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What Does *Gideon* Mean For Legal Ethics Today? IV

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The theatrical production of the musical *The Scottsboro Boys* flashes through the 82-year odyssey of 9 black teenagers who were wrongfully convicted of two rapes that, it has now been concluded, did not happen. The "crimes" were alleged to have occurred in rural Alabama on March 25, 1931.² By April 9th that same year, eight of the nine boys, aged 14-19, had been convicted and sentenced to death in the electric chair. The eight convictions were the results of three trials that were completed between April 6 and April 9. (The trial of the ninth defendant, who was 13 years old at the time of his trial, ended in a hung jury. All 12 jurors agreed that he was guilty of participating in the alleged rapes, but only seven of the 12 jurors were willing to vote for executing the 13-year-old. So a mistrial was declared.)³

Criminal trials, even those in which capital punishment was a possible outcome, moved much faster back then. One reason for that was that, if the defendants couldn't afford a lawyer, a lot of time could be saved. In 1931, there was no right to the appointment of counsel in state criminal prosecutions of indigents, even when charged with capital offenses. This meant there was no defense. No factual investigation. No review of the prosecutor's evidence before trial. No cross-examination of dubious prosecution witnesses. No testimony from witnesses for the defendants to support alibis and alternate theories. No mitigating evidence regarding the appropriateness of capital sentences, even when they were imposed on teenagers.

As it turned out, those speedy trials in April of 1931 did not end the cases. That's because the convictions of "the Scottsboro boys", as they came to be known all across the country, were overturned by the United States Supreme Court in a landmark decision handed down in 1932.

In *Powell v. Alabama*,⁴ the Court held that the Due Process Clause of the 14th Amendment requires the appointment of counsel for indigent defendants in a state

criminal proceeding that could result in a capital sentence. It would be 31 years before the Supreme Court, in *Gideon*, would extend this interpretation of the due process clause to non-capital state prosecutions.

Now, a reader might be wondering: If the Scottsboro boys didn't have lawyers, how did their convictions come before the Supreme Court? That's a surprising story that is germane to the meaning of *Gideon* today. It was the Communist Party of the United States that came to their rescue. Yes, you read that right.



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As noted, the trials of the Scottsboro boys drew national attention. There were demonstrations in the Harlem neighborhood of New York City. In addition, demonstrators carrying signs demanding justice for the Scottsboro Boys marched peacefully on the National Mall. The American Communist Party became interested in the case. The parents of the convicted boys accepted the offer of the Party's legal arm, the International Labor Defense (ILD), to provide lawyers to handle their sons' appeals.⁵ The appeals through Alabama's state courts were unsuccessful, but the ILD retained another lawyer to petitions the U.S. Supreme Court for *certiorari* and to argue the appeal when *cert.* was granted. *Powell v. Alabama* was the result.

Hang on; the story's not half-way finished yet. Even though the hasty convictions of April 1931 had been vacated, the Supreme Court had not cast an opinion on the boys' guilt or innocence. So Alabama retried them. The first one to come to trial for a second time had the benefit of an ILD-retained lawyer, Samuel Leibowitz of New York. Through Leibowitz's careful investigation and aggressive work in court, the prosecution seemed to unravel. Prosecution witnesses faltered under cross-examination. One of the "victims" of the alleged rapes recanted the testimony she gave at the first trial. Leibowitz's real performance was as courageous and powerful as was Atticus Finch's fictional work in "To Kill a Mockingbird." But, as was the case in "To Kill a Mockingbird", it didn't matter. The second trial ended with another conviction and another death sentence.⁶

There were more appeals to the Supreme Court that produced more landmark decisions. In 1935, the Supreme Court decided the companion cases of *Norris v. Alabama*⁷ and *Patterson v. Alabama*,⁸ holding that a criminal conviction obtained from a jury from which Blacks systematically had been excluded cannot stand.

So there was a third trial and, yes, a third conviction. But, in what appears to have been a negotiated compromise, four of the boys were released. The other five went to prison. In 1975, Alabama Governor George Wallace (yes, that George Wallace) exonerated one of the boys, declaring that he was "not guilty". Earlier this year (yes, 2013), the other eight Scottsboro Boys were posthumously exonerated by a bill passed by the Alabama Legislature and signed by the state's current governor.⁹

So the trials of the Scottsboro Boys contributed to significant reforms to the American criminal justice system that we all take for granted today. It is worth remembering, however, that it was lawyers' retained by the ILD, an arm of the Communist Party USA, who stood up for the Scottsboro Boys and convinced the United States Supreme Court to breathe life into the Due Process and Equal Protection Clauses of the 14th Amendment for the sake of us all.

It is also worth remembering that for the first 174 years of our republic, we – all of us, especially those in the legal profession and judiciary – tolerated a fundamentally unfair and unjust criminal justice system. Think about it: 1963 wasn't that long ago. And think about the fact that 31 years passed between *Powell* and *Gideon*. Why did it take so long? How many prosecutors and state attorneys general argued against extending *Powell's* reasoning to non-capital trials. How many state and federal appellate judges declined to acknowledge that, when defendants in criminal proceedings were unrepresented, there was an unacceptably high probability that their trials would produce inaccurate (i.e., wrongful) convictions, sending innocent people to prison and leaving true perpetrators unpunished and on the loose?

Yes, our criminal justice system has improved a lot over the decades. For this, our profession can be proud. But we have no reason to be complacent. If we could tolerate a fundamentally unjust criminal justice system for the 174 years before *Gideon*, is it possible that we are currently tolerating some fundamental problems with our civil justice system today, in our nation's 224th

year of existence? Is it possible that, say, 50 years from now, lawyers will be working in a civil justice system that provides state-funded counsel to indigent parties in civil proceedings "where basic human needs are at stake, such as disputes involving shelter, sustenance, safety, health or child custody..."¹⁰ Will they wonder why it took so long for America to develop a system of civil justice like dozens of countries around the world had put into place long before?

i David Thompson, John Kander, and Fred Ebb, *The Scottsboro Boys* (2009).

ii The chronology of this saga is taken from the theater program for the London production of *The Scottsboro Boys*, a musical that opened in 2013.

iii http://en.wikipedia.org/wiki/Scottsboro_Boys, citing DOUGLAS O. LINDER, "The Trials of the Scottsboro Boys," in *FAMOUS TRIALS* (XX ed.) 19XX.

iv *Powell v. Alabama*, 287 U.S. 45 (1932).

v http://en.wikipedia.org/wiki/Scottsboro_Boys. vi *Id.*

vii *Norris v. Alabama*, 294 U.S. 587 (1935).

viii *Patterson v. Alabama*, 294 U.S. 600 (1935).

ix Theater program for the London production of *The Scottsboro Boys*, a musical that opened in 2013.

x Among the IDL-financed lawyers who worked on these cases were Walter Pollack, Joseph Brodsky, George W. Chamlee, and Samuel Leibowitz.

xi ABA Basic Principles of a Right to Counsel in Civil Legal Proceedings, approved at the August 2010 Annual Meeting of the ABA House of Delegates.

www.americanbar.org/.../aba/.../legal.../ls_slaid_105_revised_final_aug (last viewed July 29, 2013). Numerous state and local bar associations have advocated for similar policies. *Id.*