *supra* note 20, at 258–59.

95. *See* Transcript of Record, Florida v. Gideon, slip op. (Fla. 14th Cir. Ct. Aug. 5, 1963), http://www.jud14.flcourts.org/CourtReporting/Gideon.pdf.

96. Surprisingly, Turner chose to not make an opening statement. This is a defense practice I've never understood or endorsed—especially where there is a viable defense theory, or, better yet, persuasive defense narrative, as there was here. Why not get your foot in the door at the very beginning? *See generally* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE (4th ed. 2009) (discussing all aspects of trial advocacy); THOMAS MAUET, TRIAL TECHNIQUES (8th ed. 2010) (discussing trial advocacy techniques).

97. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 265 ("Turner's

was the lookout.[98] He and his friends had been out all night drinking and partying in Apalachicola, sixty miles away, and when they couldn't get more beer there, they drove back to Panama City, broke into the Bay Harbor Poolroom, and came away with beer, wine, and Coca-Cola—this last thing something young men would likely drink, more so than a middle-aged hard-drinking man like Gideon.[99] When Cook saw Gideon early the next morning, he was an easy mark.[100]

In many ways, this was a "one-witness case." Cook was the only person who claimed to have seen Gideon in the poolroom at the time of the crime; the case would rise or fall on his credibility. Turner didn't pull his punches with Cook, and made several strong points on cross-examination. He pointed out that Cook was intimately familiar with the Bay Harbor Poolroom, so would know how to gain entry,[101] there were large placards in the window blocking Cook's ability to spot Gideon or anyone else in the pool hall, and the windows on the alley were too high to see anything,[102] Cook never called the police to report a crime,[103] and Cook had a record that he had lied about at the previous trial.[104] To Cook's claim that he was at the poolroom at 5:00 or 5:30 in the morning waiting for it to open,[105] Turner was incredulous: "Why

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theory was that Cook and his friends were responsible for the poolroom break-in. They had been partying and then broke into the poolroom and took the beer, wine, and Cokes that . . . were taken.").

98. *Id.* at 265.

99. *See* LEWIS, *supra* note 4, at 230–31 (discussing Cook's testimony); Jacob, *Memories and Reflections*, *supra* note 20, at 265, 269 (examining Cook's story and involvement).

100. *See* LEWIS, *supra* note 4, at 237.

101. Transcript of Record, *supra* note 95, at 12–13; *see also* LEWIS, *supra* note 4, at 231 (discussing Turner's theory that Cook falsely implicated Gideon).

102. Transcript of Record, *supra* note 95, at 17–18, 22–23; LEWIS, *supra* note 4, at 231.

103. Transcript of Record, *supra* note 95, at 27–31.

104. *Id.* at 35–44; *see also* LEWIS, *supra* note 4, at 231–32; Jacob, *Memories and Reflections*, *supra* note 20, at 265–68.

105. LEWIS, *supra* note 4, at 230. Cook also claimed he was at the poolroom instead of going home because he was afraid his parents would "'get on me' about coming in [after] drinking." Transcript of Record, *supra* note 95, at 13; Jacob, *Memories and Reflections*, *supra* note 20, at 260.

did [your friends] put you off two blocks from your home when they'd driven you sixty miles?"[106]

Bruce Jacob, who argued *Gideon* before the Supreme Court on behalf of the State of Florida, maintains that Turner's impeachment of Cook on his previous denial of a felony conviction for car theft—which turned out to be an adjudication of delinquency in juvenile court, not a criminal conviction—was "the most critical point in the trial."[107] Jacob faults the prosecution for not knowing whether their key witness had a record. Had they done their homework, there might have been no impeachment, and the jury might never have known that Cook had been in trouble with the law.[108]

Turner also made quick work of the other prosecution witnesses, but tended to make affirmative rather than destructive points. In Turner's cross-examination of Bay Harbor Poolroom owner Ira Strickland Jr., Turner pointed out that Gideon sometimes helped operate the poolroom—so was worthy of trust.[109] His cross of Detective Duell Pitts emphasized the twelve bottles of Coca-Cola that were taken, and revealed his lack of bad feelings towards Gideon.[110] His cross of taxi driver Preston Bray, who drove Gideon downtown the morning of the crime,[111] provided a different explanation of a statement by Gideon that had been used against him at the first trial: "If anyone asks you where you left me off, you don't know; you haven't seen me."[112] It turned out this was nothing new: Gideon routinely told Bray to say he hadn't seen him because Gideon's wife was after him about other women or child support.[113] Turner also used Bray to establish that Gideon was sober when he got in the cab, had no

106. Transcript of Record, *supra* note 95, at 13; LEWIS, *supra* note 4, at 23.

107. Jacob, *Memories and Reflections*, *supra* note 20, at 267.

108. *See id.* at 267–68 (discussing the prosecution's failure to fully investigate Cook's background).

109. LEWIS, *supra* note 4, at 232; Jacob, *Memories and Reflections*, *supra* note 20, at 263–64.

110. *See* LEWIS, *supra* note 4, at 233 (discussing Turner's cross-examination of Detective Pitts).

111. *Id.*; Jacob, *Memories and Reflections*, *supra* note 20, at 261.

112. Transcript of Record, *supra* note 95, at 131; LEWIS, *supra* note 4, at 234.

113. LEWIS, *supra* note 4, at 234.

beer, wine, or Coca-Cola on him, and his pockets did not "bulge" with change as Cook had claimed.[114]

The defense case was strategically short. Turner called the owner of a grocery store who had seen Cook the morning of the crime.[115] According to the grocer, Cook had been picked up by the police for questioning about the break-in earlier, and told him he had seen "someone in the poolroom but was 'not sure who it was.'"[116] The most he could say was "It looked like Mr. Gideon."[117] If Cook had indeed made that statement to the grocer, it was "much less positive" than his trial testimony.[118]

The second and final witness for the defense was Clarence Earl Gideon. When asked whether he broke into the Bay Harbor Poolroom, he said, "No, sir."[119] He had played poker the Sunday before the break-in and had won the money found on him.[120] He had no beer, wine, or cola on him when he was arrested,[121] though he had bought and drank beer and vodka earlier.[122] At the end of the examination, when Turner again asked what Gideon said to the charge that he broke and entered the pool hall, Gideon replied, "I'm not guilty of it, I know nothing about it."[123]

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114. *Id.*

115. *See* LEWIS, *supra* note 4, at 234 (discussing the surprise defense witness, J.D. Henderson, owner of the Bay Harbor grocery store).

116. Transcript of Record, *supra* note 95, at 106; LEWIS, *supra* note 4, at 234.

117. Transcript of Record, *supra* note 95, at 106; LEWIS, *supra* note 4, at 234–35.

118. LEWIS, *supra* note 4, at 235.

119. Transcript of Record, *supra* note 95, at 113; LEWIS, *supra* note 4, at 235; Jacob, *Memories and Reflections*, *supra* note 20, at 264.

120. Transcript of Record, *supra* note 95, at 114–15; *see also* LEWIS, *supra* note 4, at 235; Jacob, *Memories and Reflections*, *supra* note 20, at 264.

121. Transcript of Record, *supra* note 95, at 115; LEWIS, *supra* note 4, at 235. When Turner asked Gideon on direct examination whether he had any beer, wine or whiskey on him, Gideon's response was "No sir, I don't drink wine, if I had a bottle of wine I throwed it away." Transcript of Record, *supra* note 95, at 115; Jacob, *Memories and Reflections*, *supra* note 20, at 264 n.367. In an interview, Turner told Jacob he had been surprised by Gideon's answer about not drinking wine, because it was "untrue." Jacob, *Memories and Reflections*, *supra* note 20, at 264 n.367. But not so untrue that Turner felt he needed to disclose it to the court. *Id.*

122. Transcript of Record, *supra* note 95, at 116; *see also* LEWIS, *supra* note 4, at 235.

123. Transcript of Record, *supra* note 95, at 116; LEWIS, *supra* note 4, at 235. Gideon seems to have held up well when cross-examined by the prosecution. He

Turner's closing argument was "masterful."[124] He was "the model of the practiced criminal lawyer—dramatic but not too dramatic."[125] He spent most of his argument excoriating chief prosecution witness Cook—whom he called a "probationer"—as unworthy of belief.[126] He argued that Cook's testimony was not enough to prove Gideon's guilt beyond a reasonable doubt—especially in view of Gideon's perfectly reasonable explanation for having a lot of pocket change.[127]

The prosecutor made a "straightforward closing argument," challenging Gideon's account, and arguing that Cook would not falsely accuse Gideon.[128]

The jury returned a verdict of Not Guilty in just over an hour.[129] The difference between Gideon's first trial and his second was one thing: the advocacy of W. Fred Turner.[130] Turner's performance was proof of one of the central principles underlying *Gideon*: "that being represented by counsel in a criminal case makes a tremendous difference."[131]

Turner should be recognized for his part in the *Gideon* story. To Clarence Earl Gideon, what happened at trial was as important as what happened in the Supreme Court. Gideon

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stuck to his story and acknowledged in a straight forward way being an unemployed drinker and gambler, and a five-time convicted felon. Transcript of Record, *supra* note 95, at 117–30; *see also* LEWIS, *supra* note 4, at 236 (recounting Gideon's testimony on cross-examination).

124. Jacob, *Memories and Reflections*, *supra* note 20, at 269.

125. LEWIS, *supra* note 4, at 236.

126. *Id*. at 236–37 (internal quotation marks omitted).

127. *See id*. at 237 (discussing Turner's closing argument).

128. *Id*.

129. *Id*.

130. *See id.* at 238; Jacob, *Memories and Reflections*, *supra* note 20, at 269 (explaining the immense value that Turner added to Gideon's defense). Jacob gives Turner his due, but also suggests that the prosecution made two significant mistakes in the second trial: they were caught unaware during the impeachment of Cook, *see id.* at 265–68, and they failed to call a corroborating witness who testified at the first trial. *See id.* at 264–65, 270–71 (discussing the effects of the prosecution's failure to call Irene Rhodes to the stand). As to this latter point, Jacob seems to acknowledge that this witness, a woman named Irene Rhodes, may not have been terribly impressive. At the first trial, she claimed she saw Gideon with a bottle of wine, but also said that, after Gideon got into the cab, she retrieved the half-full bottle and drank it. *Id.* at 263.

131. *Id*. at 269.

believed he had a right to counsel—and felt proud of his part in the making of this constitutional guarantee.[132] But he also wanted to be vindicated and freed.[133] The latter might have been more important to Gideon than his contribution to constitutional law. Gideon was not a social justice activist; he was a prisoner doing time for a crime he maintained he did not commit.[134]

It is rare that an ordinary, hard-working, small-town lawyer—especially a public defender or court-appointed lawyer—gets the recognition he or she deserves. Like many criminal lawyers in towns and cities across the country, Turner tried hundreds of criminal cases.[135] He had a reputation throughout the Panama City area as an "outstanding criminal defense attorney."[136] He was known as a graceful,[137] forceful, resourceful advocate. He is surely one of the heroes in the *Gideon* story.

III. The Importance of Counsel for Both the Accused and Convicted

It bears repeating that Gideon was both a criminal defendant and a prisoner. He spent much of his life in various prisons, and

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132. *See* LEWIS, *supra* note 4, at 238 (recounting that when asked by a newspaper reporter whether he felt he accomplished something, Gideon replied, "Well I did").

133. *Id.*

134. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 268 (explaining that Gideon maintained his innocence throughout the entire ordeal); *see also* LEWIS, *supra* note 4, at 238 (recounting Gideon leaving court after two years of incarceration with "tears in his eyes . . . [and] trembl[ing] even more than usual as he stood in a circle of well-wishers"). Jacob has come to believe that Gideon was factually guilty. *See* Jacob, *Memories and Reflections*, *supra* note 20, at 269 ("I am convinced that Gideon, not Cook and his friends, was the person who broke into the poolroom."). However, he also recognizes that, "[I]n our system of justice, it does not matter whether he was innocent or not. All that really matters is whether he was guilty or not guilty of the crime. In his case, he was found not guilty by the jury at the 1963 trial." *Id.* at 268.

135. Saxon, *supra* note 20.

136. Jacob, *Memories and Reflections*, *supra* note 20, at 257. He later became a circuit judge. *Id.*

137. Both Jacob and Lewis said Turner reminded them of the dancer Fred Astaire. LEWIS, *supra* note 4, at 229; Jacob, *Memories and Reflections*, *supra* note 20, at 257.

it had taken its toll on him.[138] He wore the "physical marks" of it.[139] From the confines of prison, he fought for the right to a lawyer, won it, and then won his new trial. He was serving the maximum sentence for his crime—five years[140]—when he appealed to the Supreme Court. Who knows what might have happened to him had he not been acquitted. He was in his fifties. When he died of cancer on the outside he was only sixty-one.[141]

There are many, many Gideons out there—nameless, faceless prisoners doing time in far-off prisons who could really use a lawyer. Lifers and other long-serving inmates often feel that they've vanished off the face of the earth.[142] As novelist John Banville writes, "[W]hat an odd formation that is: to get life. Words so rarely mean what they mean."[143]

Long-term prisoners try not to think about whether they will ever get out; they do what they can to manage hope and despair.[144] They cling as best they can to family, friends, and community. But years in prison can cause these ties to fray. Many prisoners die in prison alone.[145]

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138. LEWIS, *supra* note 4, at 6.

139. *Id.*

140. *Id.* at 62.

141. Anthony Lewis, *Gideon: An Epitaph*, DAY (New London, Conn.), Feb. 15, 1972, at 10.

142. *See* Scott Anderson, *A Plea to be Free*, N.Y. TIMES MAG., July 22, 2012, at 26, 29 (noting that, by the time he met with Greg Ousley at the Westville Correctional Facility near Valparaiso, Indiana, a man serving a sixty-year sentence for killing his parents when he was fourteen, Ousley had had only three or four visitors in the previous decade, none family members).

143. JOHN BANVILLE, THE BOOK OF EVIDENCE 169 (1989).

144. *See id.* at 32

> For the long-term prisoner, hope is a tricky property, something that needs to be constantly monitored and managed. Bereft of it, the inmate can quickly descend into a state of apathetic despair and turn to the fast-at-hand reliefs—drug use, gang allegiance—that all but ensure his stay will be lengthened. But to nurture out too much hope is to invite repeated and crushing disappointment, which can be just a slower way to get to the same place. The proper balance, it seems, is to work toward a goal—reconciliation with a family member, winning a legal appeal—while constantly reminding yourself that it probably won't happen.

145. *See* LIFE SENTENCES: RAGE AND SURVIVAL BEHIND BARS 237 (Wilbert Rideau & Ron Wikberg eds., 1992) (describing dying in prison).

Shorter-term inmates (though, of course, "short" is a matter of perspective) do better. They can imagine freedom—and plan for it. But time on the inside is not like any other time. It crawls. There is nothing but the calendar to mark it. All prisoners live for their release date.

All are relegated to writing letters—painstakingly hand-written and sent with the few stamps allotted or purchased with meager prison earnings. They manage to find addresses to courthouses, bar associations, law offices, law schools, and law school clinics. Sometimes the addresses are no longer good and letters are returned. Usually they get no reply. One long-serving prisoner my clinic currently represents had written 1,200 letters to lawyers without a reply.

Prisoner handwriting is oddly recognizable.[146] It lives somewhere between Catholic school handwriting, with its perfect loops and gentle slant,[147] and a strangely mannered calligraphy. Letters from prisoners are almost always in cursive writing, something you hardly ever see anymore. They are densely written and invariably long—multiple pages of packed words. Gideon's were like that too.[148] Prisoners have a lot to say.

There's something intimate about these careful, hand-written letters. You can picture prisoners laboring over their letters with care. Lawyers tend to type their reply. Some send back form letters.

There is a prisoner-letter template—or at least a familiar pattern. Prisoners introduce themselves, offer kind wishes, and then share their life stories and law stories. They do what they can to get the attention of a stranger. The correspondence contains questions and assertions in equal measure. They ask, "How could this be?" They wonder if they are right about grounds for a postconviction challenge, if the law says what they think it

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146. A former student who does prisoners' rights work says that her colleagues claim they can spot a sex offender from his handwriting! That's beyond my expertise.

147. This handwriting bears the hallmarks of the famous Palmer Method. *See generally* A.N. PALMER, THE PALMER METHOD OF BUSINESS WRITING (2010) (describing the Palmer handwriting style developed by Austin Palmer in the late 19th and early 20th centuries that became the most popular cursive writing system in the U.S.).

148. *See* LEWIS, *supra* note 4, at 63–78 (discussing Gideon's correspondence from prison).

does, if they are on the right track. Then they name every conceivable argument: the arrest was unlawful, the police failed to give *Miranda* warnings, the police and prosecution failed to turn over key evidence, blacks were kept off the jury, the defense lawyer was incompetent, evidence was allowed that shouldn't have been, a lying snitch testified, the sentence was excessive.

Of course, the prisoners all had *counsel* when they went to trial or pled guilty—as defined by *Strickland v. Washington*,[149] the case that essentially gutted *Gideon* by allowing anyone with a "warm body and a law degree" to satisfy the Sixth Amendment[150]—but they did not have anyone resembling W. Fred Turner. Unfortunately, for too many indigent criminal defendants—many of whom become prisoners—the right to counsel is a few minutes' interaction, an offer of a plea, or a trial conducted with no investigation, no motions, and no viable theory of defense or sentencing.[151]

I have always gotten mail from prisoners: clients and nonclients who found their way to the law school clinic or saw my name on the rare occasion when I write an op-ed or make a comment in the press. When my book *Case of a Lifetime* came out in 2009, it generated a fair amount of mail from prisoners and

149. Strickland v. Washington, 466 U.S. 668, 669 (1984) (establishing a nearly impossible-to-meet two-prong test for ineffective assistance of counsel).

150. David Bazelon, *The Realities of* Gideon *and* Argersinger, 64 GEO. L.J. 811, 819 (1976); *see also* Abbe Smith, Strickland v. Washington*: Gutting* Gideon *and Providing Cover for Incompetent Counsel, in* WE DISSENT: TALKING BACK TO THE REHNQUIST COURT: EIGHT CASES THAT SUBVERTED CIVIL LIBERTIES AND CIVIL RIGHTS 188–226 (Michael Avery ed., 2009) (critically examining the impact of *Strickland* on the right to counsel).

151. *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, 1837–41 (1984) (recounting appallingly bad lawyering in the most serious criminal cases); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. VA. L. REV. 679, 679–84 (1990) (discussing the inadequacy of the constitutional standards for effective representation by counsel); Bruce A. Green, *Legal Fiction: The Meaning of "Counsel" in the Sixth Amendment*, 78 IOWA L. REV. 433, 433 (1993) (arguing that the constitutional requirement of counsel should include only *qualified* criminal defense attorneys); David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1762 (1993) (referring to the "world of lawyers for whom no defense at all, rather than aggressive defense or even desultory defense, is the norm").

family members.[152] Until the volume of mail became too great, it was my practice to respond personally. They were locked up and I wasn't; a personal reply was the least I could do.

A few years ago—and then officially in 2010, when I created Georgetown's Criminal Defense & Prisoner Advocacy Clinic—I started taking on prisoner cases and larger "prisoner projects" as part of the clinic docket. (This is in addition to pretrial cases in the local criminal court, which is the bulk of the clinic caseload.) The name of the clinic has generated even more prisoner mail—another version of "if you build it they will come."[153] Responding to prisoner mail has become part of what we do in the clinic—answering questions when we can, or referring prisoners to more knowledgeable sources of information in their home states.

I prefer the worst cases. If there is a guiding principle to my method of case selection, this is probably it. As I say to students, the Clinic is a Guilty Project, not an Innocence Project. I like working with long-serving guilty clients—people who did a very bad thing, served their time, and have changed. These are great cases for students, too. Though daunted at first, students manage to find the person behind the crime, and the story.

It is also true that long-serving clients tend to be gracious and grateful. They are happy to receive a reply to a letter—not to mention a thoughtful, helpful reply—and are thrilled when a lawyer or law student takes the long drive out to the prison to meet with them. Many haven't seen a lawyer since being sent to prison.

Sometimes we help get them out. This is a tremendous thing. But some prisoners may never get out no matter the effort. This is an important—and difficult—lesson for students. We talk about whether it's a good thing to stir up hope where there isn't much.[154] We do our best to have this same conversation with clients.

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152. *See* ABBE SMITH, CASE OF A LIFETIME: A CRIMINAL DEFENSE LAWYER'S STORY (2008) (recounting my efforts to free Patsy Kelly Jarrett, a woman who served more than twenty-eight years for a crime she did not commit).

153. *See supra* note 12 and accompanying text (discussing the movie *Field of Dreams*).

154. *See supra* note 144 and accompanying text (discussing the fragility of hope).

This is what it means to be a criminal defender in a time of mass incarceration: fighting for the convicted along with the accused, for those currently in prison and those who may end up there. Although we need to do what we can to stop people from being swallowed up by the system in the first place, we can't leave the more than two million in cages to fend for themselves. We need to let them know we haven't forgotten them.

I know this asks a lot. Most indigent defense systems lack the resources to properly defend the accused, much less provide representation to prisoners.[155] Court-appointed lawyers generally do not receive compensation for postconviction work after a direct appeal.[156] Very few legal aid or public interest offices provide representation to prisoners.[157] But we have to find a way to pitch in—public defenders, court-appointed lawyers, and the private bar.

Law school criminal defense clinic students should reply to prisoner mail as part of their case load. Clinics should take on a couple of prisoner clients—in a postconviction challenge, parole

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155. *See generally* THE CONSTITUTION PROJECT & THE NAT'L LEGAL AID & DEFENDER ASS'N, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009) (examining the state of the right to counsel in the U.S.); NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE (2011) (examining the effects of heavy caseloads and inadequate case support on public defenders); Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031 (2006) (addressing the sad plight of indigent defendants and acquiring adequate counsel); Eric Holder, Attorney General, Address to the American Bar Association National Summit on Indigent Defense (Feb. 4, 2012), *available at* http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-120204.html (discussing the state of indigent defense and introducing government-backed measures to further its effectiveness).

156. *See* Roscoe C. Howard, Jr., *The Defunding of Post-Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. VA. L. REV. 863, 901 (1996) (examining the effects of not receiving compensation for postconviction work on appeal); *see also* Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (holding that there is no constitutional right to counsel at collateral postconviction proceedings).

157. *See* Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1609 (2003) ("Nearly all the cases in the inmate federal civil rights docket are filed and litigated pro se."); *see also* AM. CIVIL LIBERTIES UNION, SLAMMING THE COURTHOUSE DOORS 12–14, 49, 86–87 (Dec. 2010), http://www.aclu.org/files/assets/HRP_UPRsubmission_annex.pdf (discussing the various government mechanisms eroding access to justice for indigent criminal defendants, immigrants, and other plaintiffs and defendants).

revocation or grant, clemency or pardon, or disciplinary case. I understand how time-consuming and complex criminal appeals can be; the clinic I direct doesn't do them largely because I lack expertise. But students can make a real contribution to prisoners in a parole, clemency, or disciplinary setting.

Civil law clinics can and should reach out to prisoners as well. Ever since the Legal Services Corporation prohibited the provision of certain legal services to prisoners,[158] it is nearly impossible for prisoners to obtain counsel in civil matters in most states. Clinics with expertise in family, housing, health (including mental health) law, and civil rights should provide representation to inmates or teach some law classes at local prisons.

Indeed, the entire bar—lawyers, law professors, and law students—should pitch in and provide representation to prisoners,[159] the vast majority of whom are indigent.[160] But, for the same reason Clarence Earl Gideon was reluctant to have anyone other than an experienced criminal defense lawyer represent him,[161] I worry about the quality of representation by lawyers who don't care.[162] I regularly urge clinic students who have worked with prisoners and are now headed to firms to take some prisoner cases pro bono. Some do.[163]

Whatever my qualms about uncommitted or inexperienced lawyers representing the accused or convicted, there is no reason why lawyers, law professors, and law students (whether enrolled in a law clinic or not) cannot capably respond to prisoner mail.

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158. *See* 42 U.S.C. § 2996e (2012); *see also* William Booth, *Attacked as Left-Leaning, Legal Services Suffers Deep Cuts*, WASH. POST, June 1, 1996, http://www.highbeam.com/doc/1P2-785874.html (last visited Apr. 2, 2013) (discussing the changes in the legal services market) (on file with the Washington and Lee Law Review).

159. It does not have to be lawyers alone. I have no problem with teams of lawyers, legal workers, social workers, and community activists providing services to prisoners.

160. Caroline Wolf Harlow, *Education and Correctional Populations*, BUREAU JUSTICE STATISTICS 10 tbl.14 (Apr. 2003), http://bjs.ojp.usdoj.gov/content/pub/pdf/ecp.pdf.

161. *See supra* note 50 and accompanying text.

162. *See*, *e.g.*, Maples v. Thomas, 132 S. Ct. 912, 927 (2012) (holding that an Alabama inmate who was essentially abandoned by two associates at Sullivan & Cromwell, who left the firm without telling the inmate and missed a filing deadline, could not be barred from habeas relief).

163. I urge them to take on indigent criminal cases pro bono as well.

This is a modest pro bono contribution to a population in need. Prisoners often have very basic questions about law, requiring minimal legal research. A meaningful reply only requires some thought and care.

This is not the time to talk about "rationing justice."[164] It's not the time to talk about rationing the right to counsel either,[165] no matter how costly, unpopular, or difficult it is to fulfill *Gideon*'s promise.[166] It is not "pragmatic" to dispense with the right to counsel for the poor in any category of criminal cases in an age of over-criminalization and over-incarceration. It is the worst kind of capitulation.[167]

If we cannot afford counsel in so-called "minor" criminal cases, why not redirect these cases out of the criminal justice system altogether? If we cannot afford counsel because our courthouses, jails, and prisons are full of drug offenders, why not rethink our approach to drugs? If we cannot afford to keep so many people in prison for so long, why not let them out after they've served their time and changed their ways?

There is no shortage of *lawyers* in the U.S. We have plenty of lawyers.[168] There is a shortage of *will*.

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164. Bright, *Rationing and Denial*, *supra* note 19; Joy, *supra* note 19.

165. *See* Stephanos Bibas, *Shrinking* Gideon *and Expanding Alternatives to Lawyers*, 70 WASH. & LEE L. REV. 1287, 1304–07 (2013) (exploring ways to increase legal representation to defendants through means other than lawyers); Donald A. Dripps, *Why* Gideon *Failed: Politics and Feedback Loops in the Reform of Criminal Justice*, 70 WASH. & LEE L. REV. 883, 916 (2013) (suggesting rationing of counsel based on claims of innocence, seriousness of charge, and seriousness of the range of consequences).

166. Not only do I believe in the right to counsel in criminal cases, I also believe in the right to counsel in civil cases. *See* Debra Gardner, *Pursuing a Right to Counsel in Civil Cases: Introduction and Overview*, 40 CLEARINGHOUSE REV. 167, 168 (2006) (discussing efforts to obtain a civil *Gideon*); Clare Pastore, *A Civil Right To Counsel: Closer to Reality*?, 42 LOY. L.A. L. REV. 1065, 1065 (2009) (urging a right to counsel in civil cases and suggesting that this is a promising time for such a right); Robert W. Sweet, *Civil* Gideon *and Confidence in a Just Society*, 17 YALE L. & POL'Y REV. 503, 505–06 (1998) (urging an expanded right to counsel in civil cases).

167. *See generally* Paul Butler, Op-Ed, *Gideon's Muted Trumpet*, N.Y. TIMES, Mar. 18, 2013, at A21 (arguing that, fifty years after *Gideon*, poor black criminal defendants are worse off because of "tough on crime' lawmakers" and "power-drunk prosecutors," who have built and carry out "some of the world's harshest sentencing laws").

168. *See* David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan 9, 2011, http://www.nytimes.com/2011/01/09/business/09law.html?ref=general&sr

IV. Conclusion

W. Fred Turner should be recognized as the first soldier in "Gideon's Army."[169] He demonstrated what the Supreme Court held in *Gideon*, and any fair-thinking person knows: that having a lawyer makes a difference and no one should be denied one for lack of money.

Of course, what Turner really demonstrated is the importance of having a *good lawyer*.[170] He modeled skilled, zealous defense in every aspect of Gideon's representation: his client-centered approach to interviewing and counseling, thorough fact investigation, willingness to litigate an array of pretrial motions, thoughtful jury selection, theory-driven witness examination, and persuasive closing argument.[171]

Clarence Earl Gideon must be recognized too—for his resourcefulness and persistence from a Florida prison cell. In this time of mass incarceration, we must not forget that Gideon was a criminal defendant, prisoner, and human being. He should inspire us to reach out to others like him behind bars. His fight to be heard—and to be free—is as important today as it ever was.

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c=me&pagewanted=all (last visited Apr. 2, 2013) ("Huge swaths of the country lack adequate and affordable access to lawyers, which suggests that the issue here isn't oversupply so much as maldistribution.") (on file with the Washington and Lee Law Review).

169. *See* GIDEON'S ARMY (Trilogy Films 2012) (documenting the lives of public defenders in the Deep South and the efforts of the Southern Public Defender Training Center to prepare them for their work).

170. *But see* Debra Cassens Weiss, *Kagan Says Poor Defendants Are Entitled to a 'Ford Taurus' Defense*, A.B.A. J. (Mar. 19, 2013, 7:00 AM), http://www.abajournal.com/news/article/kagan_says_poor_defendants_are_entitled_to_a_ford_taurus_defense/ (last visited Apr. 2, 2013) (reporting that Supreme Court Justice Elena Kagan stated at a Justice Department event marking the 50th anniversary of *Gideon* that poor defendants don't have the right to "the best lawyer that money can buy"—a "'Cadillac lawyer'"—but rather a "'Ford Taurus'" lawyer) (on file with the Washington and Lee Law Review).

171. I do not mean to suggest that the conventional approach to providing indigent criminal defense—through court-appointed lawyers like Fred Turner or a traditional public defender office—is the only way to fulfill *Gideon*'s promise. I believe we should be creative about providing services that meet the needs of the criminally accused and convicted in a time vastly different from Clarence Earl Gideon's. *See generally* Robin Steinberg, *Heading* Gideon*'s Call in the Twenty-first Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961 (2013) (exploring holistic defense and changes in the public defender practice).

We rightly celebrate this golden anniversary of *Gideon* for the important principle underlying it—equal justice for the poor—whether or not we have fulfilled it. Though we have a long way to go to meet *Gideon*'s promise, we must redouble our efforts not reduce them, and broaden our vision not narrow it. We must reject talk of rationing the right to counsel and focus instead on altering our insane approach to crime and punishment. Indigent defense in the twenty-first century must include the massive number of people in prison as well as those facing the prospect of prison.