

Gideon's Trumpet (Book Review)

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the lawyer can and should do about them. In all, there is much helpful material here for the student who envisions himself behind the desk as a practicing lawyer, and for the member of the Bar who takes time to consider his professional approach.

LESTER E. DENONN *



GIDEON'S TRUMPET. By Anthony Lewis. New York: Random House, 1964. Pp. 262. \$4.95.

I trust this is an unorthodox review. The book is unorthodox; unorthodox, that is, for lawyers, especially the average lawyer, for *Gideon's Trumpet* involves the average case but a non-average client and a non-average lawyer—with a non-average layman-writer.

This brings up two preliminary points of view. First, the average student or lawyer reads a case as if it consisted merely of words. He fails to understand the human element in the law.¹ Although realizing that times change the law,² he fails to comprehend that personalities and persons may likewise do so.³ The total background of a case may be all-important, and this is why the political scientist does a better job in this respect than does the law professor. Witness, for example, the excellent background analysis of the lawyer's role in influencing the Supreme Court to so interpret the fourteenth amendment as to create not only the favorable conditions for American entrepreneurs in the nineteenth century, but also a logical and legalistic strait-jacket for the twentieth-century Court;⁴ witness further the unfolding factual background of the *Steel Seizure Case* of 1952, as viewed by a non-lawyer.⁵ And witness, at the other end, the praise of Mr. Justice Frankfurter by a former student: "A case was explored as a process, through the record, the briefs, the counsel, the

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¹ See pages 54 and 55 of the volume, especially the latter, where Fortas had to face what he called a "moral problem."

² Gideon's letter to Fortas closes: "I believe that each era finds a improvement in law each year brings something new for the benefit of mankind." LEWIS, *GIDEON'S TRUMPET* 78 (1964).

³ See, e.g., Lewis' discussion of such background matter. *Id.* at 49.

⁴ TWISS, *LAWYERS AND THE CONSTITUTION* (1942).

⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). An analysis of this case appears in WESTIN, *THE ANATOMY OF A CONSTITUTIONAL LAW CASE* (1958).

judges, the statute, its legislative background, indeed the geography of the area involved, preferably to be reported on by a student who came from that locality.”⁶

Second, the average lawyer handles a case as if it were merely a conglomeration of facts to be educed from witnesses. He rarely finds the facts already woven into a connected whole, and even his efforts to do so on trial, in summation, are seldom successful. Generally, an appellate brief digests the facts as the witnesses appeared and testified. Consequently, the judge must thereupon become a hunter, literally as well as figuratively. It is the exceptional brief that disregards this orthodox pattern and develops the facts and counter-facts in a logical and chronological fashion. And it is the very exceptional lawyer who puts touches of human interest, albeit not overdone, into the story.

The reader of this review may scoff at these views. But has he ever read them before? Moreover has he read the recent *Recluse of Herald Square* by Surrogate Cox of New York County or the Wellman books?⁷ The Surrogate has made a probate case into a human drama and almost a mystery “whodunit” story, while Wellman has made a text become a warm and personal account which teaches almost by osmosis. Are these exceptional writers? The answer is written largely upon the shelves of any library, for such authors are in abundance. I am not referring to the “popular” versions of cases which omit, supply, and distort the facts, or to those which emphasize the details of prurient interest. The simple, straight story, if I may alliterate, is made a compelling, warm, and human document which can stand as a true digest and analysis of a case.

This is a roundabout way to introduce *Gideon's Trumpet*. It is written by a non-lawyer, Anthony Lewis, who is a New York Times' Washington reporter assigned primarily to the Supreme Court. Lewis has given us not only a warm, human, connected story of a Supreme Court reversal which still reverberates in state corridors, but he has also given us legal sidelights and factual tidbits which teach and endear. The case involved the unlettered, unknown, but not now unsung, Clarence Earl Gideon, who phrased the issue in his own reply when he requested certiorari: “It makes no difference how old I am or what color I am or what church I belong too [*sic*] if any. The question is I did not get a fair trial. The question is very simple. I requested the court to appoint me an attorney and the court refused.”

How and why did this question arise? Lewis does an excellent job in analyzing the holding of *Betts v. Brady*⁸ and its later develop-

⁶ Freund, *Mr. Justice Frankfurter*, in FELIX FRANKFURTER — A TRIBUTE 148 (1964).

⁷ The Wellman volumes all illustrate what is suggested. See, e.g., WELLMAN, *THE ART OF CROSS-EXAMINATION* (4th ed. 1946).

⁸ 316 U.S. 455 (1942).

ment. Briefly, the Supreme Court there held that a state, under the fourteenth amendment's due process clause, was not obligated to furnish counsel in a criminal matter to an indigent defendant who requested one, unless "an appraisal of the totality of facts in a given case . . . [discloses] a denial of fundamental fairness, shocking to the universal sense of justice. . . ." ⁹ In applying this rule each case had to be examined within its own context, and the author discloses a list of circumstances which have developed over the years in which a state denial of counsel constituted grounds for a reversal. To illustrate, the Supreme Court's requirement of special circumstances "might be his [the defendant's] own illiteracy, ignorance, youth, or mental illness, the complexity of the charge against him or the conduct of the prosecutor or judge at the trial." However, Gideon claimed none of these, but merely that "I requested the court to appoint me an attorney and the court refused." Upon these pathetic words an appeal was built, a doctrine was reversed, a new uniform requirement was imposed upon the states,¹⁰ a new system of criminal justice was required to be fashioned, and this volume was born.

Gideon's Trumpet sounds loud a story which is sufficiently technical to delight a lawyer,¹¹ and yet so down-to-earth in the telling that a non-lawyer can comprehend every legalistic rule and rationale. For example, can a procedural discussion of the Supreme Court's jurisdiction and discretionary power under Article III of the Constitution be of interest to the layman? In discussing cases such as *Martin v. Hunter's Lessee*,¹² *NAACP v. Alabama*,¹³ *Dred Scott v. Sandford*,¹⁴ *Erie R.R. v. Tompkins*,¹⁵ and *Thompson v. City of Louisville*,¹⁶ Lewis makes this esoteric body of constitutional

⁹ *Id.* at 462.

¹⁰ As part of his analysis Lewis presents the Frankfurter-Black issues, one of which is their attitude toward federalism. In addition, he refers to the committee report of the 1958 Conference of (State) Chief Justices, which decried the "overall tendency" of the Supreme Court to press for extensions of federal power. LEWIS, *op. cit. supra* note 2, at 86-87. He then concludes that the *Gideon* case was, in effect, a request by the defendant to nationalize still further by imposing "the universal requirement that counsel be supplied to poor criminal defendants." *Id.* at 88.

¹¹ Although he has taken law courses, Mr. Lewis is not a lawyer and he consequently slips, inadvertently, in his legal particulars. *E.g.*, *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833), did not find Chief Justice Marshall writing "a specific decision that the Bill of Rights did not cover the states." The holding of the case was limited to the fifth amendment's eminent domain clause and its inapplicability to the states. The reasoning of the opinion supports the broader statement by Lewis, and it has been so used. Of course, by later particular judicial selection and inclusion, the holding has been narrowed to almost a present-day vanishing point.

¹² 14 U.S. (1 Wheat.) 304 (1816).

¹³ 357 U.S. 449 (1958).

¹⁴ 60 U.S. (19 How.) 393 (1857).

¹⁵ 304 U.S. 64 (1938).

¹⁶ 362 U.S. 199 (1960).

law readable, understandable, and even fascinating.¹⁷ At one point the author, speaking of the absence of legal implications upon a denial of certiorari, says: "That is why various justices have tried to educate the public" regarding this rule, and yet, "lawyers" can easily be substituted for "public" without doing the profession an injustice. Thus, in this and other like aspects Lewis also provides a technical, procedural education for practitioners. However, it is the substantive aspects of constitutional law that are of even greater interest to both lawyer and layman and the volume abounds in these necessary digressions. For example, the judicial power of review, ever-present and ever-important, creeps into the discussion, together with the doctrine of self-restraint and the Frankfurter-Black views thereon; the merits of federalism are touched upon, although superficially; and the current judicial debate concerning the application of the entire Bill of Rights to the states is briefly analyzed.

Of even greater interest and importance to lawyers is the opening glimpse, and then continuing discussion, of a competent lawyer at work. That is to say, how the mind of Abe Fortas, who was appointed by the Supreme Court as Gideon's counsel, functioned in this case. How he was appointed is naturally interesting, but it is the discussion of how he fulfills this assignment that will impress and educate the lawyer-reader. After a biographical treatment of Fortas, Lewis gets down to the business of how this lawyer began his assignment. I wish space permitted presenting verbatim pages 53-64 of the volume, for here is compressed a practical education for the trial or appellate lawyer. Briefly, Fortas found that he first had to get the facts, not only the facts appearing in the cold, bare certiorari record, but also those in the trial record along with the personal, human touches which only Gideon could supply. This was necessary even though the Supreme Court's grant of certiorari had requested that counsel include a reconsideration of the *Betts* holding, since the lawyer assigned to aid Gideon was there to protect a client, not to expound a theory, and the special circumstances rule which had followed hot upon *Betts* might conceivably apply here. In other words, Fortas owed Gideon the duty of *not* reconsidering *Betts*, if the

¹⁷ See LEWIS, GIDEON'S TRUMPET ch. 2, at 11-28 (1964). It is necessary to include the pagination of this chapter since the volume, unfortunately, does not contain a table of contents. Another minor criticism is that the author omits all references to *Betts* and *Gideon* in his Table of Cases because they "appear so frequently that they are not indexed." *Id.* at 257. Consequently, the reader may have to search several minutes in order to locate the citations to *Gideon* and *Betts*. Furthermore, and an even more minor criticism, there are no footnotes. Instead, the references are gathered at the end of the volume under pages and chapters. Hence, the reader is compelled to seek and perhaps not find the references. On the credit-side, there is a list of suggested readings. *Id.* at 253-56.

facts so permitted, even though in deference to the Supreme Court's wishes the case and its reconsideration should be briefed. If the special circumstances rule applied, then the major preparation and argument should be directed to this area. Consequently, all of the facts became important, and these had to be obtained. The personal letter which Gideon sent to Fortas, outlining his life, is a human interest document which reveals that law, as Lewis puts it, involves "the smell of flesh and blood; [a lawyer] wants a human being for a client, not an abstract principle." Nevertheless, the details of Gideon's life disclosed little, if any, special circumstances which could be urged under the exceptions to the *Betts* doctrine. The trial record then became important¹⁸ and a reading of that document convinced Fortas and his associates that

there was no longer any question about the appropriateness of this case as the vehicle to challenge *Betts v. Brady*. Plainly Gideon was not mentally defective. The charge against him, and the proof, were not particularly complicated. The judge had tried to be fair; at least there was no overt bias in the courtroom. In short, Gideon had not suffered from any of the special circumstances that would have entitled him to a lawyer under the limited rule of *Betts v. Brady*. And yet it was altogether clear that a lawyer would have helped. The trial had been a rudimentary one, with a prosecution case that was fragmentary at best. Gideon had not made a single objection or pressed any of the favorable lines of defense. An Arnold, Fortas and Porter associate said later: "We knew as soon as we read that transcript that here was a perfect case to challenge the assumption of *Betts* that a man could have a fair trial without a lawyer. He did very well for a layman, he acted like a lawyer. But it was a pitiful effort really. He may have committed this crime, but it was never proved by the prosecution. A lawyer—not a great lawyer, just an ordinary, competent lawyer—could have made ashes of the case."

Since special circumstances were out of the way, and since the trial itself appeared to provide a good base upon which to attack *Betts*, Fortas had to reconsider *Betts* in order to help Gideon. But how should the brief be written and the oral argument made? Again, the author gives a fascinating analysis which calls to mind the late Judge Jerome Frank's practical views of the judicial approach to decisions and Thurman Arnold's realistic appraisal of law in action (he is now a senior member in the Fortas firm). Fortas had to think of a reconsideration of *Betts* in the light of not only its theoretical bases, but also as interpreted and applied by men, *i.e.*, Justices of the Supreme Court. He was aware of the fact that upon the current bench sat a few men who had already either directly or impliedly manifested their views, *viz.*, against

¹⁸ This was later included in the *Gideon* brief and Florida's Attorney General, upon oral argument, complained about its inclusion. "Justice Harlan: 'Why do you bother about that?' Jacob: 'Okay, I won't press it.'" *Id.* at 176.

changing the *Betts* rule. Furthermore, the judicial philosophy of the present Justices had to be considered in the light of a reliance upon the value of stare decisis, federalism, incorporation of the Bill of Rights into the prohibitions of the fourteenth amendment, etc. These pages, 84-94, are simply "must" re-reading for the purchaser of this volume.

At this point, however, Lewis digresses from these details of Fortas' thinking and presents some background material on the sixth amendment and on how *Betts* came to be decided. He also shows that the *Betts* doctrine had not been accepted by the legal profession since its birth and that this, in conjunction with other factors, enabled Fortas to recognize "that the current of legal history was moving with him." Even so, how would the Justices vote? According to Lewis, the Fortas thinking disclosed that the Chief Justice and Justices Black, Douglas, and Brennan would favor reversal. Opposing would be Justices Stewart, Clark, and Harlan, together with Frankfurter (who was expected to return to the bench that fall despite his illness, but who retired, with Justice Goldberg taking the seat), creating an apparently balanced Court. How would the newest appointee, Justice White, vote? Any mystery as to the voting was dissipated March 18, 1963 (the decision day). The Court was unanimous in overruling *Betts*,¹⁹ with Justice Black writing the majority opinion and Justices Douglas, Clark, and Harlan concurring in the result but writing separate opinions. In other words, Supreme Court box-scores, like presidential polls, are subject to sudden change, and hence the Justices cannot be dissected, catalogued, and boxed with any degree of infallibility.

The preceding digression aside, Lewis returns to his lawyer-at-work narrative. One thought became more and more a fact as I read on. We have all read of and even had experience with that legal gargantua, the big firm. I don't propose to debate this, but I wonder what would have happened if Fortas had been a single practitioner, for the work that Lewis portrays from here on is that of a large, if not giant, law firm, which can call upon its many members, associates, clerks and summer workers, to do the job. Again I suggest as "must" reading pages 120-134, for here are compressed the lawyers' efforts which produced the brief digested at pages 135-138. Lewis concludes this phase of the appeal with the printing and service of the brief, and a letter from Gideon to Fortas thanking him for the work.

Lewis thereupon passes over to a discussion of Florida's opposition to Gideon's brief. Upon what meat has this state's attorney fed? After a brief presentation of the background of Bruce Robert Jacob, the author discusses the reasons behind Jacob's

¹⁹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

request to the other forty-nine states' attorneys to file amicus briefs and the role of such briefs. Then comes a stinger! Jacob had expected a degree of assistance from the other states because, disregarding his personal views on the merits, most state attorneys general would feel obliged (at least so he reasoned) to support a position on *Betts v. Brady* which permitted them to act freely without the compulsion of a supervening and uniform federal requirement—freely, that is, with respect to providing counsel in all criminal prosecutions. But instead of cooperation there came opposition, e.g., only two states, Alabama and North Carolina, eventually filed amicus briefs in support of Florida's position, while twenty-two states endorsed, as amici, the brief filed by Massachusetts supporting Gideon's position. If ever an appeal for cooperation backfired, it was this one. Lewis relates the over-all details of the Florida brief and then presents the separate Oregon and A.C.L.U. amicus briefs opposing Florida.

Thereupon, the briefs having been filed, the oral argument encompasses the entirety of Chapter 11. As before, this, too, is "must" re-reading. A preliminary discussion of oral argument ensues, wherein Lewis points up the informality of the Court during argument; gives the sitting of the Justices and a one sentence background description of each; and then describes the case being brought up before the tribunal. The give-and-take, the questions and answers, the general and particular views, not only of the Justices but of counsel, provide a fascinating background for any lawyer or layman, for here is compressed the physical battle itself, toward which all has been leading. Briefs and research, printed words and phrases, all bow to the oral argument. Unfortunately (to this writer) the requirements of space prevent Lewis from incorporating more than he has selected, excellent though these selections be. The flavor and the excitement of the courtroom's atmosphere nevertheless do come through, and for this Mr. Lewis is to be congratulated.

What follows is, today, anticlimactic since we all know that *Betts* was overruled, and that *Gideon v. Wainwright*²⁰ has spawned fresh problems, albeit minor on the comparative scale of values. But for the average reader the discussion of the Court's determination and reading of its opinions is definitely of interest, as is the practical aftermath of the reversal. Lewis does moralize to a degree, but against the backdrop of what has preceded, this reads well. The "Epilogue" is naturally of great importance, for the reader's curiosity has long been aroused. Now that Gideon has won his right to counsel, what has happened to him? The answer, as recorded in the volume, is a description of Gideon's new trial in which he was represented by a lawyer, but not until after some pyrotechnics by Gideon. The transcript of the new trial is quoted

²⁰ *Ibid.*

almost *ad nauseum*, but at least the layman can see what is involved in such a case. The result was a jury verdict of not guilty. Put differently, a lawyer got Gideon off, whereas without one he had lost. Lewis does not say whether Gideon's "fame" and any (questionable) sympathy for him influenced the verdict. Did Gideon feel he accomplished something, asked a reporter after the trial? And the final line of the volume is Gideon's reply, "Well I did." And the final line of this review is, "And how!"

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