Fulfilling the Unfulfilled Promise of *Gideon*: Litigation as a Viable Strategic Tool

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INTRODUCTION

Nearly fifty years after the landmark case of *Gideon v. Wainwright*,[1] representation of indigent criminal defendants in many instances has remained inadequate. Commentators have proffered various reasons for the deficiencies, including inadequate funding, excessive caseloads, inconsistent standards, and judges involved in the selection of indigent defense counsel. Numerous legal scholars, committees, and commissions have suggested reforms. This Essay focuses on the use of litigation to secure the promise of *Gideon*. It discusses the effect various lawsuits have had on systemic reform and provides a recent case study from Michigan of a lawsuit that served as a catalyst for legislative change. Finally, this Essay suggests future approaches to achieve systemic reform.

I. THE RIGHT TO ASSISTANCE OF COUNSEL

The Sixth Amendment of the United States Constitution guarantees that a person accused of a crime shall "have the Assistance of Counsel for his defence."[2] The *Gideon* Court incorporated the Sixth Amendment guarantee of counsel for all individuals charged with a felony and unable to afford counsel into Fourteenth Amendment due process, thereby requiring states, and not just the federal government, to appoint counsel to indigent criminal defendants.[3] The idea was not particularly shocking or revolutionary. At that time, only a few states did not appoint counsel for all defendants accused of a felony.[4] Since *Gideon*, the more important issue has been defining the quality of representation needed to satisfy the right to counsel and determining how to achieve such representation.

A. *THE MANDATE OF* GIDEON V. WAINWRIGHT*: WHAT IS REQUIRED?*

Although the *Gideon* Court did not give any guidance on what it would consider adequate representation, some federal courts had already developed a low standard.[5] Later, in *Strickland v. Washington*, the Supreme Court articulated a two-part test for ineffective assistance: first, the

1. Gideon v. Wainwright, 372 U.S. 335 (1963). The plaintiff in *Gideon* had been charged with felony breaking and entering in a Florida state court. He could not afford an attorney and requested that the court appoint one. The court denied his request, stating that, in Florida, only capital defendants were entitled to an appointed attorney. Mr. Gideon represented himself and was convicted and sentenced to five years in prison. He appealed and, in a decision making it clear that the Sixth Amendment applied to the states via the Fourteenth Amendment, the U.S. Supreme Court held that, "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344.

2. U.S. CONST. amend. VI.

3. *Gideon*, 372 U.S. at 342–45.

4. *See* Jerold H. Israel, Gideon v. Wainwright*: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 267.

5. *See, e.g.*, Diggs v. Welch, 148 F.2d 667, 669 (D.C. Cir. 1945) (stating that in order to justify habeas corpus relief, the proceedings must have been "a farce and a mockery of justice").

defendant must show that counsel acted outside the range of professional competence and second, that counsel's errors were prejudicial.[6] The Supreme Court also has stated that to be adequate, counsel must be capable of putting the prosecution's case to the "crucible of meaningful adversarial testing."[7]

B. STATE CONSTITUTIONAL GUARANTEES

A majority of states, and those containing over ninety percent of the U.S. population, had an implicit or explicit guarantee of the right to counsel in their state constitutions when Congress ratified the Fourteenth Amendment in 1868.[8] Twelve state constitutions included the explicit right to counsel; seventeen states guaranteed the right to be heard by "self and counsel;" and an additional five states had a somewhat more ambiguous right to be heard by self and counsel.[9] The majority of state constitutions currently provide for a right to counsel.[10] Additionally, nearly half the states have constitutional provisions that allow parties to present state constitutional claims directly to the state supreme court.[11] State supreme court decisions which are grounded on the analyses of state constitutional provisions are unreviewable by federal courts, as long as they meet the minimum standards of the federal Constitution.[12]

C. CONSTITUTIONAL RIGHT TO COUNSEL BASED ON EQUAL PROTECTION AND DUE PROCESS

Prior to *Gideon*, the Supreme Court had relied upon due process and equal protection principles as a basis to prevent discriminatory procedures in criminal trials.[13] The Court explicitly recognized a due process right to effective assistance of counsel in *Powell v. Alabama*.[14] Although most courts have abandoned a due process analysis in favor of a Sixth Amendment analysis, equal protection and due process arguments still have force. At a minimum, defendants have a right to effective assistance in any proceeding

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6. Strickland v. Washington, 466 U.S. 668, 687 (1984).

7. United States v. Cronic, 466 U.S. 648, 656 (1984).

8. Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 61 (2008).

9. *Id.*

10. *See, e.g.*, MICH. CONST. art. I § 20.

11. Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 767, n.106 (2010). States which are reported to have such constitutional provisions are: Alabama, Arkansas, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. *Id.*

12. *Id.* at 768.

13. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956).

14. Powell v. Alabama, 287 U.S. 45, 73 (1932).

where there is a right to counsel, whether based on due process or the Sixth Amendment.[15]

D. EXTENSION OF THE CONSTITUTIONAL RIGHT TO COUNSEL

In the years after *Gideon*, the Supreme Court extended the right to counsel. The Court mandated the right to counsel for juveniles at risk of "commitment to an institution"[16] and for individuals charged with misdemeanors that could result in incarceration.[17] In *Douglas v. California*, the Supreme Court held that indigent defendants have a constitutional right to counsel during an appeal as of right.[18] The Court has also extended the right to counsel to in-person lineups[19] and cases where suspended, rather than actual, jail sentences were at issue.[20] Most recently, the Supreme Court recognized the constitutional right to counsel at the plea-bargaining stage.[21]

II. INDIGENT CRIMINAL DEFENSE SINCE *GIDEON*

While there has been significant progress in the defense of indigent persons, quality defense continues to be a problem in the majority of states. This deficiency becomes greater when fiscal problems affect state and local governments. Ten years after *Gideon*, a National Legal Aid and Defender Association ("NLADA") study reported that, nationwide, the resources allocated to indigent defense representation were "grossly deficient."[22] The study found that advocates were "overburdened, undertrained, and underpaid," and that the poor had little confidence in their provided counsel or in the fairness of the American criminal justice system.[23]

During the past ten to fifteen years, many have drawn attention to the ongoing, and in some cases increasing, problems of providing constitutionally adequate representation to indigent criminal defendants. For example, in March 2013, the National Association of Criminal Defense Counsel ("NACDL") released a report documenting the relationship between the low rates paid to defense counsel and inadequate

15. *See, e.g.*, Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1 (2009); Lauren Sudeall Lucas, *Reclaiming Equality to Reframe Indigent Defense Reform*, 97 MINN. L. REV. 1197 (2013).

16. *In re* Gault, 387 U.S. 1, 41 (1967).

17. Argersinger v. Hamlin, 407 U.S. 25, 36–37 (1972).

18. Douglas v. California, 372 U.S. 353, 357–58 (1963).

19. United States v. Wade, 388 U.S. 218, 223 (1967).

20. Alabama v. Shelton, 535 U.S. 654, 674 (2002).

21. Lafler v. Cooper, 132 S. Ct. 1376 (2012); Missouri v. Frye, 132 S. Ct. 1399 (2012).

22. LAURENCE A. BENNER, NAT'L LEGAL AID & DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 70 (1973).

23. *Id.*

representation.[24] The report found that inadequate compensation limits the number of attorneys willing to represent indigent defendants and creates conflicts of interest by encouraging attorneys to limit the amount of work they perform on a case.[25]

A. OBSTACLES TO PROVIDING ADEQUATE REPRESENTATION

Gideon provided the states with an unfunded mandate and lacked an enforcement mechanism. Additionally, there were no clear criteria as to what constitutes adequate representation.

1. Changing Needs and Budgetary Issues

During the 1960s and 1970s, crime rates increased significantly, leading to more prosecutions and a greater need for indigent defense counsel.[26] The decisions of the Supreme Court that expanded the right to counsel—including to juveniles,[27] those charged with misdemeanors,[28] those facing suspended jail time,[29] and appellants appealing as of right[30]—led to the need for additional defense counsel to address diverse issues.

Money is a critical factor in providing an effective indigent defense. In recent years, the economy and fiscal position of state and local governments has affected funding for indigent defense. Indigent defense spending nearly tripled between 1986 and 2008; however, many systems remain in crisis.[31] In its 2009 report, the National Right to Counsel Committee concluded that the country's fiscal crisis caused "severe adverse consequences for the funding of indigent defense."[32] The report found indigent defense was already receiving less fiscal support than prosecution and law enforcement,[33]

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24. John P. Gross, NAT'L ASS'N OF CRIMINAL DEF. ATTORNEYS, *Rationing Justice: The Underfunding of Assigned Counsel Systems, in GIDEON* AT 50: A THREE-PART EXAMINATION OF INDIGENT DEFENSE IN AMERICA (2013), *available at* www.nacdl.org/reports/gideonat50/rationingjustice.

25. *Id.* at 15–16. Low hourly rates also may encourage some attorneys to take on more clients than they can effectively represent in order to make a living, resulting in an "inadequate, inexperienced, overworked and inherently conflicted pool of attorneys accepting court appointments." *Id.* at 16.

26. Gary LaFree, *Explaining the Crime Bust of the 1990s*, 91 J. CRIM. L. & CRIMINOLOGY 269, 270 (2000) (reviewing ALFRED BLUMSTEIN & JOEL WALLMAN, THE CRIME DROP IN AMERICA (2000)).

27. *In re* Gault, 387 U.S. 1, 4 (1967).

28. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

29. Alabama v. Shelton, 535 U.S. 654, 658 (2002).

30. Douglas v. California, 372 U.S. 353, 357 (1963).

31. HOLLY R. STEVENS ET AL., STATE, COUNTY AND LOCAL EXPENDITURES FOR INDIGENT DEFENSE SERVICES FISCAL YEAR 2008, at 7 (2010), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_expenditures_fy08.authcheckdam.pdf (documenting an inflation adjusted increase from $1,946,856,026 in 1986 and to $5,337,151,718 in 2008).

32. NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 7 (2009) [hereinafter JUSTICE DENIED].

33. *Id.*

and appropriations for indigent defense were being reduced in a number of states.[34]

Inadequate funding leads to mounting caseloads. In part, because of the relatively low fees that contract or appointed counsel are paid, there is a very high rate of guilty pleas (estimates are ninety-seven percent in federal court and ninety-four percent in state court).[35] While it is difficult to quantify the economic benefits of providing competent counsel, studies show that, without adequate resources for indigent defense, more people are incarcerated due to increased levels of pretrial detention and excessive prison sentences.[36] There also is an increased number of wrongful convictions.[37]

The ABA Standing Committee on Legal Aid and Indigent Defendants has concluded that inadequate compensation "makes the recruitment and retention of experienced attorneys extraordinarily difficult."[38] Such compensation "reduces the pool of attorneys willing to take the appointments."[39] Additionally, judges selecting counsel may do so for reasons unrelated to counsel's competency.[40]

2. Standard of Conduct for Effective Assistance

As noted, *Strickland v. Washington* articulated a two-part test for ineffective assistance: (1) deficient conduct by counsel and (2) prejudice to the defendant.[41] Because the standard requires actual prejudice, it has been difficult for criminal defendants to obtain prospective relief or to identify deficient conduct until after a conviction has occurred.[42] Moreover, courts rarely find that a lawyer's conduct was of the magnitude to warrant a finding of a Sixth Amendment violation.[43]

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34. *Id.* at 59–60.

35. Erwin Chemerinsky, *Lessons from* Gideon, 122 YALE L.J. 2676, 2678 (2013).

36. *See, e.g.*, JUSTICE POLICY INST., SYSTEM OVERLOAD: THE COSTS OF UNDER-RESOURCING PUBLIC DEFENSE 17–20 (2011), *available at* http://www.justicepolicy.org/uploads/justicepolicy/documents/system_overload_final.pdf.

37. *Id.* at 21.

38. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S* BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 9 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

39. James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 188 (2012).

40. *Id.*

41. Strickland v. Washington, 466 U.S. 668, 687 (1984).

42. *Id.* (holding that to find ineffective assistance, courts must determine "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

43. *Id.* at 689. The Supreme Court mandated that courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," thus encouraging courts to engage in a highly deferential review. *Id.*

Several groups, most prominently the American Bar Association ("ABA"), have promulgated standards for effective indigent defense that go well beyond the "floor" of *Strickland*.[44] Nevertheless, both the *Strickland* standard and the fact that generally defendants can only raise ineffective assistance of counsel claims post conviction "make[] it very difficult for a convicted individual to get relief, even when counsel's performance is quite deficient."[45] In addition, because it is difficult to succeed on effective assistance claims, states may lack motivation to adopt higher standards or attempt to ensure high quality representation for indigent defendants. The relief involved in an ineffective assistance challenge is reversal of the conviction, not any punitive sanction against the state for providing the ineffective indigent defense counsel.[46]

B. VARIATIONS IN STATE PRACTICE

The majority of states now have some form of a state-administered system for indigent defense; others leave the administration to counties or other municipal entities.[47] States that do not fund at least seventy-five percent of indigent defense services provide the lowest quality indigent defense.[48] There are three primary models for providing counsel to indigent defendants: (1) public defender programs that employ full- or part-time counsel; (2) a contract system, where individuals or firms engage in a contract to provide representation for a number of indigent defendants; and (3) an assigned counsel system, where courts appoint attorneys to handle individual cases.[49]

1. Public Defender Programs

Public defender programs involve a public or private nonprofit organization with full- or part-time paid staff and support personnel.[50] Many consider public defender programs as the preferred option because the

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44. ABA STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002).

45. Chemerinsky, *supra* note 35, at 2685.

46. There may be added cost to the state in defending the ineffective assistance challenge and possibly retrying the case. The ineffective counsel generally would face consequences only if a claim were brought before the appropriate discipline board or agency.

47. STEVENS ET AL., *supra* note 31, at 5. Comprehensive data collected in 2008 reflect twenty-three states in which the indigent defense system was 100% state funded, and 19 states in which the system was more than 50% county funded. *Id.* Nearly two-thirds of the states had a statewide commission that provided oversight. *Id.*

48. Nat'l Legal Aid & Defender Ass'n, *National Committee on the Right to Counsel: Facts & Figures*, http://www.nlada.org/Defender/Defender_Kit/facts (last visited May 20, 2014).

49. Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995).

50. *Id.*

attorneys receive a salary, training, and support.[51] However, even in public defender programs, lawyers often have very large caseloads, which may preclude effective representation.[52] A contract or assigned counsel system is generally used when the public defender has a conflict or caseloads become too large.[53]

2. Contract System

In a contract program, the state, county, or other jurisdictional district enters into a contract with a law firm, non-profit organization, or other group of attorneys to provide indigent defense services. Such contracts are often "fixed-price" and the entity agrees to handle all, or a specific number or kind, of the cases for a flat fee.[54] The ABA and others have criticized this type of contract,[55] and the Arizona Supreme Court held it to be unconstitutional.[56] An alternative to the fixed-price contract is a fixed-fee-per-case contract.[57]

3. Assigned Counsel System

The assigned counsel system requires the court to assign counsel to indigent defense cases. Assignment may be ad hoc or it may involve a more coordinated rotation.[58] Attorneys may receive an hourly rate, often with a cap, or a flat fee based on the type of case.[59] Programs may or may not require attorneys to meet training, supervision, and experience requirements.[60] Appointed counsel's independence from the judiciary, especially where judges are elected, is a concern when the court makes ad hoc appointments.[61]

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51. *See id.* at 36.

52. NORMAN LEFSTEIN, SECURING REASONABLE CASELOADS: ETHICS AND LAW IN PUBLIC DEFENSE 12–13 (2011), *available at* http://americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf (citing NAT'L RIGHT TO COUNSEL COMM., *supra* note 32, at 7).

53. Spangenberg and Beeman, *supra* note 49, at 32–35.

54. *Id.* at 34. The fee often is an annual rate.

55. *Id.*

56. *Id.* (citing State v. Smith, 681 P.2d 1374 (Ariz. 1984)).

57. Spangenberg & Beeman, *supra* note 49, at 34–35.

58. *Id* at 33.

59. *Id.* at 32–33.

60. *Id.*

61. *See* STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEF. SERVS. § 5-1.3 (1990).

C. STANDARDS FOR ADEQUATE REPRESENTATION

Since the 1970s, the ABA and the NLADA have articulated performance standards for indigent defense counsel.[62] In February 2002, the ABA House of Delegates approved the Ten Principles of a Public Defense Delivery System (the "Ten Principles"), which establish the necessary criteria for an indigent defense system to provide adequate—i.e., effective, efficient, high-quality, ethical, and conflict-free—legal representation.[63] The Ten Principles have been widely cited, and they arguably reflect a national consensus regarding the prerequisites for constitutionally adequate criminal defense.[64] A number of state bar associations and state commissions have adopted a version of the Ten Principles or other standards related to attorney performance.[65] Other groups have also developed standards for indigent defense practices.[66]

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62. *See generally* NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (2006), *available at* http://www.nlada.org/Defender/Defender_Standards/Performance_Guidelines.

63. ABA'S TEN PRINCIPLES, *supra* note 44, at 1. The Ten Principles are:

> (1) The public defense function, including the selection, funding, and payment of defense counsel, is independent. (2) Where the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar. (3) Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel. (4) Defense counsel is provided sufficient time and a confidential space within which to meet with the client. (5) Defense counsel's workload is controlled to permit the rendering of quality representation. (6) Defense counsel's ability, training, and experience match the complexity of the case. (7) The same attorney continuously represents the client until completion of the case. (8) There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system. (9) Defense counsel is provided with and required to attend continuing legal education. (10) Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

64. *See, e.g.*, NAT'L LEGAL AID & DEFENDER ASS'N & AMERICAN COUNCIL OF CHIEF DEFENDERS, IMPLEMENTATION OF THE ABA'S TEN PRINCIPLES IN ASSIGNED-COUNSEL SYSTEMS BEST PRACTICES Committee Preliminary Report 1 (2010), *available at* www.nlada.org/Defender/Defender_ACCD/DMS/Documents/128527131 2.2/NLADA%20best%20prac%209-12-10mt%20final.pdf; *see also* David Carroll, Phyllis Mann & Jon Mosher, The Judicial Underpinnings of the American Bar Association's *Ten Principles of a Public Defense System* and Their Use in Defining Non-Representation Under *United States v. Cronic*, 466 U.S. 648 (1984) (2011) at 4, *available at* http://nlada.net/sites/default/files/na_juicialunderpinningsofabaten principles_10262011.pdf.

65. *See, e.g.*, AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, ANNUAL REVIEW. OF NATIONAL DEVELOPMENTS IN INDIGENT DEFENSE 2 (2012); LOUISIANA PUBLIC DEFENDER BD., TRIAL COURT PERFORMANCE STANDARDS (2010), *available at* http://lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/LPDB%20Trial%20Court%20Performance%20Standards.pdf; SAN MATEO CNTY. BAR ASSOC. PRIVATE DEFENDER PROGRAM, ANNUAL REPORT FISCAL YEAR 2010–2011 TO THE BOARD OF SUPERVISORS SAN MATEO COUNTY, *available at* https://www.smcba.org/UserFiles/files/docs/ANNUAL%20REPORT%20FYE%202010%20-%20

III. LITIGATION AS A MECHANISM FOR FULFILLING THE PROMISE OF *GIDEON*

A. EARLY LITIGATION AFTER GIDEON

After *Gideon*, the initial cases involving constitutionally adequate representation—including *Strickland* and *Cronic*—generally challenged attorney performance that resulted in convictions.[67] Some of these cases contained challenges to public defense systems, specifically to the compensation structure for indigent defense counsel.[68] Such cases almost always involved the collateral review process, as defendants in most jurisdictions are not able to challenge their trial attorneys' effectiveness on direct appeal.[69]

In addition, some early systemic "impact" lawsuits were filed that did not arise out of an individual case. For example, the chief public defender in Minneapolis filed a lawsuit alleging that the state's underfunded public defense system deprived his clients of their constitutional right to counsel.[70] However, the Minnesota Supreme Court held that the plaintiff had failed to show that the clients "actually [had] been prejudiced due to ineffective assistance of counsel."[71]

In *Luckey v. Harris*, the Eleventh Circuit held that in addition to allowing post-conviction review, the Sixth Amendment provides indigent defendants the right to bring independent challenges to ineffective assistance.[72]

2011.pdf; STATE BAR OF TEX., PERFORMANCE GUIDELINES FOR NON-CAPITAL CRIMINAL DEFENSE REPRESENTATION (2011), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Texas_Bar_Journal&Template=/CM/ContentDisplay.cfm&ContentID=14703.

66. *See Community Oriented Defender (COD) Statement of Principles*, Brennan Center for Just. (Feb. 4, 2010), *available at* http://www.brennancenter.org/analysis/community-oriented-defender-cod-statement-principles.

67. *See* Strickland v. Washington, 466 U.S. 668, 671 (1984) (considering whether defendant's conviction should be "set aside because counsel's assistance . . . was ineffective"); United States v. Cronic, 466 U.S. 648, 663–66 (1984) (determining the proper interpretation of the Sixth Amendment in the context of an ineffective assistance of counsel claim and holding that ineffective assistance could not be presumed when counsel was a young real estate attorney who had never tried a criminal case, was given only twenty-five days to prepare for trial in a case where the charges were complex and grave, and where some witnesses were not easily available. A showing of actual ineffectiveness was needed.).

68. *See Ex parte* Grayson, 479 So. 2d 76, 79 (Ala. 1985) (considering the constitutionality of Alabama's compensation of counsel statute which allowed for a maximum fee of $1000—even in capital cases); Webb v. Commonwealth, 528 S.E.2d 138, 145 (Va. Ct. App. 2000) (considering the constitutionality of Virginia's statutory attorney's fees caps). Both courts held that limiting defense counsel's compensation did not deprive defendant of due process or equal protection. *But see* State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984) (en banc) (holding that the county's bid system violated the federal and state constitutions, as well as prevailing professional standards, resulting in an inference of ineffective assistance of counsel).

69. Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679, 692 (2007).

70. Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996).

71. *Id.* at 7.

72. Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

However, that same court later ruled against the plaintiffs because of the *Younger* abstention doctrine,[73] which prohibits federal courts from issuing rulings that would interfere with ongoing state criminal prosecutions.[74] The *Younger* doctrine generally precludes this type of structural litigation in federal courts, thus limiting plaintiffs to state courts.[75] Nevertheless, the holding by the Eleventh Circuit in *Luckey*—i.e. an indigent defendant's Sixth Amendment challenge is not limited to post-conviction review—provides leverage to indigent defense advocates.[76]

While the *Luckey* holding created helpful precedent for advocates, and some of the early post-*Gideon* lawsuits met success,[77] that success was often limited or short-lived. This is primarily because the lawsuits did not provide guidance on reform or enforcement measures, and states have continued to confront funding issues.[78] Moreover, the cases were not a good vehicle for systemic reform because they focused on challenging individual defendants' convictions. Furthermore, the early cases did not provide data demonstrating actual harm to other clients, which would have supported the existence of widespread violations of the Sixth Amendment right to counsel.[79]

B. SYSTEMIC LITIGATION SEEKING SIGNIFICANT REFORM

Advocates could also seek significant reform by filing civil rights class action lawsuits, generally in state court, to remedy systemic right-to-counsel problems.[80] Professor Drinan refers to these as "second-generation suits."[81] The general difference between these cases and earlier strategic litigation is that these class actions challenge specific objective criteria and demonstrate common harm to plaintiffs.[82] These second-generation suits have been more successful than the earlier strategic litigation and, while they have met varying degrees of success, these suits can be an effective tool for raising public awareness and precipitating legislative reform. The remainder of this Essay will examine the effect of some of these lawsuits and discuss the lawsuit and legislative reform in Michigan as an exemplar case study.

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73. Luckey v. Miller, 976 F.2d 673, 677–79 (11th Cir. 1992).

74. Younger v. Harris, 401 U.S. 37, 43–54 (1971).

75. *See, e.g.*, Hurrell-Harring v. State, 930 N.E.2d 217 (N.Y. 2010); EVE BRENSIKE PRIMUS, LITIGATION STRATEGIES FOR DEALING WITH THE INDIGENT DEFENSE CRISIS, AM. CONSTITUTION SOC'Y, at 4–5, *available at* http://www.acslaw.org/files/Primus%20-%20Litigation%20Strategies.pdf.

76. Luckey v. Harris, 860 F.2d at 1017–18.

77. *See, e.g.*, State v. Smith, 681 P.2d 1374 (Ariz. 1984); State v. Peart, 621 So. 2d 780 (La. 1993); State v. Lynch, 796 P.2d 1150 (Okla. 1990).

78. *See* Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 438–43 (2009) (providing a discussion of the cases).

79. *Id.*

80. *Id.* at 443–48.

81. *Id.* at 444.

82. *Id.*

1. *Rivera v. Rowland* (Connecticut)

In *Rivera*, the ACLU and the Connecticut Civil Liberties Union brought a class action against the governor of Connecticut alleging that underfunding of the indigent defense system caused the plaintiffs to suffer harm because of excessive caseloads, substandard rates of compensation for defense counsel and the lack of adequate representation for juvenile defendants.[83] The court declined to dismiss the lawsuit, finding that it had jurisdiction over plaintiffs' justiciable claims and that the plaintiffs had alleged specific harms.[84] After more than four years of litigation, the parties reached a settlement providing for a reduction in caseloads through an increase in public defense staffing, new practice and caseload guidelines, and training and oversight for "private 'special' public defenders."[85]

2. *Flournoy v. State of Georgia* (Georgia)

In *Flournoy*, indigent criminal defendants filed a class action lawsuit against the State of Georgia and the Georgia Public Defender Standards Council ("GPDSC"), seeking mandamus, declaratory and injunctive relief to compel the defendants to provide adequate, effective, and conflict-free counsel to assist in their motions for new trial and appellate proceedings.[86] The court granted the Petition for Mandamus and certified the class.[87] In December 2011, the court approved a consent decree, which provided for the hiring of additional full-time staff attorneys in the appellate division of the GPDSC, control of workload, hiring standards, qualifications for attorneys, and training.[88] In addition, the decree set fees, established minimum qualifications, and provided for monitoring of contract attorneys.[89]

3. *Simmons v. State Public Defender* (Iowa)

Simmons involved a challenge to a rigid fee cap for contracted counsel on appellate matters.[90] The Iowa Supreme Court, in a unanimous decision,

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83. Second Amended Class Action Complaint, Rivera v. Rowland, No. CV-95-0545629 S (Conn. Super. Ct. Jan. 22, 1997), *available at* http://www.nlada.net/sites/default/files/ct_riveravrowland_aclucomplaint_01-22-1997.pdf.

84. Rivera v. Rowland, No. CV 950545629S, 1996 WL 636475, at *4–6 (Conn. Super. Ct. Oct. 23, 1996).

85. Drinan, *supra* note 78, at 445 (internal citation omitted).

86. Petition for Writ of Mandamus and Verified Complaint for Injunctive and Declaratory Relief at 2, Flournoy v. State, No. 2009CV178947 (Ga. Super. Ct. Dec. 15, 2009).

87. Order on Class Certification and Mandamus at 1, Flournoy v. State, No. 2009CV178947 (Ga. Super. Ct. Feb. 23, 2010).

88. Consent Decree at 1–2, Flournoy v. State, No. 2009CV178947 (Ga. Super. Ct. Dec. 14, 2011).

89. *Id.* at 3–15.

90. Simmons v. State Pub. Defender, 791 N.W.2d 69 (Iowa 2010).

held that a rigid fee cap of $1500 per appellate case would "substantially undermine the right of indigents to effective assistance of counsel."[91] The court's decision effectively bans the use of flat-fee contracting in Iowa.[92]

4. *Hurrell-Harring v. New York* (New York)

In May 2010, New York's highest court reinstated a lawsuit brought by the New York Civil Liberties Union on behalf of indigent criminal defendants.[93] The suit, *Hurrell-Harring v. New York*, alleged that New York's public defense system was not adequate to ensure the constitutional right to counsel.[94] New York has no statewide system for the provision of indigent criminal defense—instead that responsibility falls to counties. Rather than making a *Strickland* ineffective assistance claim, the complaint in *Hurrell-Harring* was based on the allegation that the state failed to effectuate *Gideon*'s requirement of the right to counsel.[95] The complaint made allegations similar to those made in *Cronic*.[96] It relied on the Supreme Court's holding that, in a narrowly defined context, factors other than solely counsel's performance at trial—i.e., when a defendant was denied counsel—can justify a presumption of ineffectiveness.[97] The *Hurrell-Harring* court stated that limited resources available to public defenders might result in "merely nominal attorney-client pairings"[98] that "could convert the appointment of counsel into a sham."[99] Accordingly, the court granted class certification, the case remains pending, and discovery is ongoing.[100] The litigation has been contentious and discovery disputes are being litigated.[101]

5. *Arianna S.* ex rel *Weber v. Massachusetts* (Massachusetts)

Arianna S. involved a class of pretrial detainees who alleged that the statewide assigned-counsel system was unconstitutional because of its grossly inadequate funding.[102] At the time, indigent pretrial detainees in Massachusetts had no attorneys because the low rate of compensation

91. *Id.* at 87.

92. *Id.* at 88–89.

93. Hurrell-Harring v. State, 930 N.E.2d 217, 218, 220, 226 (N.Y. 2010).

94. *Id.* at 219.

95. *Id.*

96. United States v. Cronic, 466 U.S. 648, 659 (1984).

97. Amended Class Action Complaint, Hurrell-Harring v. State, No. 8866-07 (N.Y. Sup. Ct. Apr. 28, 2008), *available at* http://www.nyclu.org/files/Amended%20Class%20Action%20Complaint.pdf.

98. Hurrell-Haring, 930 N.E.2d at 224.

99. *Id.* (quoting Avery v. Alabama, 308 U.S. 444, 446 (1940)).

100. Hurrell-Harring v. State, 914 N.Y.S.2d 367, 372 (App. Div. 2011).

101. *See* Hurrell-Harring v. State, 977 N.Y.S.2d 449, 452–53 (App. Div. 2013).

102. Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 760 (2010).

created a shortage of lawyers in the assigned-counsel program.[103] Prior to the filing of the *Arianna S.* litigation, in *Lavallee v. Justices in the Hampden Superior Court*, the Supreme Court of Massachusetts ordered that all indigent defendants incarcerated pretrial in Hampden County must be released after seven days if counsel was not appointed, and their cases dismissed after forty-five days if no counsel filed an appearance.[104] Following the decision in *Lavallee*, a single justice of the Massachusetts Supreme Judicial Court entered an order allowing judges in Hampden County to assign counsel from the private bar to represent indigent defendants, even if the private attorneys were unwilling or uncertified to do so.[105]

It was during this time that *Arianna S.* was filed. From 1986 to August 2004, assigned counsel in Massachusetts were paid $54 per hour in murder cases and murder appeals; $39 per hour in mental health cases, superior court cases, and superior court appeals; and $30 per hour in all other appeals, and district court criminal cases, juvenile court delinquency cases, and bail hearings and reviews.[106] One month after the lawsuit was filed, the Massachusetts legislature passed a bill increasing hourly rates for court-appointed counsel by $7.50 and establishing a commission to study indigent defense.[107] The Massachusetts Supreme Court then stayed the *Ariana S.* litigation; however, after the legislature failed to act on the commission's recommendations, the plaintiffs in *Ariana S.* filed a motion to lift the stay, and the court scheduled an immediate hearing.[108] This resulted in prompt passage of reform legislation, which "substantially increased the rates of compensation for assigned counsel" and increased the budget appropriation for assigned counsel by approximately fifty percent.[109]

6. *Public Defender, Eleventh Judicial Circuit v. Florida* (Florida)

The Florida Supreme Court decided *Public Defender, Eleventh Judicial Circuit of Florida v. State* on May 23, 2013.[110] The Miami-Dade County Public Defender's Office filed motions to withdraw from representing twenty-one criminal clients, "certifying a conflict of interest in each case."[111] The Public

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103. *See generally* Lavallee v. Justices in the Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004).

104. *Id.* at 911.

105. Cooper v. Reg'l Admin. Judge of the Dist. Court for Region V, 854 N.E.2d 966, 969 (Mass. 2006).

106. THE SPANGENBERG GRP., INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 2 (2005), *available at* http://www.sado.org/fees/maindigdefreform2005.pdf.

107. Mass. Sess. Law Chapter 253, an Act Relative to Private Attorneys Providing Public Counsel Services (Mass. 2004), *available at* https://malegislature.gov/Laws/SessionLaws.

108. THE SPANGENBERG GRP., *supra* note 106, at 7.

109. Hanlon, *supra* note 11, at 761.

110. Pub. Defender, Eleventh Judicial Circuit v. State, 115 So. 3d 261 (Fla. 2013).

111. Jacek Stramski, *Florida Supreme Court Holds that Excessive Caseload in 11th Circuit May Warrant Prospective Rejection of Third-Degree Felony Cases by Public Defender's Office*, FLASCBLOG: THE FLORIDA

Defender claimed "that due to caseload and underfunding, the office would not be able to ethically represent those clients."[112] The primary issue for the court was whether an excessive caseload could constitute a sufficient conflict of interest to allow attorneys to prospectively refuse to accept additional cases.[113]

Before remanding the case back to the trial court, the Florida Supreme Court held that a Florida statute could not prevent the withdrawal of a public defender based on an excessive workload, if the workload creates a conflict.[114] The court also held that indigent defendants could secure the Sixth Amendment right to an effective attorney prospectively.[115] The court concluded that the problem of conflicts caused by excessive caseloads could be addressed through system- and office-wide reform.[116]

7. *Best v. Grant County* (Washington)

In *Best*, the ACLU of Washington and Columbia Legal Services alleged that Grant County's felony public defense system violated indigent defendants' constitutional right to counsel.[117] In 2005, the County agreed to a settlement after a court found that the County's system "suffered from systemic deficiencies," and that the County overworked its lawyers, failed to provide effective supervision, and allowed the prosecutor's office to affect funding for expert witnesses and investigations.[118] The suit ended in April 2013, "after seven years of court-ordered monitoring."[119] Shortly thereafter, the Washington Supreme Court adopted new caseload limits for public defenders in an effort to make sure the lawyers have sufficient time for each client.[120]

SUPREME COURT BLOG (May 24, 2013), http://www.flascblog.com/florida-supreme-court-holds-that-excessive-caseload-in-11th-circuit-may-warrant-prospective-rejection-of-third-degree-felony-cases-by-public-defenders-office/.

112. *Id.*

113. *Public Defender*, 115 So. 3d at 264–65.

114. *Id.* at 270 (citing Fla. Stat. § 27.5303(1)(d) (2012)).

115. *Id.*

116. *Id.* at 272–74.

117. Complaint for Injunctive and Declaratory Relief at 2, Best v. Grant Cnty., No. 04-2-00189-0 (Wash. Super. Ct. Dec. 21, 2004), *available at* http://www.aclu-wa.org/library_files_2004-04-05-GrantComplaint.pdf.

118. *Grant County Agrees to Overhaul Public Defense System*, ACLU OF WASH. STATE (Nov. 7, 2005), *available at* https://www.aclu-wa.org/news/grant-county-agrees-overhaul-public-defense-system.

119. *See Grant County Public Defense Suit Ends with Major Improvements*, ACLU OF WASH. STATE (June 11, 2013), *available at* https://www.aclu-wa.org/news/grant-county-public-defense-suit-ends-major-improvements.

120. Order, *In re* the Adoption of New Standards for Indigent Defense and Certification of Compliance, No. 25700-A-1004 (Wash. June 15, 2012), *available at* http://www.courts.wa.gov/content/publicUpload/Press%20Releases/25700-A-1004.pdf; *see also* Gene Johnson, *ACLU Claims Public Defense System Failing in 2 Wash. Towns*, KOMONEWS.COM (June 18, 2013, 7:01 PM), *available*

8. *Wilbur v. City of Mount Vernon and City of Burlington* (Washington)

Wilbur, another class action, was filed in federal district court in 2011. It alleged systemic violations of the constitutional right to effective assistance of counsel.[121] Plaintiffs' lawyers sued the cities of Mount Vernon and Burlington, which at the time the lawsuit was filed had two part-time lawyers responsible for handling more than 2000 misdemeanor cases a year.[122] Under their contract with the cities, the two attorneys served as "the Public Defender" and were paid a flat annual fee out of which they were to provide all "investigative, paralegal, and clerical services."[123] The plaintiffs alleged that their appointed attorneys did not regularly return calls, never visited with them in jail, did not investigate their cases, and urged them to plead guilty.[124] The complaint stated that the cities' failure to adequately monitor and oversee the contract amounted to a constructive denial of the right to counsel as guaranteed by *Gideon*.[125] The case was tried in July 2013.

On August 14, 2013, the U.S. Department of Justice ("DOJ") joined the case by filing a Statement of Interest.[126] The statement does not take a position on the merits of the case, but states that, "should any remedies be warranted," the remedy should include workload controls for public defense providers "to ensure quality representation."[127] The statement further calls for an "independent monitor" to ensure the cities' compliance with any court order issued in the case.[128] This is the first time the DOJ has weighed in on any indigent defense litigation.

In December 2013, the U.S. District Court for the Western District of Washington held that the public defense system of Mt. Vernon and Burlington deprives indigent persons who file misdemeanor charges of their fundamental right to assistance of counsel. The court noted that indigent defense services "amounted to little more than a meet and plead system," and ordered the cities to hire a supervisor to ensure their defense system

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at http://www.komonews.com/news/local/ACLU-claims-public-defense-system-broken-in-2-Wash-towns-212086101.html.

121. Plaintiffs' Motion for Class Certification at 1, Wilbur v. City of Mount Vernon, No. 2:11-cv-01100 RSL (W.D. Wash. Nov. 10, 2011), 2011 WL 11056870.

122. *Id.* at 1, 4.

123. *Id.* at 2.

124. *Id.* at 8, 10–15.

125. *Id.* at 7, 15.

126. Statement of Interest of the United States at 3, Wilbur v. City of Mount Vernon, No. C11-01100RSL (W.D. Wash. Aug. 14, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf ("The United States has an interest in ensuring that all jurisdictions—federal, state, and local—are fulfilling their obligation under the Constitution to provide effective assistance of counsel to individuals facing criminal charges who cannot afford an attorney, as required by *Gideon v. Wainwright*." (citation omitted)).

127. *Id.* at 2.

128. *Id.* at 6.

complies with constitutional standards, retaining jurisdiction over the case for three years while reforms proceed.[129]

9. *White v. Martz* (Montana)

In *White*, the ACLU filed a class action lawsuit on behalf of indigent criminal defendants from seven counties in Montana. The suit challenged the adequacy of the public defender systems in their counties and the state of Montana.[130] Before trial, the ACLU of Montana and the Montana Attorney General's Office agreed to postpone the lawsuit and seek a legislative solution to Montana's indigent public defense problems.[131] The legislature created a new statewide public defender system and Montana became the first state to incorporate each of the ABA's Ten Principles into its Public Defender Act.[132]

IV. MICHIGAN—A CASE STUDY

A. *INDIGENT DEFENSE IN MICHIGAN BEFORE* DUNCAN

Michigan was one of the first states to pass a law requiring the appointment and compensation of counsel, but the state passed on that obligation to its counties.[133] The system has seen little or no change in more than 150 years.[134] Michigan is one of the only states that do not have a centralized state public defense system, lacking both state funding and oversight. Each county is free to determine how it provides counsel to indigent defendants, which means that the county controls the appointment of counsel, the amount counsel are paid, the training (or lack thereof) that counsel receive, and all other aspects of its system. This results in a patchwork of indigent defense services throughout the state.

In 2008, Michigan ranked forty-fourth out of the fifty states in per capita spending on indigent defense; virtually no funding comes from the

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129. Wilbur v. City of Mount Vernon, No. C11-1100RSL 3, 9, 22 (W.D. Wash. Dec. 4, 2013), *available at* https://www.wacdl.org/20131204Dkt325MemorandumofDecision.pdf.

130. Amended Complaint at 2, White v. Martz, No. C DV-2002-133 (Dist. Ct. Mont. Apr. 1, 2002).

131. Scott Crichton, *Guest Opinion: Legislation Must Guarantee Legal Defense for all Montanans*, BILLINGS GAZETTE (Jan. 21, 2005), *available at* http://billingsgazette.com/news/opinion/guest-opinion-legislation-must-guarantee-legal-defense-for-all-montanans/article_c285ede7-2615-52d9-960e-60d50ae1a12c.html.

132. *See* NAT'L LEGAL AID & DEFENDER ASS'N, AN ASSESSMENT OF INDIGENT DEFENSE SERVICES IN MONTANA, *available at* http://www.nlada.net/sites/default/files/mt_whitevmartznlada08-04-2004_report.pdf (last visited May 20, 2014).

133. *See* 1937 Mich. Pub. Acts 220.

134. MICH. COMP. LAWS SERV. § 775.16 (LexisNexis 2012) (The "Former Acts" section of the history to this law states that "[t]his section, as originally enacted, reenacted, except proviso, section 1 of Pub Acts 1857, No. 109, being CL 1857, § 5675").

state.[135] Only a few counties have a public defender program;[136] others have contract or assigned-counsel programs; still others have a combination of these programs.[137]

Since 1978, a number of statewide and local committees and task forces pointed out the deficiencies in Michigan's indigent criminal defense system, and some offered potential solutions.[138] Each recommended the creation of a statewide indigent defense commission and/or the adoption of statewide standards. None of the proposals had any significant effect.

Additionally, there have been a number of individual cases filed in Michigan that have concerned various problems, including attorney compensation and ineffective assistance of counsel. In 1989, the Recorder's Court Bar Association sued for superintending control against the chief judges of the Wayne Circuit Court, challenging the "fixed fee" schedule for assigned counsel.[139] The Michigan Supreme Court appointed a special master, who recommended abolishing the flat fee schedule in favor of an hourly rate of $60–$70 or a return to the 1982 event-based fee schedule adjusted for inflation.[140] In June 2001, an administrative order decreased assigned counsel fees statewide to 10% below the $75 established in 1993. In response, the Criminal Defense Attorneys of Michigan and the Wayne County Criminal Defense Bar Association filed a lawsuit, but it was unsuccessful.[141]

B. DUNCAN V. MICHIGAN

In 2007, several law firms and the ACLU of Michigan filed a class action lawsuit, *Duncan v. Michigan*, against the State of Michigan and its governor on behalf of a number of individual defendants in then-pending criminal cases.[142] The individual plaintiffs alleged their assigned counsel had not fulfilled basic obligations of representation. For example, the assigned

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135. NAT'L LEGAL AID & DEFENDER ASS'N, A RACE TO THE BOTTOM: SPEED & SAVINGS OVER DUE PROCESS: A CONSTITUTIONAL CRISIS i–iv (2008), *available at* http://www.mynlada.org/michigan/michigan_report.pdf.

136. *Id.* at 7. There are five public defender offices with salaried attorneys: Bay, Chippewa, Kent, Washtenaw, and Wayne Counties. The office does not necessarily provide the majority of services for the county, e.g., Wayne.

137. *Id.* at 8–9.

138. *E.g.*, Defense Services Committee (1981), Special State Bar Task Force on Assigned Counsel Standards (1986), Michigan Public Defense Task Force (2002). *See* Complaint, Duncan v. Michigan, No. 07-000242-CZ (Ingham Cnty. Mich. Cir. Ct. Feb. 22, 2007) at 23–24, *available at* https://www.aclu.org/files/images/asset_upload_file244_28623.pdf; *see also* Thomas W. Cranmer, Indigent Criminal Defense Systems in the State of Michigan – A Time for Evaluation and Action, Mich. Bar. J. 10 (2006).

139. Recorder's Court Bar Ass'n v. Wayne Circuit Court, 503 N.W.2d 885, 886 (Mich. 1993).

140. *Id.* at 887, 888 n.2.

141. Wayne Cnty. Criminal Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court, 663 N.W.2d 471, 472 (Mich. 2003).

142. Complaint, *supra* note 138.

counsel had allegedly not made jail visits, returned phone calls, or investigated their clients' cases. The lawsuit targeted three Michigan counties: Berrien, Genesee, and Muskegon. Notably, the *Duncan* class plaintiffs were pre-conviction, meaning they had not yet gone to trial or pled guilty.[143]

This was not a hastily drafted and filed lawsuit, and attorneys carefully selected the forum. Before filing the lawsuit, volunteer attorneys and paralegals spent several months conducting court watching in the three targeted counties, as well as other counties. The volunteer attorneys also talked with defendants, defendants' families, prosecutors and defense counsel.

The lawsuit alleged that Michigan abdicated its obligation under the United States and Michigan constitutions by providing little or no funding or oversight and delegating the responsibility for trial-level indigent defense services to the counties.[144] The lawsuit points out violations of the Ten Principles,[145] as well as violations of the "Eleven Principles," adopted by the State Bar of Michigan in 2002.[146]

Specifically, the complaint alleged the following specific deficiencies in the three targeted counties:

> (a) No written client eligibility standards;
>
> (b) No merit-based attorney hiring and retention programs;
>
> (c) No written attorney performance standards or meaningful systems of attorney supervision and monitoring;
>
> (d) No guidelines on how to identify conflicts of interest;
>
> (e) No attorney workload standards;
>
> (f) No adequate attorney training; and
>
> (g) No independence from the judiciary or the prosecutorial function.[147]

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143. *Id.* at 7, 9, 12, 14, 15, 17, 18.

144. *Id.* at 3.

145. *Id.* at 29 (citing ABA'S TEN PRINCIPLES, *supra* note 44).

146. STATE BAR OF MICHIGAN ET AL., ELEVEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (April 2002), *available at* http://www.michigancampaignforjustice.org/docs/Eleven%20Principles.pdf (adding an eleventh principle, which states that a function of indigent defense should be "to explore and advocate for programs that improve the [indigent defense] system and reduce recidivism"); *see* Thomas W. Cranmer, *Indigent Criminal Defense Systems in the State of Michigan—A Time for Evaluation and Action*, MICH. BAR. J., Feb. 2006, at 10, 10–11 (2006). Michigan's State Bar Representative Assembly was the first governing body of any state bar association to adopt the ABA's Ten Principles. *See State Bar of Michigan Heralds Legislative Passage of Indigent Criminal Defense Reform*, STATE BAR OF MICH. (June 19, 2013), http://www.michbar.org/news/releases/archives13/6_19_13_indigentdefense.cfm.

147. Complaint, *supra* note 138, at 3–4

The final allegation alleged "judges routinely involve themselves in the solicitation of contract bids and the selection and retention of indigent defense counsel. . . ." and "[m]any indigent defense counsel also serve as prosecutors, often in the same courtrooms before the same judges. Some are [even] assigned to defend individuals they previously prosecuted."[148]

The plaintiffs alleged these deficiencies caused specific harms including:

> (a) Wrongful denial of representation;
>
> (b) Wrongful conviction of crimes;
>
> (c) Unnecessary or prolonged pre-trial detention;
>
> (d) Guilty pleas to inappropriate charges and denial of the right to trial when meritorious defenses [were] available; and
>
> (e) Harsher sentences than the facts of the case warrant and few alternatives to incarceration.[149]

The complaint sought declaratory and injunctive relief, requiring the State of Michigan to provide constitutionally sufficient indigent defense programs.[150]

The procedural history of *Duncan* is convoluted and wrought with the political battles that are manifest in Michigan, including in the Michigan Supreme Court. Shortly after the lawsuit was initiated, the State filed an answer and motion for summary disposition, which argued that plaintiffs failed to plead a valid cause of action, they lacked standing, and could not certify their purported class.[151] The trial court denied the motion for summary disposition and granted class certification, and defendants appealed.[152] The Michigan Court of Appeals affirmed the trial court in a 2-1 decision,[153] and the defendants appealed to the Michigan Supreme Court. The Supreme Court reversed itself twice on motions for reconsideration, ultimately remanding the case to the trial court.[154] The court again denied the State's motion for summary disposition, and the Michigan Court of

148. *Id.* 34, 37.

149. *Id.* at 4–5.

150. *Id.* at 48.

151. Duncan v. State, 774 N.W.2d 89, 100 (Mich. Ct. App. 2009).

152. *Id.*

153. *Id.* at 89.

154. Order, Duncan v. Michigan, 791 N.W.2d 713 (Mich. Dec. 29, 2010) (No. 139345-7) *available at* http://publicdocs.courts.mi.gov:81/sct/public/orders/20101229_s139345_122_139345_2010-12-29_or.pdf; Order, Duncan v. Michigan, 784 N.W.2d 51 (Mich. July 16, 2010) (No. 139345-7) *available at* http://publicdocs.courts.mi.gov:81/sct/public/orders/20100716_s139345_111_139345_2010-07-16_or.pdf; Order, Duncan v. Michigan, 780 N.W.2d 843 (Mich. Apr. 30, 2010) (No. 139345-7) *available at* http://publicdocs.courts.mi.gov:81/sct/public/orders/20100430_s139345_106_139345_2010-04-30_or.pdf. The reversals coincided with the changes in the majority political party of the Supreme Court justices.

Appeals affirmed on April 2, 2013, again in a 2–1 decision.[155] The State again sought leave to appeal to the Michigan Supreme Court. The governor ultimately signed legislation creating a commission responsible for establishing standards for the provision of indigent criminal defense, monitoring compliance, and requiring funding.[156] The court did not order the relief obtained by the legislation, but the legislation very likely was influenced by the pending lawsuit. In light of the legislative relief, the plaintiffs voluntarily dismissed *Duncan* in July 2013.[157]

Although the *Duncan* lawsuit was voluntarily dismissed, it was a catalyst for reform of the indigent defense system in Michigan. The lawsuit helped generate more awareness of, and progress in, reforming the system than at any other time during the fifty years since *Gideon.*

C. LEGISLATIVE REFORM—MICHIGAN'S DEFENSE REFORM ACT

Contemporaneous with preparation for *Duncan,* advocates devised a strategy to urge the Michigan legislature to enact change. As a first step, a joint resolution of the Michigan legislature authorized a study of indigent defense services in a representative sample of counties.[158] In 2008, the National Legal Aid & Defender Association, in partnership with the State Bar of Michigan, completed the yearlong study. It focused on ten representative counties, which were selected by an "advisory group . . . composed of representatives from the State Court Administrator's Office,

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155. Duncan v. Michigan, 832 N.W.2d 761, 764 (Mich. Ct. App. 2013). The majority and dissenting opinions in these cases highlight the potential difficulties with this type of litigation. In his 22-page second dissenting opinion (his first dissent was 56 pages) containing criticism of the Michigan Supreme Court's confusing legal positioning, Judge Whitbeck asserts that the appeal of plaintiffs' failure to state a claim was not foreclosed under the law of the case doctrine and reiterates his articulate argument for the lack of a showing of "prejudice per se" by plaintiffs because pre-conviction claims are speculative in nature. *Id.* at 784–85. Moreover, it is his position that the plaintiffs must demonstrate that the state's action or inaction caused (correlation is insufficient) the deficient performance of counsel. *Id.* at 785.

156. *See supra* notes 63–65 and accompanying text.

157. Duncan v. Michigan, 832 N.W.2d 752, 752 (Mich. 2013). It apparently was determined that, with published authority that the lawsuit raised a judiciable question, and with the new legislation, it would be best not to give the divided Supreme Court another opportunity to decide the dispositive issues.

158. S. Con. Res. 39, at 450, 93rd Leg., Reg. Sess. (Mich. 2006), *available at* www.legislature.mi.gov/(S(d5005255d3hlbo45f2weiv45))/documents/2005-2006/journal/ senate/pdf/2006-SJ-03-15-026.pdf, (stating that as "[t]he people of Michigan expect the government to administer a system of justice that is just, swift, accountable, and frugal, and whereas Michigan has no accounting for the total number of misdemeanor, felony, juvenile, mental health, and appellate cases requiring the appointment of counsel; and Whereas, Michigan has incomplete accounting for expenditures dedicated to public defense services," the Michigan Legislature requests the NLADA, in cooperation with the State Bar of Michigan, to issue a report describing "the costs of indigent criminal cases, the number of criminal cases assigned to court-appointed attorneys, and the types of criminal cases that receive court appointed attorneys in Michigan"). The study was funded in part by a grant from the Atlantic Philanthropies. A RACE TO THE BOTTOM, *supra* note 130, at 94 n.4.

the Prosecuting Attorneys Association of Michigan, the State Bar of Michigan, the State Appellate Defender Office, the Criminal Defense Attorneys of Michigan, and trial-level judges."[159] The study—which the Michigan legislature commissioned by resolution with bi-partisan support—concluded that "Michigan fails to provide competent representation to those who cannot afford counsel in its criminal courts."[160] The study further described numerous deficiencies in Michigan's system that violated the ABA *Ten Principles of a Public Defense Delivery System.*[161]

Shortly after the release of the study, appropriately titled *A Race to the Bottom,* in June 2008, a number of individuals and organizations came together to form the Michigan Campaign for Justice ("the Campaign"), a broad-based non-partisan coalition which has proved instrumental in lobbying the Michigan legislature and garnering public support through publicity and events.[162] Initially it issued a Michigan Report Card on Public Defense.[163] Then, in 2011, the Campaign, along with the ACLU and ACLU of Michigan, produced a report for legislators and others describing thirteen people wrongfully convicted at a cost to taxpayers of $13 million.[164] The Campaign continues to monitor and advocate for a constitutionally adequate indigent defense system.[165]

Subsequent to a State Bar of Michigan's report—which stated that the costs and constitutional crisis caused by Michigan's inadequate indigent defense system needed immediate attention[166]—and after the Michigan Supreme Court affirmed the trial court's denial of the State's motion for summary disposition in *Duncan* and remanded the case[167], Michigan Governor Rick Snyder issued an executive order on October 13, 2011 that established the Indigent Defense Advisory Commission.[168] That commission was charged with making "recommendations to the Governor and the

159. A RACE TO THE BOTTOM, *supra* note 135, at i.

160. *Id.*

161. *Id.* at iii–iv; ABA'S TEN PRINCIPLES, *supra* note 44.

162. *See Press Release Archive,* MICH. CAMPAIGN FOR JUSTICE, www.michigancampaignforjustice.org/press_release_archive.php (last visited May 20, 2014).

163. REPORT CARD ON MICHIGAN'S PUBLIC DEFENSE SYSTEM, MICH. CAMPAIGN FOR JUSTICE, http://www.michigancampaignforjustice.org/michigans_report_card.php (last visited May 20, 2013).

164. MICH. CAMPAIGN FOR JUSTICE ET AL., FACES OF FAILING PUBLIC DEFENSE SYSTEMS: PORTRAITS OF MICHIGAN'S CONSTITUTIONAL CRISIS 5 (2011), *available at* http://www.michigancampaignforjustice.org/docs/MI_failedjustice_bookletFINAL.pdf.

165. MICH. CAMPAIGN FOR JUSTICE, www.michigancampaignforjustice.org (last visited May 20, 2014).

166. JUDICIAL CROSSROADS TASK FORCE, REPORT AND RECOMMENDATIONS: DELIVERING JUSTICE IN THE FACE OF DIMINISHING RESOURCES (2011), www.michbar.org/judicialcrossroads/JudicialcrossroadsReport.pdf.

167. *See supra* note 154 and accompanying text.

168. Exec. Order No. 2011-12 (Mich. 2011), *available at* http://www.legislature.mi.gov/documents/2011-2012/executiveorder/pdf/2011-EO-12.pdf.

Legislature for [statewide] improvements to the system of providing legal representation for indigent criminal defendants."[169] It issued a report that recommended sweeping reforms and the creation of a permanent state commission to oversee the counties' public defense services.[170]

After the Supreme Court remanded the *Duncan* case, and the Indigent Defense Advisory Commission issued its report, several Michigan representatives introduced bipartisan legislation in 2012 to create a new statewide permanent commission to oversee indigent defense services in Michigan.[171] The commission was to establish standards, provide recommendations for funding, and identify and share best practices.[172] In the House of Representatives the legislation passed seventy-one to thirty-six on a bipartisan basis in November 2012.[173] However, the Senate did not act.[174] Opposition in the Senate stemmed primarily from the perceived increased expenses for the counties and testimony from the Michigan Attorney General's office that Michigan's indigent defense system was adequate because there had not been many successful ineffective assistance of counsel cases.[175]

Although the bill failed in 2012, advocates kept up the pressure in 2013. On April 10, 2013, a week after the Michigan Court of Appeals affirmed the trial court's denial of the defendants' second motion for summary judgment in *Duncan*, Rep. McMillin introduced House Bill No. 4529. The bill was similar to the prior bill introduced in 2012, but addressed funding differently.[176]

This time the bill was successful. In July 2013, Governor Snyder signed Public Act 93 of 2013 (House Bill No. 4529; Senate Bill No. 301) into law.[177] Similar to the bills that failed in 2012, PA 93 created the Michigan Indigent

169. *Id.* at 2.

170. MICH. ADVISORY COMM'N ON INDIGENT DEF., REPORT OF THE MICHIGAN ADVISORY COMMISSION ON INDIGENT DEFENSE (2012), *available at* http://www.michigan.gov/documents/snyder/Indigent_Defense_Advisory_Comm_Rpt_390212_7.pdf.

171. H.B. 5804, 96th Leg., Reg. Sess. (Mich. 2012), *available at* http://www.legislature.mi.gov/documents/2011-2012/billintroduced/House/pdf/2012-HIB-5804.pdf.

172. *Id.*

173. David Carroll, *The Clock Runs Out on Michigan Reform for this Year*, SIXTH AMENDMENT CTR. (Dec. 19, 2012), http://www.sixthamendment.org/the-clock-runs-out-on-michigan-reform-for-this-year/.

174. *Id.*

175. *Id.*; *see* Letter from Hon. Timothy Lewis et al. to Rep. Tom McMillin, 45th District Michigan, and Hon. Thomas Boyd, 55th Judicial District, Ingham County (Sep. 19 2012), *available at* http://www.constitutionproject.org/pdf/091912_nrtccletterrehb5804.pdf.

176. H.B. 4529, 97th Leg., Reg. Sess. (Mich. 2013), *available at* http://www.legislature.mi.gov/documents/2013-2014/billintroduced/House/pdf/2013-HIB-4529.pdf.

177. Michigan indigent defense commission act, 2013 Mich. Pub. Acts 93. (codified at MICH. COMP. LAWS §§ 780.981–.1003 (2013)). Republicans Tom McMillin and Bruce Caswell were the primary authors of identical bills. Both passed their respective chambers with overwhelming majorities, and the concurrence votes occurred on June 19, 2013.

Defense Commission ("MIDC"), a fifteen-member commission with nominees provided to the governor by diverse authorities. The MIDC was given the power to develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure that all indigent adults in the state consistently receive effective indigent criminal defense services.[178] The Commission has the authority to investigate, audit, and review county indigent defense programs to "assure compliance with the commission's minimum standards, rules and procedures."[179] These standards are consistent with a majority of the ABA's Ten Principles.[180] The State will provide additional money to ensure compliance with the standards.[181]

When Governor Snyder signed PA 93, Michigan became the twenty-first state to adopt a statewide commission approach to indigent defense.[182] Currently, nominations for the MIDC have been submitted to the governor, and the governor is expected to name members of the Commission soon. Additionally, Governor Snyder included one million dollars in funding for the new commission in his executive budget recommendation for fiscal years 2015 and 2016.[183] It is unlikely the law would have been enacted without the well-coordinated advocacy effort, a large part of which was the *Duncan* lawsuit.[184]

V. WHAT'S NEXT?—APPROACHES FOR ACHIEVING SYSTEMIC REFORM

As various scholars have pointed out, systemic change involves a "long, slow and concerted effort" as well as the involvement of all stakeholders and public support.[185] There is not a single, foolproof model for achieving successful structural reform, but advocates should consider litigation as a component of seeking change.

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178. MICH. COMP. LAWS ANN. § 780.985(3) (West 2013).

179. *Id.* § 780.989(1)(b).

180. *See id.* §§ 780.991(1)(a), (11)(2)(a)–(f).

181. *Id.* § 780.995(7).

182. David Carroll, *A Birds-Eye View of Independent Commissions in the 50 States*, SIXTH AMENDMENT CTR. (April 19, 2013), http://sixthamendment.org/a-birds-eye-view-of-independent-commissions-in-the-50-states/.

183. RICK SNYDER, STATE OF MICHIGAN, EXECUTIVE BUDGET: FISCAL YEARS 2015 AND 2016 B-48 (2014), *available at* http://www.michigan.gov/documents/budget/A_446646_7.pdf.

184. *See* David Carroll, *Michigan Passes Public Defense Reform Legislation*, SIXTH AMENDMENT CTR. (June 19, 2013), http://sixthamendment.org/michigan-passes-public-defense-reform-legislation/ ("There can be little doubt that SB 300/HB 4529 were a direct attempt to not only fix the problems but to perhaps stem the still active lawsuit.").

185. *See, e.g.*, Carol S. Steiker, Gideon *at Fifty: A Problem of Political Will*, 122 YALE L.J. 2694, 2701 (2013).

A. INVOLVEMENT OF THE U.S. DEPARTMENT OF JUSTICE

Arguments have been made for a federal enforcement action[186] and a post-trial, systemic habeas cause of action,[187] supported by the DOJ. Professor Primus has proposed that the DOJ should have congressional authorization to file federal enforcement actions to obtain equitable relief from states' systemic right to counsel violations.[188] She has also proposed deputizing private citizens and interest groups to file enforcement actions on behalf of the United States.[189] In addition, Professor Primus proposes that Congress "add a new chapter to Title 28 that would create a specific habeas corpus cause of action for systemic right-to-counsel violations," and thereby avoid the abstention problems.[190]

In 2013, United States Senator Patrick Leahy introduced the Gideon's Promise Act, which would encourage states to direct federal funds toward improving the overall administration of justice and would require the DOJ to assist states that want support in developing an effective and efficient system of indigent defense.[191] The bill, on which no action has been taken, would also establish a cause of action for the federal government to step in when a state systematically fails to provide constitutionally required representation.[192]

In March 2013, Attorney General Eric Holder announced that the DOJ's Bureau of Justice Assistance would provide two million dollars in fiscal year 2013 to fund new initiatives to strengthen indigent defense.[193] The money allows a recipient to provide training and technical assistance to state and local jurisdictions, produce publications and resources, and develop related national policies.[194] The money also supports indigent defense delivery systems in two new jurisdictions.[195] Additionally, the Attorney General announced that money would be allocated for effective representation of juveniles.[196] Perhaps the previously discussed Statement of Interest that the DOJ filed in the lawsuit of *Wilbur* v. *City of Mount Vernon and*

186. *See* Primus, *supra* note 75, at 6–7.

187. *See id.* at 8–12.

188. *Id.* at 5–6, 14–15.

189. *Id.* at 5, 14–15.

190. *Id.* at 8, 15–18.

191. Gideon's Promise Act, S. 597, 113th Cong. (2013).

192. *Id.*

193. Eric Holder, U.S. Att'y Gen., *Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright*, U.S. DEPT. OF JUSTICE NEWS (Mar. 15, 2013), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html.

194. *Id.*

195. *Id.*

196. *Id.* Attorney General Holder announced that, subject to available funds, $400,000 would be awarded to support a broad range of services and activities to improve juvenile indigent defense nationally.

City of Burlington[197] is even more significant than the announced funding initiatives.[198] While the DOJ did not take a position on whether the defendants violated plaintiffs' right to counsel, the Statement of Interest recommended the relief ultimately granted in *Wilbur*, that is, appointment of an independent monitor if a violation were found.[199]

B. CONTINUED USE OF STRATEGIC LITIGATION

Some scholars have argued that litigation addressing a jurisdiction's approach to providing indigent criminal defense is the best strategy for effectuating change.[200] Admittedly, such litigation is difficult and time-consuming.[201] However, when well-thought-out, carefully and strategically filed, and accompanied by significant efforts from organized groups to garner public and legislative support, advocates should encourage this litigation, with or without DOJ involvement. Even if the lawsuit itself does not obtain the relief requested, as it did in *Wilbur*, it can be a catalyst for broad systemic reform, as the *Duncan* litigation in Michigan and the litigation in other states discussed above demonstrate.

C. OTHER APPROACHES

Advocates have also suggested and implemented some novel approaches to help fulfill the promise of *Gideon*. For example, Gideon's Promise (formerly the Southern Public Defender Training Center) has implemented a "Teach for America"-like model. Gideon's Promise encourages new lawyers, trained as "zealous" client advocates, to work in public defense offices throughout the South.[202] Gideon's Promise offers

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197. *See supra* text accompanying note 129.

198. Carrie Johnson, *Justice Department Tackles Quality of Defense for the Poor*, NPR NEWS, (Sept. 3, 2013), http://www.npr.org/2013/09/03/216809388/justice-dept-tackles-quality-of-defense-for-the-poor; *see also supra* notes 126–28. Jocelyn Samuels, head of the DOJ civil rights unit stated, "Independent monitors have provided an objective source for assessing accountability, for evaluating whether an entity is complying with the terms of a consent decree and for gaining community confidence in the fact that the reforms will take place in a systemic and effective way." *Id.*

199. Statement of Interest of the United States,*supra* note 126. .

200. *See, e.g.*, Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT L. REV. 293, 322 & n.173 (2002); Richard J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203, 216–17 (1986); Margaret H. Lemos, Note, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808, 1835–42 (2000).

201. Bernhard, *supra* note 200, at 322 (explaining that systemic litigation requires "egregious conditions . . . allegations of actual injury to clients, litigation support from a law reform organization or bar organization, and public favor").

202. Steiker, *supra* note 185, at 2711–12 (citing *Goal & Mission*, GIDEON'S PROMISE, http://gideonspromise.org/about/goal-mission (last visited May 20, 2014)).

ongoing training and support for these attorneys once they begin working in regular jobs as public defenders.[203]

Another suggestion involves the use of non-lawyers as lay advocates for certain defendants (e.g., juveniles and those accused of misdemeanors).[204] Such advocates also might represent a defendant, particularly a low-level offender, at a bail proceeding.[205]

Public opinion is obviously important if legislation is to move forward and for support of organizations like Gideon's Promise. The book (and movie), *Gideon's Trumpet*,[206] and the recent film, *Gideon's Army*,[207] have brought the issue of indigent criminal defense somewhat into the mainstream, as has the publicity for a number of rulings exonerating individuals convicted of serious, and sometimes capital, crimes. Law schools can also play a role in educating students regarding the gaps between the Constitution and the realities of criminal defense.

CONCLUSION

The fiftieth anniversary of *Gideon* has provided an opportunity to evaluate efforts toward achieving the unfulfilled promise of an adequate defense for all indigent criminal defendants. Well-planned strategic litigation can be an effective tool that advocates should use as part of an overall plan to garner support and achieve systemic indigent defense reform.

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203. *Id.* at 2710–11.

204. Donald A. Dripps, *Up from* Gideon, 45 TEX. TECH L. REV. 113, 127–28 (2012).

205. Cara H. Drinan, *Getting Real About* Gideon*: The Next Fifty Years of Enforcing the Right to Counsel*, 70 WASH. & LEE L. REV. 1309, 1335-38 (2013); *cf.* Turner v. Rogers, 131 S. Ct. 2507, 2519–20 (2011) (discussion of procedural safeguards that can take the place of a lawyer).

206. ANTHONY LEWIS, GIDEON'S TRUMPET (1964); GIDEON'S ARMY (HBO Documentary Films 2013).