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## Book Review of Preludes to Gideon

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come what Professor Alexander seems to be implying—not simply a champion of the consuming public, but an actual force in helping to maintain a competitive economy, then its staff and funds must be increased. Moreover, this would require the use of a larger number of specialists than now is used to help unravel the complex interrelationships between competition and false advertising. The problem of determining the amount and quality of information needed for insuring rational consumer decisions is going to require a broader perspective on the part of the F.T.C. than now exists. Be this as it may, Professor Alexander's book should go far to help bring order out of the confusion that is now apparent in false advertising cases. Private and public interests demand a reading of this work.

WILLIAM W. GILLIES\*

PRELUDES TO GIDEON. BY DANIEL JOHN MEADOR. Charlottesville, Virginia: The Michie Company, 1967.

As a trial and appellate attorney of many years experience in federal courts and as a professor of law, this reviewer found Dean Meador's *Preludes to Gideon* an intensely fascinating and thought-provoking exposé of the frustrations, in both trial and appellate advocacy, experienced by counsel assigned to represent indigent convicts in the assertion of the denial of their 6th Amendment right to counsel in state court criminal proceedings and in the procurement of relief through federal habeas corpus. The narrative impressed this reader with the futility of the expenditure of so much time and effort, physical and mental, by eminent legal scholars on behalf of those so unworthy thereof and with results so disproportionate to the efforts expended. Surely, the need is thus demonstrated for the establishment of a more efficient system of indigent representation instead of the random selection of outstanding legal scholars with their resultant divergence from the field of legal education in which their profound knowledge is more usefully employed for the best interests of the nation in its entirety.

While the book has been written with law students primarily in mind, this reviewer deems it to be most instructive and of extreme practical significance to experienced trial and appellate advocates as well. It abounds in practical examples of proper pleadings at the trial level,

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of the problems presented on appeals from adverse decisions and, finally, of the differences in the principles applicable to the preparations in the Supreme Court of the United States of petitions for writs of certiorari and of briefs in that court following the grants of certiorari. A seasoned trial and appellate advocate has much to learn from the actual experiences of erudite counsel in litigated cases and this work contains a wealth of knowledge of real practical benefit to him.

In addition, Dean Meador's book illustrates the practical problems posed, at all levels of federal litigation in the restricted area concerned, of strategy, tactics and choice of available remedies. Well reasoned solutions, substantive as well as procedural, are expounded. This is one of the thought-provoking aspects of this work. This reader found himself frequently pausing and pondering whether, similarly situated, he would have acted as did the author and his co-counsel. Hindsight is always to be preferred to foresight in the solutions of these problems. Still, the problems posed presented exhilarating mental exercises for the careful reader.

While of true practical importance to the seasoned practitioner, this book should be carefully studied by the neophyte who, in all likelihood, will be assigned to represent one of these indigent convicts until a better system is inaugurated. Toward the close of the work, the prophecy was made that these convicts would level their guns at the competency of their assigned counsel. This prophecy has now materialized in fact. The advance sheets of the federal reporter and federal supplement are replete with decisions in which these indigents have leveled unfounded charges of malpractice against conscientious and learned counsel who, without adequate or reasonable compensation and at great personal and financial sacrifice, have creditably represented such defendants in their criminal trials. The drowning man grasps at a straw. So, here, every strategic decision of assigned counsel is questioned. The result is that many honorable and skilled practitioners are placed in the unenviable light of being required to defend their knowledge, decisions and judgment against irresponsible accusations of professional incompetence. This is, indeed, a sad commentary upon the role of the lawyer in our society, an inevitable corollary of the recent decisions expanding the right to counsel in the several phases of the criminal process. It is without parallel in other professional relationships. Though distasteful to be required to defend one's professional competency, months or even years after termination of a criminal trial, in a collateral habeas corpus

proceeding in federal court, it behooves the inexperienced to acquire sufficient proficiency as to be impervious to attack by an ungrateful client whose guilt of the crime charged was abundantly established. Dean Meador's book is ideal for this purpose.

Rule 11 of the Federal Rules of Criminal Procedure, as amended effective July 1, 1966, has resulted in a further downgrading of an honorable profession in the view of the public. The inference seems inescapable that lawyers, in the opinions of the courts, may not be trusted to render proper advice to criminal defendants by the rule's requirements that, despite representation by counsel, a criminal defendant's plea of guilty may not be accepted without the court's first addressing the defendant personally and determining that the guilty plea is voluntarily made with understanding of the nature of the charge and the consequences of the plea, and its further provision that the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. One cannot but question whether *Gideon v. Wainwright*<sup>1</sup> and its progeny have produced salutary effects upon the legal profession and the administration of criminal justice in our land, particularly in the findings of informed persons that the decisions have contributed substantially to the breakdown of law and order and to the inordinate increase in the incidence of crime.

Let it be recalled that the events portrayed in the book here reviewed constituted but a single facet in a era of expanding constitutional concepts in the area of criminal law. The minorities of several previous decades have now become the majorities which, through the due process clause of the 14th Amendment, have extended to the states in their criminal proceedings many of the provisions of the Bill of Rights, previously held applicable only to the federal government in its criminal prosecutions, notably the first, fourth, fifth and sixth amendments to the Constitution. *Preludes to Gideon* may not thus be considered in isolation, which accounts in large measure for the instances of cautious approaches by the courts and attorneys-general to solutions of the problems depicted in this book.

A review of this book would be incomplete without a consideration of the sequelae of *Gideon* in view of the impressive list of unresolved questions posed by this decision and recorded at the conclusion of the work. Following *Gideon*, by a series of historic decisions, the right to counsel in criminal cases has been advanced from arraignment to inter-

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1. 372 U.S. 335 (1963).

rogation incident to a lawful arrest when it ceases to be investigatory and becomes accusatory. *Escobedo v. Illinois*<sup>2</sup> produced such a maze of conflicting decisions that a declaration of guidelines became required. *Miranda v. Arizona*<sup>3</sup> was the vehicle selected. The problem of retroactivity of these newly announced principles, discussed at some length in the book, as a practical matter could be solved only by a declaration of prospectivity of application and by references to a decision date as was done in *Linkletter v. Walker*<sup>4</sup> and *Johnson v. New Jersey*.<sup>5</sup> The right to counsel has been further extended in *U.S. v. Wade*<sup>6</sup> to a pre-trial confrontation with witnesses. Once again, these new rules are not to be applied retroactively.<sup>7</sup> On the basis of *Gideon*, a further extension of the doctrine was effected in *Mempa v. Rhay*,<sup>8</sup> holding that the right to counsel attaches even to state probation revocation hearings and in *In re Gault*,<sup>9</sup> holding that the right to counsel attaches to juvenile proceedings previously held not criminal in nature.

The author has posed, in outline form, an extensive but not conclusive list of many of the unresolved questions presented by *Gideon*. The list could be considerably augmented by the many other recent decisions which have similarly extended the operations of these amendments to the Constitution to the states by the presently declared construction of the due process clause of the 14th Amendment. The extraordinary writ of habeas corpus in federal courts has now become ordinary indeed and the United States District Courts have thus had cast upon them an inordinate burden of case loads. While exhaustion of state court remedies is stated to be required as a condition precedent, the concept is, in many instances, difficult of practical application and has led to apparently conflicting decisions. Similarly, confusion has been generated respecting the right to dismiss such a petition without an evidentiary hearing. The very concept enables a federal trial judge to overrule a decision of the highest court of a state on a constitutional question presented to it arising in a state court criminal proceeding.

To the list of unresolved questions so posed by the author, may there

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2. 378 U.S. 478 (1964).

3. 384 U.S. 436 (1967).

4. 381 U.S. 618 (1965).

5. 384 U.S. 719 (1966).

6. 388 U.S. 218 (1967).

7. *Stoval v. Denno*, 388 U.S. 293 (1967).

8. 386 U.S. 907, 953 (1967).

9. 387 U.S. 1 (1967).

not also in fairness be added the questions whether the author and his diligent and effective co-counsel were parties to the opening of a "Pandora's Box" and whether, in their zeal, inordinate emphasis was placed upon the alleged unrestricted "right" to representation by counsel of indigent convicts, to the exclusion of considerations of extraordinary circumstances requiring such representation, of the questions of the guilt of such convicts of the crimes of which they were properly convicted by juries and of the rights of the public whose rights they transgressed in their malevolent acts.

GEORGE D. HORNING, JR.\*

**CIVILIANS UNDER MILITARY JUSTICE: THE BRITISH PRACTICE SINCE 1689, ESPECIALLY IN NORTH AMERICA.** BY FREDERICK BERNAYS WIENER.<sup>1</sup> Chicago: The University of Chicago Press, 1967. Pp. 346. \$11.50.

Advance review copies of *Civilians Under Military Justice* were hardly distributed to prospective reviewers when the book was cited in the United States District Court for the District of Columbia in support of an application for writ of habeas corpus by a civilian merchant seaman held for trial for murder of a fellow seaman by a Marine general court-martial in South Vietnam.<sup>2</sup> The petitioner's counsel, however, relied less upon the textual material than upon the monumental reputation of the author, Frederick Bernays Wiener.

I know Mr. Wiener as a friend and as a practitioner. I have the highest regard for him in both capacities; but I have long disagreed with his opinion that the Supreme Court of the United States properly concluded, at a rehearing in which it reversed its original decision, that civilians accompanying the armed forces in foreign countries in time of peace are not constitutionally subject to courts-martial jurisdiction.<sup>3</sup> It has been said that history is interpretation. Mr. Wiener insists in the Introduction that "the ultimate result in the United States reflects with surprising fidelity what had long been the approved practice in the British Service."<sup>4</sup> Nothing in his materials has altered my conviction

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1. Member of the Bar of the District of Columbia.

2. *Latney v. Ignatius*, Habeas Corpus No. 539-67 (D.D.C. Jan. 15, 1968).

3. *Reid v. Covert*, 354 U.S. 1 (1957), *rev'g* 351 U.S. 487 (1956).

4. WIENER, CIVILIANS UNDER MILITARY JUSTICE 4 (1967).