Muting Gideon's Trumpet: Pricing the “Right to Counsel” in Minnesota Courts

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The year 2003 marks the 40th Anniversary of Gideon v. Wainwright [FN1]-- the U.S. Supreme Court case made famous by Anthony Lewis' book, Gideon's Trumpet, and the movie by the same name, starring Henry Fonda. The case made for a great story:

Clarence Earl Gideon was a penniless prisoner who was serving a five-year sentence; because his request for an attorney had been denied, Gideon had represented himself before the Florida jury that convicted him of breaking and entering the Bay Harbor pool room. After being sentenced, Gideon scrawled a handwritten post-conviction petition in No. 2 pencil and mailed it directly to the U.S. Supreme Court. Mr. Gideon couldn't understand why the right to counsel, which was clearly spelled out in the 6th Amendment and which applied in federal courts and in other kinds of cases in state court, did not apply to him.

**THE NECESSITY OF LEGAL REPRESENTATION**

As early as 1938, the Supreme Court had held, in Johnson v. Zerbst, [FN2] that the 6th Amendment right to defense counsel was so central to the adversary system that, in the absence of appointed defense counsel, federal courts lacked jurisdiction to issue judgments. In the famous "Scottsboro Boys" case [FN3] decided in 1932, the Supreme Court had held that state courts had to appoint free counsel in some kinds of capital cases. In 1956, the Supreme Court had ruled that both rich and poor have the same right to transcripts on appeal.1956. [FN4] In 1962, the year before Gideon's trial, the Supreme Court had held that appointed counsel was required in any case in which the presence of a lawyer might make a difference; [FN5] but this "right" was determined case-by-case on appeal, with the benefit of the doubt going to the trial judge who denied the appointment.

The Supreme Court appointed a well-known New York lawyer and future Supreme Court *Justice*, Abe Fortas, to represent Mr. Gideon on appeal. Then-University of Minnesota Law Professor Yale Kamisar and Minnesota Attorney General Walter Mondale played key roles in the case, organizing some 22 state governments to enter the case in support of Clarence Gideon's right to a lawyer. Minnesota can justifiably claim to have been in the forefront of establishing the right to counsel for all indigent defendants 40 years ago.

Whether an appointed counsel might make a difference in the quality of justice, or not, was answered in the second Gideon trial. Two years after he was originally convicted, Clarence Earl Gideon was tried before a jury second time. This time W. Fred Turner, "a leading criminal lawyer" was appointed to represent him. As reported by Anthony Lewis in the New York Times of August 5, 1963:

Mr. Turner found a new defense witness. He developed evidence to discredit the chief prosecution witness. He talked to the jury about "reasonable doubt" and that "this country was not founded on a man having to prove
his innocence -- we're all thankful for that"
The trial began at 9 this morning and lasted most of the day. The jury took an hour and five minutes to decide the verdict: Not guilty.

THE IMPACT OF THE GIDEON "REVOLUTION"
Although the Gideon Court took one seemingly small step, by applying the right to counsel to all serious state prosecutions, rather than case-by case, the decision had enormous implications for the 90 percent of criminal prosecutions that occur in state courts. [FN6] The Gideon Court touched off a criminal litigation "revolution" that would have made Clarence Earl Gideon famous even without the book or the movie. According to Anthony Lewis, writing in the New York Times of August 5, 1963,

The decision set off widespread reactions among the states. Florida's Legislature passed in May a bill providing a public defender in every judicial circuit .... [o]ther state legislatures, courts and lawyers have broadened provisions for counsel for the poor.

Opponents of Gideon complained that the nation couldn't afford to give fair trials to poor people, because Gideon actually did much more than increase the number of defense attorneys for the up to 90 percent of state criminal defendants too poor to hire a private lawyer. [FN7] Gideon also meant more judges, more prosecutors, more bailiffs, more court personnel, and more jurors. More courtrooms had to be built; more law school seats were needed; and more law professors were employed to meet the need.

The cynical might say that Gideon was nothing more than a "full employment" case for the legal profession. But, by requiring trained adversaries on both sides of serious criminal cases, Gideon ushered in a "justice revolution" that transformed the American legal system from the bottom up. The Supreme Court thought that ensuring the integrity of the adversary process was worth the cost: "[T]he right of one charged with crime to counsel may not be fundamental and essential to a fair trial in some countries, but not in ours." [FN8]

After Gideon, tens of thousands of trials were transformed from one-sided exercises in pro se futility to real "adversarial" proceedings in which evidence was challenged, objections were preserved for appeal, complex legal arguments were advanced, strategic decisions were taken, and the quality of appellate court opinions was elevated because of improved trial records. But, many cases were also resolved more quickly as lawyers began assisting defendants in settling cases when a guilty plea made sense. Trial records made by Gideon-required lawyers not only made later Warren Court decisions possible, but improved the quality of jurisprudence in all facets of criminal litigation, up to the present moment.

PUTTING A PRICE ON GIDEON
Given the prominence of Gideon as the foundation protecting fundamental fairness in adversary criminal proceedings, and the important role Minnesota played in supporting Gideon's right-to-counsel claims, it is more than slightly ironic that the Minnesota Legislature chose this year, the 40th anniversary of Gideon, to require indigent defendants to pay "public defense" fees from $50 to $200, irrespective of their particular financial circumstances. Failure to pay up in 30 days results in a civil judgment -- presumably reflected in credit reports -- that the state can recoup through withholding tax refunds, or other state payments.

On September 3, ruling in State v. Tennin, Hennepin County District Judge Richard Hopper declared the new fees unconstitutional, based on longstanding Supreme Court precedent that due process requires a judicial determination whether a "substantial hardship" will result for each defendant. Minnesota already had a $28 attorney representation fee and levied court costs; courts have routinely found that requiring these payments by
already indigent defendants would be a "hardship." Ramsey County Judge George Stephenson told the Washington Post, "Most judges waived the [attorney] *19 fee because the money is better used elsewhere ... day care, court costs, underlying fines and transportation costs." [FN9] The case is pending before the Court of Appeals [FN10] and is certain to be reviewed by the Minnesota Supreme Court, and possibly by the U.S. Supreme Court.

Minnesota is not completely alone in this effort to turn prosecution of indigent defendants into a state "income stream," irrespective of the requirements of Gideon. Based on the "we can't afford it" argument, and fears that low-income defendants were taking advantage of "free" legal representation, a few other states have enacted similar "pay to play" reimbursement schemes. The November 13, 2003, Washington Post reported that Florida, the state with the most "successful" system so far -- and also the state that denied a lawyer to Clarence Gideon -- raised $2.5 million in fees. Minnesota, with a much smaller population and lower crime and incarceration rates, is projecting an income of $10.2 million over the two-year budget cycle.

But, even if the Minnesota scheme is more financially "successful," forcing indigent defendants to choose between paying for the lawyer that a fair adversary system requires and paying the rent raises much larger questions about the "costs" the Minnesota rule imposes on the legal system, itself. In Gideon, the Court recognized that all governments rely on lawyers to prosecute crime and, in an adversary system like ours, lawyers on both sides are necessary for that system to function:

fair tribunals in which every defendant stands equal before the law ... cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. [FN11]

In Gideon, the Supreme Court noted that "there are few defendants charged with a crime ... who fail to hire the best lawyers they can ...." [FN12] No one seriously questioned O.J. Simpson's right to put together a "dream team" defense when he was facing serious criminal charges. Corporate clients may complain about the legal fees we lawyers charge, but no one ever questions the corporate client's right to pursue their own interests, with the best representation available, in either criminal or civil proceedings. And, all lawyers and law students know the well-worn admonition that even a lawyer, acting pro se in any kind of legal proceeding, has a "fool for a client."

In an "adversarial" system premised upon the skillful presentation of competing viewpoints to reach the "truth," [or at least a legally sufficient and socially acceptable outcome], this should not be surprising. But access to legal representation and meaningful access to the courts, even for people of average income, has been, and continues to be, determined by market forces. Before Gideon, the same was true of both civil and criminal proceedings.

OTHER RIGHTS TO COUNSEL

In Minnesota, imbalanced "access to justice" in the civil arena -- resulting from "market failure" in delivering legal services -- has led to many laudable efforts to right the imbalance. These include such as IOLTA funds to support legal services for low-income clients; MSBA President James Baillie's focus on encouraging pro bono legal services to the disadvantaged, [FN13] and the Minnesota Justice Foundation/Law School program to have 80 percent of law students contribute 50 hours of pro bono work during law school.

But, as everyone associated with the legal profession knows, pro bono "charity" can never be sufficient to meet the need, and even people who consider themselves "middle-class" have difficulty finding legal representation they can afford. It has been estimated that despite the fee-shifting of contingency fee practice and the best efforts of agencies like Legal Aid, much if not most of the population remains unserved, or underserved. [FN14] This embarrassment for our profession can only get worse as the costs of legal education increase and the economic
climate reduces foundation funding and other sources of income for "public interest" legal jobs. [FN15]

For law students, the good news is that there is a vast unmet need for legal representation in the civil courts in Minnesota, and the myth that "there are too many lawyers" is just not true -- even though Minnesota has 24,000 today, up from 14,500 [FN16] in 1986. The truth is, because there is no right to a lawyer in civil cases, and because we lack a delivery system that can link lawyers with the majority of the population of average means that needs lawyers, too many lawyers are trying to work for too few people.

This phenomenon not only sheds light on the MSBA push for more pro bono representation, but it has also led to increased pro se filings in recent years. These have presented such difficulty for efficient court administration that in 1998 Minnesota's Conference of Chief Judges proposed procedural rules favoring cases filed by lawyers, while making it easier to dismiss messy pro se litigation. [FN17] The irony is that in making it even more difficult for nonlawyers to have access to the tax-supported courts, the new rules lend credence to the argument that our entire profession unfairly benefits from public subsidies that make it possible for us to ply our trade. And wealthier litigants get a bigger subsidy than those who can't afford to burn up court time.

Although we have come to accept the common wisdom that there is no "right" to a lawyer in civil proceedings, it is worth questioning why that must be so. Justices Powell and Rehnquist, writing in dissent in Argersinger v. Hamlin (the case that held "actual incarceration" to be the trigger activating the 6th Amendment right to counsel in minor state and federal criminal cases) made a compelling argument *20 that there are many interests that might be more important than merely spending one night in jail:

Serious consequences also may result in convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals that a brief stay in jail. When deprivation of property rights and interest is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process. [FN18]

Justices Powell and Rehnquist are certainly correct. Imagine facing a legal proceeding in which your job, your house, custody of your child, or repossession of the car you need to get to work are at issue. Minnesota has not yet recognized a constitutional right to an attorney in most civil proceedings, even when liberty -- the constitutional right which triggers the requirements of Gideon in a criminal context -- is at issue.

To be fair, the Minnesota Legislature has expanded the right to counsel in some civil proceedings via statute. Persons facing confinement in civil commitment proceedings have a statutory right to counsel at commitment hearings and during the course of the confinement, but lack of funding from financially stretched county budgets often makes this statutory "right" illusory. Children in juvenile court also are provided with counsel, whether the proceeding is criminal in nature or not. And, in some cases, Minnesota courts do appoint counsel in post-conviction, civil habeas corpus proceedings. But this is a matter of judicial discretion. Even indigent inmates who, like Clarence Gideon, advance legitimate constitutional claims, have no constitutional right to a lawyer to help prepare or litigate the petitions filed after direct appeals are exhausted.

Although not discussed in State v. Tennin, the new statute might well undermine another kind of "right to counsel" that comes from the Miranda requirement that a person "in custody" be given the opportunity to consult with a lawyer before answering any questions, to prevent coercion and to protect the 5th Amendment right to remain silent. Just recently, in U.S. v. Dickerson, [FN19] Chief Justice Rehnquist wrote that the Miranda requirements were not just one way of ensuring the absence of coercion: the Miranda warnings, including the right to
consult with a lawyer at no cost before answering questions, are constitutionally required. The new statute may also be unconstitutional because it seems to change Miranda to require a warning that "you have a right pay up to $200 to consult with a lawyer before answering questions."

In Minnesota, this right is brigaded by the Minnesota Supreme Court's requirement in State v. Scales [FN20] that all statements taken following a waiver of the Miranda/Dickerson right to counsel must be electronically recorded to be admitted as evidence at trial. While Alaska is the only other state with this requirement, more law enforcement agencies in more states are adopting the procedure. Following the death penalty moratorium Governor Ryan imposed in Illinois after a string of wrongful death penalty convictions, the governor's select commission recommended recording of all confessions.

Minnesota also has another little-known, but potentially powerful mechanism for enforcing the right of a suspect in police custody to an attorney: civil damages and criminal prosecution for law enforcement officers. Since 1889, Minn. Stat. 481.10 has required that: "all officers ... shall admit any attorney ... whom the restrained person may desire to consult ... shall notify the attorney of the request for consultation ... reasonable telephone access shall be provided ... at no charge ...." This 19th Century "right to counsel" makes Minnesota the only state in the nation that provides criminal and civil penalties for officers who violate Miranda by refusing to comply with a request for a lawyer.

MUTING GIDEON'S TRUMPET
The failure to adequately fund criminal defense for indigents has long undermined the promise of both Gideon and Miranda, both in Minnesota and elsewhere. The diminishing resources provided for the defense of indigents was raised in 1991 by then-Hennepin County Public Defender Bill Kennedy in a suit alleging that funding by the State Board of Public Defense resulted in public defenders providing "ineffective assistance of counsel." Kennedy argued that public defenders' effectiveness was diminished as caseloads increased and defense funding was reduced, at least in relation to funding for law enforcement and prosecutors. At bottom, Kennedy asserted more than ten years ago that the "adversary process" -- that made Gideon necessary -- was no longer working effectively in Minnesota criminal courtrooms.

Although the suit was dismissed, the issues raised by Kennedy have not disappeared, and may actually have gotten worse. According to State Public Defender John Stuart, recent budget cuts have made a bad situation even worse. Since 2000, Minnesota has lost 36 public defender positions, and the case-load has gone up 14 percent. The average public defender in Minnesota handles 915 cases a year, more than twice the number recommended by the American Bar Association. According to Kristine Kolar, 9th District Public Defender, public defenders logged in 40,000 unpaid hours in 2002. And, in the last year, more than double the usual number of public defenders resigned.

The problem of diminishing resources is having an impact on the Minnesota justice system that extends beyond the funding and caseloads of public defenders and undermines not only the right to counsel, but other rights as well. Prosecutors and defense attorneys, as well as judges, objected to the proposed elimination of mandatory written transcripts in felony and gross misdemeanor cases. (By order dated October 31, 2003, the Minnesota Supreme Court ordered elimination of mandatory written transcripts of plea and sentencing hearings; by order dated November 10, 2003, the Court eliminated mandatory transcription of extended jurisdiction juvenile (EJJ) hearings. See "Orders in the Courts," p. 32. ED.) According to Norman County Attorney Thomas Opheim, "[M]any times the transcript is the only accurate record we have ... the actual sentence and the reasoning behind it are important tools in handling post-judgment matters." District Judge James Lynn noted that even judges
can't predict which transcripts might be needed later, even if many do go unreviewed.

Eliminating $3 million from the state's biennium budget to save jobs of court personnel is the justification for cutting out the transcripts. (Although tape recordings will still be made, litigants will have to pay for transcripts). According to opponents at an October 15 Supreme Court hearing, which included judges as well as prosecutors and defense attorneys, the absence of transcripts would make meritless appeals more likely, and further stretch public defender resources. Hennepin County Attorney Amy Klobuchar expressed concerns that public accountability of the courts to the public would suffer. Charging for transcripts will also increase cost barriers for private litigants who wish to exercise their rights to appeal.

Stuart explained that paying for transcripts would increase public defender budgets by an additional $140,000 and prosecutors noted that appeal costs for the prosecution would be shifted from the state court system to county budgets. To protect a shrinking budget, even public defenders have proposed limiting use of appointed public defenders in CHIPS (Children in Need of Protective Services) cases, in which parental rights may be lost, and children may be sent to a state facility.

"Cost cutting" is also the justification for the "pay for your defense" statute. Proponents of the statute allege that the system is abused by defendants who could afford private lawyers. State Rep. Eric Lipman wrote a brief defending the income-generating scheme saying that lawmakers, like him, were exasperated by judges who failed to assess the $28 fee. Lipman told the Washington Post that, "These are modest amounts. We're trying to get some balance here. Too many judges just waived the fee as a general rule." [FN21]

The mandated "fee for no-cost counsel" may indeed be "modest," at least by Mr. Lipman's standards, but consider what $100 or $50, much less $200 -- payable now-- might mean to Clarence Gideon trying to decide whether he could afford his "right to counsel" in his second trial. In Minnesota, if he grossed more than $250 a week -- or $500 if he were the head of household -- he could not even qualify for a public defender. Under the new "Minnesota Plan," Mr. Gideon could not consult with a public defender about whether or not to plead guilty for less than $200, much less get advice about the details of his case. Mr. Gideon's dilemma would be whether to "voluntarily" waive his right to counsel or to take on a debt greater than his monthly food bill. And, if he couldn't pay up in 30 days, a civil judgment might ruin whatever credit he had.

Given this kind of "Hobson's choice," the "making indigents pay" plan may do more to solve the courts' and public defenders' funding problems by coercing "waivers" of Gideon and Miranda than by generating "income" from desperate indigents who pay the fees. But the "make indigents pay" plan may actually prove more expensive in the long run because improperly conducted pro se trials and guilty pleas may result in more pro se appeals. These are the same problems that caused the Conference of Chief Judges to try to limit pro se civil litigation a few years back. [FN22]

When considering the problem of the "undeserving poor" who "take advantage" by being added to the list of 900 other clients each public defender is carrying, I wonder how many lawyers could "afford" to fully represent clients who gross even $600 or $700 a week. One court appearance can eat up a client's entire weekly income, and a full trial would be out of the question. The plan to charge indigent defendants does nothing to solve the "market failure" for the vast "middle-class."

Even if getting lawyers out of more criminal cases does reduce budgets in the short term, the ultimate question is whether these "savings" are worth their cost to the American system of adversary justice and to the society as a whole. In Gideon, Justice Black stated what we who work in our adversarial legal system all know to be true:
"lawyers in criminal courts are necessities, not luxuries." [FN23] That's why the Supreme Court, ruling in Johnson v. Zerbst, stripped the federal courts of jurisdiction to issue criminal judgments when both adversaries aren't present. When indigent Minnesota defendants are forced to choose between necessities like food, shelter, or a car payment to get to work and the necessity of getting at least some advice from an overworked, under-funded public defender, Gideon's promise of a baseline level of "equal justice" for all has been fatally betrayed. This is a cost that all Americans bear, even if it doesn't show up on a bottom line. The simple question is: how much is "justice" worth to Minnesotans?

State Public Defender John Stuart has articulated the dilemma: "[t]his isn't my choice ... but if a choice has to be made between [the fee] versus laying off many, many lawyers and making the quality of services suffer, then we have to do whatever has to be done." But the Washington Post also quoted Stuart as accepting the assumption that these "choices" are borne out of financial necessity: "The state is broke, so how are we going to operate?"

Although, in light of current political realities, the fees are better than further cutting public defender budgets overall, accepting "we're too broke to protect the Constitution" lets Minnesota's political elites off the hook. When the objective is to "squeeze" every last dime out of all state agencies, a criminal court system that usually "processes" poor people -- who are among those least likely to vote -- makes an inviting target. Gideon's guarantees are under attack in Minnesota because it makes good politics, and the integrity of our legal system in protecting the interests of the less affluent is forfeit -- every day, in every courtroom in the state.

A "MODEST" PROPOSAL

Here's a modest, tongue-in-cheek proposal to "fix" the system in another way: What if every criminal defendant had the same right to counsel that was recognized in Gideon? After all, some 90 percent of all defendants already get Gideon's diminishing protections and we could cut unnecessary "costs" by reducing public subsidies for lengthy, expensive trials like the one O.J.'s "dream team" gave him, if O.J. and the Enron defendants had one overworked public defender. We could save millions of dollars in extra prosecutors' and judges' salaries alone. Perhaps more importantly, "equal justice" really would exist in American criminal courts, at least between criminal defendants.

Better yet, if the guarantees of Gideon (and only those guarantees) applied to all, then everyone, regardless of wealth or influence, would be entitled to exactly the same level of "criminal justice" that is now being imposed on politically vulnerable Minnesotans who make less than $250 a week.

I wonder, would Minnesota be able to find the cash to allow "Gideon's Trumpet" to sound more loudly, then?

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[FN1]. 372 U.S.335 (1963)

[FN2]. 403 U.S. 458 (1938)

[FN3]. Powell v. Alabama, 287 U.S. 45 (1932)


[FN5]. Chewning v. Cunningham, 368 U.S. 443 (1962)


[FN8]. Gideon at 344.

[FN9]. Washington Post, 10/20/03.


[FN11]. Gideon at 344.

[FN12]. Id.

[FN13]. In initiating the MSBA pro bono challenge, President Baillie told the 2003 Convention that "Legal Aid is in crisis" and called for recruiting 500 new pro bono lawyers and increasing pro bono clients by 1,000. Minn. Lawyer, 09/22/03.


[FN16]. Minnesota attorney population supplied by MSBA.

[FN17]. Proposals to make it easier to dismiss pro se suits as "frivolous" were rejected by the Minnesota Supreme Court in 1998. See "Proposed Fix for 'Frivolous' Suits Proves Controversial", St.Paul Pioneer Press 11/26/98.


[FN20]. 518 N.W.2d 587 (Minn. 1994)

[FN21]. Washington Post, 10/20/03.

[FN22]. See note 18, supra.

[FN23]. Gideon at 344.

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