

Book Reviews

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Book Reviews

Gideon's Trumpet. By Anthony Lewis. Random House: New York, 1964, Pp. 262; with notes, suggested readings, table of cases, and index. \$4.95.

The Pulitzer prize winning author of this excellent book has been with the Washington Bureau of The New York Times since 1955, specializing in coverage of the Supreme Court, the Justice Department, and legal matters generally. With insight, understanding and a sensitive awareness of the Court's indispensable role in the American political process, Mr. Lewis has written a courtroom drama of intense interest to lawyers and laymen alike. In addition, he has woven into this drama a patient, meticulous and discerning treatise on the machinations of the Supreme Court, giving the reader a lively sense of justice in the making.

The extraordinary case about which this book is written began with the arrest of Clarence Earl Gideon for breaking and entering the Bar Harbor Pool Room in Panama City, Florida, on June 3, 1961. On August 4, 1961, Gideon's case was called for trial. The defendant advised the court that he was not ready to stand trial because he did not have an attorney and requested that counsel be appointed to represent him. The court denied his request, explaining that under the laws of the State of Florida, the court could only appoint counsel in capital cases. To this, Gideon replied, "The United States Supreme Court says I am entitled to be represented by counsel."¹ Gideon was clearly wrong, of course, as the United States Supreme Court had held the opposite in the case of *Betts v. Brady*² and in succeeding right-to-counsel cases.

The author describes Gideon as a "used up" man of fifty-one, "rather likeable, but one tossed aside by life."³ He had been in and out of prisons, but he clearly had not given up caring about life or freedom. On January 8, 1962, a secretary in the office of the Clerk of the Supreme Court received a large envelope from Gideon, containing a "Petition for Writ of Certiorari Directed to the Supreme Court State of Florida," written in pencil on lined sheets of paper provided by the Florida prison. Gideon said, in substance,

¹ LEWIS, at 10.

² 316 U.S. 455 (1942).

³ LEWIS, at 5-6.

that his conviction violated the due process clause of the Fourteenth Amendment to the Constitution, as he had been tried and convicted without the aid of counsel to assist in his defense.

Since *Betts*, the Court had maintained that an impoverished defendant was entitled to counsel only in certain circumstances. Gideon did not contend that he was the victim of special circumstances, such as his own illiteracy, ignorance, youth, or mental illness. He did not contend that he was at a disadvantage because of the complexity of the charge against him, or the conduct of the prosecutor or judge at the trial. He simply said he had asked for a lawyer but his indigency prevented him from hiring one. Fortunately for Gideon, the Court decided it was time to take a second look at the "special circumstances" doctrine. The petition for certiorari was granted.

As Gideon had no counsel, and had made an oath that he could not afford to employ one, the Court appointed Abe Fortas, an outstanding Washington lawyer, to represent him. Fortas was no stranger to constitutional questions and was highly skilled in appellate practice. His interest in criminal law was reputedly more philosophical than practical, his firm being primarily engaged in anti-trust litigation, practice before administrative agencies, corporate counselling, and the like. He had, however, argued and won *Durham v. United States*.⁴ Gideon was indeed fortunate when the Court entered its order appointing Fortas to serve as counsel for petitioner.

The author gives a detailed and fascinating account of the variety of decisions which faced Fortas in his preparation of the case. He knew that the Supreme Court would not be unmindful of the probable consequences of reversing its position in *Betts* after following it for two decades. He was well aware of Justice Felix Frankfurter's warning that "such an abrupt innovation as recognition of the constitutional claim here . . . would furnish opportunities hitherto un contemplated for opening wide prison doors of the land."⁵ Was this the appropriate case, and were a majority prepared to "reconsider" *Betts*? Should he urge upon the Court the "special circumstances doctrine"? To what extent should he go into the social implication of the issue of the case?

⁴ 214 F. 2d 862 (D.C. Cir. 1954). The Court of Appeals for the District of Columbia adopted a broader concept of criminal insanity, holding that "an accused is not criminally responsible if his unlawful act was the product of a mental disease or defect."

⁵ LEWIS, at 28.

In his brief, Mr. Fortas argued that the right to counsel is assured by the Fourteenth Amendment. He knew that the Court had repeatedly held that the Fourteenth Amendment did not incorporate the Sixth Amendment which guaranteed to an accused "the Assistance of Counsel for his defense." He argued with force and persuasion that the basic difficulty with the *Betts*⁶ doctrine is "that no man, however intelligent, can conduct his own defense adequately."⁷

The Assistant Attorney General of Florida contended that an overruling of *Betts* would be an invasion of state's rights, and emphasized the practical implications of failing to adhere to the *Betts* rule. A survey of the Florida prisons showed that approximately 5,093 of the 7,836 prisoners in custody at that time were not represented by counsel when tried. In a letter written to the attorneys general of forty-nine states, the State of Florida "invited" them to submit *amicus curiae* briefs. One of the most interesting developments of this aspect of the case is the somewhat surprising fact that twenty-three states did in fact join in an *amicus* brief — but took Gideon's side of the case. Only two joined with Florida.

The story reached its climax on January 19, 1963, when Gideon's case was argued to a full court. The author gives us a superbly written account of the interest and concern shown by the Justices in their questioning of counsel, much of which is given verbatim, mostly in the form of dialogue. He dramatically depicts the grandiose setting in which Gideon's fate was to be decided, and gives a lively account of the probing interrogation of counsel by the Court. The end of Gideon's case in the Supreme Court came swiftly. On March 18, 1963, Justice Black, in concluding his oral opinion for a unanimous Court, said: "The Court in *Betts v. Brady* departed from the sound wisdom upon which the

⁶ It is worthy of comment to note the analogy presented by the *Betts* and Gideon cases. *Betts* was charged with robbery in Carroll County, Maryland, and asked the court to appoint a lawyer for him because he was too poor to hire one. The trial judge refused on the same ground that the Florida court denied counsel to Gideon. *Betts*, who was tried without a jury, was found guilty and received an eight year sentence. He eventually filed a petition for habeas corpus in the Court of Appeals of Maryland. Chief Judge Bond reviewed the record of the trial and rejected *Betts*' claim in a detailed opinion. The Supreme Court affirmed Judge Bond in a six to three opinion saying that "want of counsel in a particular case may result in a conviction lacking . . . in fundamental fairness," but that would have to be found from the circumstances. In the *Betts* case, the Supreme Court relied on the finding of fact by Judge Bond; however, Mr. Lewis points out the suggestion made by others, that the esteem in which Judge Bond was held may have influenced the result.

⁷ Lewis, at 170.

Court's holding in *Powell v. Alabama* rested. Florida, supported by two other states, has asked that *Betts v. Brady* be left intact. Twenty-three states, as friends of the Court, argue that *Betts* was 'an anachronism when handed down' and that it should now be overruled. We agree."⁸

On August 5, 1963, Gideon was again tried by a jury in the Circuit Court for Bay County, Florida. The judge who had presided at Gideon's first trial appointed a local attorney to represent the Defendant. After what appears to have been a rather routine and colorless proceeding, the jury returned its verdict of not guilty, after deliberating approximately an hour. Gideon was again a free man, as the result of one of the most significant decisions in the field of criminal law of this century.

It has been said that the great rights secured for all of us by the Bill of Rights are constantly tested and retested in the courts by the people who "live in the bottom of society's barrel." Whenever there is a fundamental change in the law, the results may often be spectacular and far reaching. By January 1, 1964, nine hundred seventy-six prisoners had been released outright from Florida penitentiaries, the State feeling that they could not be successfully retried. An additional five hundred were back in court for retrials, and petitions from hundreds more were awaiting consideration. On August 10, 1963, the Court of Appeals of Maryland adopted Rule 719, which provides that indigent defendants desiring a lawyer must be provided one, if the crime with which they are charged provides for either a sentence of imprisonment for six months or more, or a fine of five hundred dollars or more, or both. This Rule further provides that counsel need not be appointed where the offense charged is desertion or non-support of wife, children or destitute parents. On August 20, 1964, President Johnson signed a bill authorizing the payment of fees to court-appointed lawyers for the first time in the federal courts.⁹ On August 26, 1964, Chief Judge Roszel C. Thomsen of the United States District Court for the District of Maryland advised the press that a committee of the United States Judicial Conference had been appointed to gather information and to make recommendations on the matter of compensating court-appointed counsel. The American Bar Association, at its recent annual meeting in New York, approved the adoption of minimum national standards for indigent defense programs, including the formation in each

⁸ *Id.* at 189-90.

⁹ Criminal Justice Act of 1964, 78 Stat. 552 (1964).

of the nation's 3,100 counties of an adequate system for providing competent counsel for indigent defendants. According to a recent American Bar Association Report, 300,000 persons are charged each year with serious crimes in state courts, and "at least half of these persons cannot afford to hire a lawyer to defend them."

The new drive for equal justice, inspired and compelled by the *Gideon* case, is consistent with the ideal envisioned by the late Judge Learned Hand, who many years ago said, "If we are to keep our democracy, there must be one commandment: Thou shalt not ration justice." The problem presented by the new drive for equal justice is how 200,000 lawyers in private practice can adequately defend more than 150,000 indigents a year. The solution is not an easy one. Due to the well recognized fact that an extremely high percentage of court-appointed lawyers are unskilled in criminal law, the advocates of public defender systems are arguing with increasing fervor that public defenders should be set up to face public prosecutors throughout the land to guarantee indigent defendants "an even match in our adversary system of trial procedures."

Mr. Lewis has authored a superb narrative of justice in action. He has clearly set in context the history of the right-to-counsel cases to illustrate how constitutional doctrine develops. He tells the *Gideon* story from beginning to end in an informative, exciting and sometimes dramatic manner. Mr. Lewis has written a splendid book for laymen without being obscure and for lawyers without being commonplace. Mr. Lewis has made a valuable contribution to good reading and created a better understanding of the inner workings of our highest Court.

C. MAURICE FLINN*

Justice In Moscow. By George Feifer. Simon and Schuster, 1964, Pp. 353. \$5.95.

Six years ago the Bar Association of Baltimore City invited the Russian Ambassador to the United States to speak on the subject of the Soviet legal system. The invitation became a *cause celebre*. Public protests, pickets, threatening phone calls and a hastily called special meeting of the Bar Association to reconsider the invitation followed. To the protestants, the Soviet Union had a system of rule

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based on force and terror, not law; hence the Ambassador could not and should not have anything to say on the latter.¹

It is unlikely that either the general public or the Bar has a different image of Russian law and justice today. Plays and novels of the Communist scene featuring midnight arrests, Star Chamber interrogations, Siberian labor camps and secret executions have attracted, as might well be expected, a much larger audience than the excellent though technical works of legal scholars which present a reasoned analysis — and more balanced view — of the Soviet legal system.²

George Feifer's, *Justice in Moscow* is the right prescription for our lack of knowledge. Feifer is an American student who in 1959 served as a guide at the American National Exhibition in Moscow and in 1962 returned to Moscow State University to write a doctoral dissertation on Soviet criminal theory. In the middle of his studies, he decided to "sample the pudding, instead of reading the recipes," and went to court "to find out about socialist legality in the flesh, not on paper; to seek the ways of living Russian law and the workings of Soviet justice."³

His findings and conclusions based upon attendance of hundreds of trials and interviews with countless judges, lawyers and litigants are skillfully reported in *Justice in Moscow*. The reader tours courtroom after courtroom where the color, human drama and detail of Russian life — mirrored in the trials — unfolds. At the same time, he is slipped a generous, salutary dosage of legal commentary which infuses into the narratives of the trials the principles and philosophy of Soviet law.

Feifer makes clear at the outset one basic ground rule: the justice he is seeking in the courts of Russia does not mean justice in terms of constitutional or judicial protection of political rights, for the power of the Communist Party in the political sphere is supreme and unchallengable. Feifer quotes from a textbook on the Soviet judiciary assigned him at Moscow State University:

"The court does not stand and cannot stand beyond politics, beyond the solution of tasks which face the

¹ The invitation was ratified (by a vote of 334-90) and the Ambassador spoke. For details, see the Baltimore Morning and Evening *Sunpapers*, June 10 and 11, 1958.

² Professors Harold J. Berman and John N. Hazard are the leading authorities. Their basic works are BERMAN, *JUSTICE IN THE U.S.S.R.* (1963 rev. ed.), and HAZARD, *THE SOVIET SYSTEM OF GOVERNMENT* (3rd rev. ed. 1964).

³ FEIFER, at 14.

state, beyond the direction of the Party. The court is an active, effective conductor of the policies of the state, a participant in the construction of Communism."⁴

However, is it not, as Professor Berman suggests, possible and, from the dictatorship's point of view, desirable to maintain a system of law which will deal justly with those relationships between the individual and society or the state which do not directly involve the power of the state?⁵ Feifer makes this distinction:

"But the rule of law is not always the same as justice, and it was the latter that I was looking for. I was interested not in cases defining the fringes of political rights, but in all those ordinary cases in the middle: the daily cases that deal with common crimes and disputes; the great mass of cases that have nothing at all to do with state security or ideological purity. . . . I wanted to know what happens to Ivan, (the average fellow) when he falls afoul of the law, his wife, or his boss."⁶

Most of the trials reported are in the lower criminal courts and to the Western observer are a blend of the familiar and unfamiliar. Many crimes are universal in character: reckless driving, petty theft, robbery and "hooliganism". But some are indigenous, e.g., "speculation" (the buying up and resale of goods or other items for the purpose of making a profit) and "exceeding authority" (by a public official).⁷ The trials are public; a judge presides; the defendant is represented by counsel (in all cases in which the state procurator appears, which is all but "minor" cases, the defendant *must* have counsel); and an indictment is read.⁸ There is, however, no jury. Two lay assessors, who sit for two week terms, flank the judge and have an equal vote with the judge on both guilt and sentence (in theory the judge votes last). The proceedings lack both formality and surprise since the evidence adduced has almost invariably been uncovered by a preliminary investigation. Indeed, Feifer observes that "the trial is a reconstruction not

⁴ *Id.* at 251.

⁵ BERMAN, JUSTICE IN THE U.S.S.R., *supra* note 2, at 372.

⁶ FEIFER, at 15.

⁷ There is also the unusual feature that a crime directly against the state, e.g., theft of state property, carries a stiffer statutory penalty than the same crime committed against an individual.

⁸ The case is fully tried even if the defendant pleads guilty.

so much of the crime as of an earlier reconstruction of it."⁹ And although defense counsel has the right to cross-examine, there are few defense stratagems as lawyers in the United States know them. Evidentiary questions are virtually non-existent.

The judge dominates the trial, and the focus of his attention is not the crime, but the criminal. This is the "whole man" concept of Soviet justice. The defendant's past life, personality, family life, work record and community reputation are minutely scrutinized in relation to what a citizen's proper behavior and attitude are supposed to be in Soviet society. The judge asks a defendant charged with murder:

"But what was your *purpose* in life? Isn't it true that you never gave anything serious attention except perhaps drink? You switched jobs, you switched interest, you *drifted*. Where were you headed? What were you doing to improve yourself and Soviet society?"¹⁰

Another judge says to a defendant charged with violating passport regulations:

"Young man, you have got to get yourself a job, you have got to find yourself an honest place in our socialist society. Young man, you are a fungus. You have done nothing with your life but practice the bourgeois creed of getting something for nothing."¹¹

The trial moves inexorably towards a verdict of guilty and a stiff sentence. Feifer could not recall seeing a single acquittal, and he described the punishments as "astonishingly severe".

The thread which runs through these seemingly disparate elements of justice and injustice is the political doctrine that the central function of Soviet law is to *educate*

⁹ FEIFER, at 86. The preliminary investigation, modeled on the continental European practice far exceeds in scope and thoroughness American grand jury proceedings. It includes testimony by witnesses and experts, an evaluation of the defendant by his colleagues and superiors, and testimony by the defendant (the defendant need not testify at the trial but must answer questions during the preliminary investigation). The cursory nature of grand jury proceedings and relative absence of any preliminary investigation in American procedures is a conspicuous shortcoming since the investigation may release an obviously innocent man without the humiliation and expense of a trial and, in any event, appraises the defendant of the details of the case against him. Feifer found little indication of any violence being used in connection with the investigation.

¹⁰ *Id.* at 264.

¹¹ *Id.* at 67.

the people to be socially conscious, dedicated members of society. The task is no less than "the fundamental remaking of the consciousness of the people" so that in time society will discipline itself by the norms of social custom and conscience.¹² To carry out this task the Soviet judge lectures with Calvinistic indignation; the "whole man" is put on trial; Soviet courts sometimes sit in factories or apartment houses so that the defendant's neighbors can watch; the infamous "parasite" law¹³ is enforced; and the unique tradition of the *obshchestvennost* pervades the legal system.

The *obshchestvennost* cannot be exactly translated or defined. It is most nearly the spirit of the community, the public but non-governmental institutionalization of the community. A collective can vote to send a lay member as a defender or accuser of a defendant in a criminal case, and this lay member, as *obshchestvennik*, has the same procedural rights, such as the right to call witnesses, cross-examine and argue, as the procurator or defense attorney (although as a matter of practice, the *obshchestvennik* confines his participation to informing the court of the community's opinion of the "whole man"). The *obshchestvennost* also furnishes a voluntary corps of people's police, assumes duties of parole over minor offenders, applies measures of social censure in lieu of other criminal punishments, and conducts the so-called Comradely Courts, or miniature town meetings, where such antisocial behavior as truancy from work, drunkenness, insults and swearing may be punished by small fines and social censure.

The Soviet legal system also educates by swinging a big stick. A Soviet judge told Feifer: "Everyone must know for certain that it is futile to break the law — that he has no chance of getting away with it."¹⁴ The American sporting theory of justice with its emphasis on rules of evidence and procedure and the relative skills of advocates (the "modern American race to beat the law" in Roscoe Pound's phrase)

¹² FEIFER, at 333. Feifer quotes a Soviet judge: "Every living person must be made to understand that society is *his*, that to rob his neighbor is to rob himself." *Id.* at 330. (The echo is James Baldwin.)

Professor Berman terms Soviet law "parental": "The Soviet citizen is considered to be a member of a growing, unfinished, still immature society, which is moving towards a new and higher plan of development. As a subject of law, or litigant in court, he is like a child or youth to be trained, guided, disciplined, directed. The judge plays the part of a parent or guardian. . . ." BERMAN, *op. cit. supra* note 2, at 284.

¹³ Persons considered to be "avoiding socially useful work and leading an antisocial parasitic way of life" can be tried and banished from their community without most of the protections of criminal procedure.

¹⁴ FEIFER, at 330.

has no place in the Soviet system. The overriding consideration in any individual case is not the rights of the individual but the higher and greater good of a reformed mankind.¹⁵

Feifer concludes that the ambitions and goals of the Soviet legal system are loftier and "more shining" than Western ones and therefore, since we do not know for sure whether the Russians will attain them, a final decision on Russian justice, which serves those ambitions and goals, must be reserved. That decision must be remanded to another generation, or to the generation after that, for further evidence. "Is it fair (he asks) to taste the pudding while it is still cooking?"¹⁶

The immense worth of *Justice in Moscow* is not to be measured, however, by the weight of the author's legal excursions or conclusions. Feifer is not an attorney, and his book is not a working text for those who wish to be informed in depth on the Russian legal system and reach their own conclusions on it *vis a vis* justice in the United States.¹⁷ But it is more than enough that *Justice in Moscow* is an absorbing readable primer which begins to clear away our distorted images of the Soviet system so that upon the bedrock of a true understanding of that system, we can proceed to challenge its assertions.

KALMAN R. HETTLEMAN*

¹⁵ Many of the critics of the Supreme Court's recent opinions in the area of civil liberties will no doubt be dismayed to find themselves arguing more or less like Russian jurists.

¹⁶ FEIFER, at 335.

¹⁷ Feifer is at his best in the colorful narratives of the trials, at his next best on Soviet legal practices and theory, and at his blatant worst in references to law in the United States. It is unfortunate that he has thought it necessary to gloss his picture of Russia "as a reasonably normal, progressive, content and happy place to live (Saturday Review of Literature, 47:27, 28, June 27, 1964)" with the uniformly uninformed and hyperbolic criticisms of criminal procedure in the United States which appear throughout the book. In the process, he has underestimated the persuasiveness of the picture of Russian life and has painted and flavored it.

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