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Commentary

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Commentary

*Norman Lefstein**

Good morning, ladies and gentlemen. I am delighted to be here and to have the opportunity to comment on my colleagues' remarks. I also welcome the chance to share with you my perspectives about indigent defense in the United States and here in Missouri.

Adele Bernhard talked about the need for standards, especially performance standards, and I agree with her about the importance of such standards.¹ In fact, there are all kinds of standards in this country dealing with indigent defense. But the truth is they often do not make much difference because frequently defense lawyers lack the capability to represent their clients adequately due to excessive caseloads, lack of adequate support services, and other shortcomings.²

The National Legal Aid and Defender Association (NLADA) has developed the most detailed performance standards for providing defense services.³ But performance standards do not ensure that quality representation is provided, let alone representation that complies with professional responsibility requirements of competence and diligence.⁴ To illustrate, the Nevada Supreme Court entered an order on January 4, 2008, which provides as follows: "It is hereby ordered that the public defenders in Clark County and Washoe County shall advise the county commissioners of their respective counties when they are unavailable to accept further appointment based on ethical considerations relating to their ability to comply with the performance standards contained in Exhibit A to this order."⁵ The performance standards

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1. Adele Bernhard, *Raising the Bar: Standards Based Training, Supervision, and Evaluation – An Essay*, 75 MO. L. REV. 831 (2010).

2. See, e.g., THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 2 (2009) [hereinafter JUSTICE DENIED] ("Due to funding shortfalls, excessive caseloads, and a host of other problems, many [indigent defense systems] are truly failing.").

3. PERFORMANCE GUIDELINES FOR CRIMINAL DEF. REPRESENTATION (Nat'l Legal Aid & Defender Ass'n, 1995).

4. See MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3 [hereinafter ABA MODEL RULES].

5. *In re* the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Jan. 4, 2008) available at <http://www.clearinghouse.net/chDocs/public/PD-NV-0001-0002.pdf>. Clark and Washoe Counties are the two largest counties in Nevada. Nevada QuickFacts from the U.S. Census Bureau, <http://quickfacts.census.gov/qfd/>

adopted in Nevada are modeled after those recommended by NLADA and are substantially similar.⁶ Although implementation of this order initially was delayed, some months later, the Nevada Supreme Court declared that the standards are fully applicable.⁷ Yet the caseloads in Clark and Washoe Counties remain exceedingly high and the defenders in these counties have not taken any action to protest their caseloads by either asking that assignments be halted or that withdrawal from representation be permitted.⁸ And that unfortunately is the story throughout much of the United States today, as few defenders and defense programs challenge their caseloads despite their being wholly unreasonable.

Phyllis Mann talked about federal support of defense services among the fifty states and referred to the national symposium on indigent defense held in February 2010 in Washington, D.C.⁹ It is gratifying that U.S. Attorney General Eric Holder has spoken out strongly about the need to improve indigent defense services throughout the country,¹⁰ and I am convinced of his personal commitment to the cause. But the overriding question is whether or not federal funding of indigent defense will ever be provided. I remain pessimistic that, unless the states are aided by the federal government, the states will ever sufficiently support the funding of public defense, especially in view of their financial problems and competing obligations. Clearly, they have not done so thus far.

Think about how we got to where we are today. Obviously, the United States Supreme Court did not pass legislation establishing the right to counsel and provide funding for its implementation. The Court does not pass laws; it renders legal opinions. After *Gideon v. Wainwright*¹¹ was decided in 1963,

states/32000.html (last visited July 9, 2010). Las Vegas is in Clark County and Reno is in Washoe County. *See id.*; City of Reno, <http://www.reno.gov/Index.aspx?page=252> (last visited July 9, 2010).

6. *In re* the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Nev. Oct. 16, 2008), available at <http://www.nvbar.org/PDF/adkt411.pdf>. This order included the following sentence: "It is hereby ordered that the performance standards contained in Exhibit A to this order are to be implemented effective April 1, 2009." *Id.*

7. *Id.*

8. For a discussion of caseload problems in Clark and Washoe Counties, see THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC'Y AT GEORGE MASON UNIV., ASSESSMENT OF THE WASHOE AND CLARK COUNTY, NEVADA PUBLIC DEFENDER OFFICES (2009).

9. Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715 (2010).

10. *See, e.g.*, Attorney General Eric Holder, Remarks on Indigent Defense Reform at the Brennan Legacy Awards Dinner (Nov. 16, 2009), available at http://www.brennancenter.org/content/resource/attorney_general_eric_holder_on_indigent_defense_reform/.

11. 372 U.S. 335 (1963).

the Court soon extended the right to counsel.¹² But *Gideon* and the Court's other decisions were unfunded mandates imposed on state and local jurisdictions. While the cost of providing adequate defense services is substantially less than the expense of prosecution, police, and corrections, state legislatures have lacked the necessary political will to provide sufficient funding for the defense function. This is no doubt because indigent defense lacks the popular support enjoyed by law enforcement-related expenses. Our country's way of handling the right to counsel differs significantly from that of England and Scotland, where national legislation established the right to counsel with funding provided by the national government.¹³ In the United States, there has been very little *federal* support provided to the states to implement the nation's *federal* constitutional right to counsel.¹⁴

Adele Bernhard mentioned the 1973 caseload standards recommended by the National Advisory Commission on Criminal Justice Standards and Goals (NAC).¹⁵ Among the NAC's proposals was a recommendation that public defenders, on average, should not provide per annum representation in more than 150 felony cases, 400 misdemeanor cases, or 200 juvenile delinquency cases.¹⁶ However, the recommendations often are repeated without any mention of the commentary that accompanied them when they were proposed. The report of the NAC explained that there had been a NLADA committee meeting,¹⁷ and the committee suggested these may be appropriate numbers while acknowledging "the dangers of proposing any national guidelines."¹⁸ The NAC then proceeded to explain that it had "accepted" the recommendation of the committee report of NLADA.¹⁹ In other words, the committee conceded that it did no empirical work to come up with its numbers; it simply embraced recommendations of a NLADA committee without apparently even understanding how NLADA came up with its recommended numbers. Despite the fact that the NAC numbers are more than thirty-five

12. See, e.g., *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (right to counsel applies to misdemeanor cases resulting in actual imprisonment); *In re Gault*, 387 U.S. 1, 36-37 (1967) (right to counsel applies to juvenile delinquency proceedings).

13. Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 840 n.25, 861-71 (2004).

14. The American Bar Association has repeatedly called for federal support of indigent defense in the nation's state courts. See, e.g., AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, REPORT WITH RECOMMENDATION TO THE HOUSE OF DELEGATES (1979), available at <http://www.abanet.org/legalservices/downloads/sclaid/121.pdf>; AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 41 (2004) (Recommendation 2).

15. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS 276 (1973).

16. *Id.*

17. *Id.* at 277.

18. *Id.*

19. *Id.*

years old, seemingly the product of guesswork, and offered with significant caveats, they nevertheless frequently are referred to as “national caseload standards!” It is worth noting that the National District Attorneys Association concluded after several years of study that reliable national caseload guidelines for prosecutors could not be developed, due to the significant number of variables involved in prosecuting cases across the country.²⁰

Now, I would like to turn to the ABA ethics opinion dealing with excessive workloads in public defense.²¹ Soon after the opinion was published, I co-authored an article that discussed the way in which the ethics opinion was requested from the ABA ethics committee.²² During a program I moderated at the ABA Annual Meeting in Atlanta in 2004, Ross Shepard, then the director of defender services of NLADA, inquired why no one had ever asked the ABA Standing Committee on Ethics and Professional Responsibility to issue a formal opinion dealing with the subject. In response, I told Shepard that it sounded to me like a very good idea. After the annual meeting, Shepard wrote a letter on behalf of NLADA to the ABA ethics committee and urged that such an opinion be issued. The committee replied that it had published several opinions dealing with civil legal aid programs and had advised legal aid lawyers not to accept additional cases if they had too many. Accordingly, the committee declined to write another opinion on what they believed to be essentially the same subject.

Of course, the committee was wrong. Its prior opinions did not cover the ethics issues presented by excessive workloads in public defense. As a result, on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants (and with the approval of Ross Shepard on behalf of NLADA), I wrote a letter to the ABA ethics committee, politely suggesting that it did not seemingly understand the difference between civil legal aid and public defense. I explained that in most jurisdictions, unlike legal aid, lawyers are appointed by judges to provide defense services and that usually these lawyers cannot easily reject cases because judges typically insist that either the lawyers or their defense agency accept them. Accordingly, defenders and/or their defense agencies normally have to ask judges that they either not be appointed or that they be permitted to withdraw. My letter contributed to the ethics committee’s reconsideration of whether it should write an opinion about excessive workloads in public defense.

However, before the ABA ethics committee decided to write its ethics opinion, an unusual hearing was arranged in which the committee met with me and others to discuss the wisdom of addressing the excessive workload

20. AM. PROSECUTORS RESEARCH INST., HOW MANY CASES SHOULD A PROSECUTOR HANDLE? RESULTS OF THE NATIONAL WORKLOAD ASSESSMENT PROJECT 27 (2002).

21. ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006).

22. Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 10, 11 & nn.10-12.

issue in a formal ethics opinion.²³ I refer to this meeting as “unusual” because the committee does not normally meet with interested persons before deciding whether to write an opinion. Because I had taught professional responsibility for many years, there never was any doubt in my mind about what the opinion would say about the duty of lawyers when confronted with too many cases: in that situation, first and foremost, lawyers must try to stop the assignment of additional cases. Also, depending on the circumstances, lawyers may also have to seek to withdraw because they cannot engage in representation if they will violate a rule of professional conduct in doing so.²⁴ In addition, when lawyers have too many cases, they cannot always be competent and diligent in representing all of their clients as required by professional conduct rules.²⁵

During the ABA ethics committee hearing, counsel for the committee expressed reservations about issuing an opinion about excessive workloads and suggested to me that what I really wanted was an ABA ethics opinion that lawyers could use in order to try to persuade states to provide additional funding for indigent defense. While I conceded that I would be glad if that happened, I said that this was not my overriding concern. Instead, I explained that my primary concern was that, although while in law school, students learn how to represent people the right way, all too often when students graduate and embark on careers in public defense they are forced to cut all kinds of corners in representing their clients. As such, they are often forced to do things very differently from what they learned in law school, especially if they participated in strong clinical programs in which caseloads were controlled. Too often lawyers in public defense programs, through no fault of their own, are coerced into providing a form of second-rate legal representation due to their intolerable workloads and lack of adequate support services.

In August 2009, the ABA House of Delegates approved eight guidelines dealing with excessive workloads in public defense, which were proposed by the ABA Standing Committee on Legal Aid and Indigent Defendants and endorsed by other ABA entities.²⁶ The guidelines build upon the rules of professional conduct as well as the ABA’s ethics opinion. After the ethics opinion was issued, I realized that certain matters were not covered either in the ethics opinion or professional conduct rules. For example, neither spells out the symptoms of inadequate defense representation when caseloads are totally unreasonable. Guideline 1, therefore, lists some of the most significant performance obligations in providing defense services and suggests that if they are not being discharged, it is probably because the lawyers have ex-

23. *Id.* at 11 & n.11.

24. ABA MODEL RULES, *supra* note 4, at R. 1.16(a).

25. *Id.* at R. 1.1, 1.3.

26. AM. BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), *available at* http://www.abanet.org/legalservices/sc-laid/defender/downloads/eight_guidelines_of_public_defense.pdf (last visited July 13, 2010).

cessive workloads.²⁷ Another guideline addresses the issue of training and urges that the training include what lawyers should do when they believe they have too many cases.²⁸

The leadership of Missouri's statewide defense program and the Missouri Bar Association has sought to deal with the excessive caseload problem in this state. Recently, the Supreme Court of Missouri rendered an important decision dealing with excessive defense caseloads.²⁹ However, the caseload crisis in Missouri has persisted for a long time, and the Missouri Public Defender Commission has referenced the problem in their annual reports. In what seems to me a remarkable confession, in its 2009 report, the commission writes that "the struggle [has] turned into a full-blown caseload crisis with lawyers forced to triage their services."³⁰ This finding was based in part upon a 2005 study of the Missouri program, which noted that "the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases every day."³¹

The recent decision of the Supreme Court of Missouri suggests that the court itself believes that probably many public defenders in the state are violating their ethical duties due to their high caseloads.³² Yet, in the long history of caseload problems in Missouri's public defense system, has a lawyer ever asked a trial court to stop appointing the lawyer to new cases or moved to withdraw from pending cases as required by rules of professional conduct? The answer is "no!"³³

27. *Id.* at Guideline 1.

28. "The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable." *Id.* at Guideline 3.

29. *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870 (2009) (en banc).

30. STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2009 ANNUAL REPORT 3 (2009), available at <http://www.publicdefender.mo.gov/about/FY2009AnnualReport.pdf>.

31. THE SPANGENBERG GROUP, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 2 (2005).

32. The court found:

The excessive number of cases to which the public defender's offices are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned. The cases presented here to this Court show both the constitutional and ethical dilemmas currently facing the Office of the State Public Defender.

Pratte, 298 S.W.3d at 880.

33. My question was rhetorical. While I provided my own answer based on what I knew of the situation in Missouri, a member of the audience, presumably either a current or former public defender associated with the Missouri program, shouted "no." This reply from an audience member was not challenged either at the time it

It has been almost forty-eight years since *Gideon* was decided.³⁴ Although the financing of defense services has never been adequate in most of the country, state and local jurisdictions currently are facing enormous budgetary problems due to the recession, and this has led to cutbacks in funding for defense services.³⁵ However, the duty of defense lawyers to comply with professional conduct rules does not take a vacation when funding is in short supply, and, thus, defense programs and their lawyers have little choice but to challenge caseloads that interfere with their obligation to provide ethical representation of their clients.

I am concerned, moreover, that the Supreme Court of Missouri's recent decision may not be an adequate answer to the caseload problems faced by the state's defender program. First, the court holds that defense attorneys must have three months with too many cases before doing anything about the problem.³⁶ In addition, the caseload standards in Missouri are much like the NAC numbers, except for certain sex offense cases for which some allowance is made since these cases require more time than most other felonies.³⁷ However, for reasons that I do not have sufficient time to explain, I think the NAC numbers are normally too high in the first place. And lawyers have to have three months of a caseload deemed to be excessive before anything can be done about it. But what about the clients during the three-months who are part of each lawyer's very high caseload? Apparently they are just victims of a necessary buildup of cases that must be endured during the three-month period. Also, the court's decision does not discuss withdrawing from cases, although this is clearly contemplated by professional conduct rules.³⁸

was uttered or later during the day when an official of the Missouri Public Defender agency addressed the symposium's attendees. However, just as this Article was being prepared for publication, I was pleased to read that several Missouri public defender offices have declared that they are unavailable to accept new appointments due to the caseloads of their staff lawyers. See, e.g., Andrew Denney, *Feeling the Strain*, ST. JOSEPH NEWS PRESS, Aug. 2, 2010, available at <http://www.newspressnow.com/news/2010/aug/02/local-public-defenders-struggle-under-caseloads/>; Brian Hamburg, Op-Ed., *Silver Lining Possible for Overburdened Defenders*, SPRINGFIELD NEWS-LEADER, Aug. 5, 2010, available at <http://www.news-leader.com/article/20100805/OPINIONS02/8050332/Hamburg-Silver-lining-possible-for-overburdened-defenders>.

34. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

35. See, e.g., JUSTICE DENIED, *supra* note 2, at 2 ("In the country's current fiscal crisis, indigent defense funding may be further curtailed, and the risk of convicting innocent persons will be greater than ever. Although troubles in indigent defense have long existed, the call for reform has never been more urgent.").

36. *Pratte*, 298 S.W.3d at 887 ("The proper remedy for the public defender - under the caseload management portions of the rule - is to certify the office as having 'limited availability' once its maximum caseload is exceeded for three consecutive months . . .").

37. *Id.* at 878 & nn.17-18.

38. See *supra* note 24 and accompanying text. If withdrawal is sought, it should be done at the earliest possible time after representation of the client has begun. The

In reflecting on the duty of defense lawyers confronted with excessive caseloads, I think a somewhat different course of action should be seriously considered, although I am unaware of any defender program that has done what I am about to suggest. What I have in mind is that a defense agency overwhelmed with cases could orchestrate an office-wide effort to protest the agency's caseload. I emphasize that this will have to be done by the heads of defense programs, since public defenders acting on their own are extremely unlikely to do this. I suggest that some and, if appropriate, all of an agency's public defenders file relatively brief motions seeking to halt all new case assignments and, if necessary, seek to withdraw from all cases in which they believe they will be unable to provide competent and diligent defense services. This is exactly what the rules of professional conduct require and precisely what the ABA's ethics opinion contemplates. Such routine motions, even if summarily rejected in the trial court, may protect clients in the event of convictions; also, they will likely protect defense lawyers charged with violating disciplinary rules arising out of representing too many clients.

Such conduct by defense lawyers also helps to avoid arguments about whether reasonably competent assistance of counsel was provided under the Sixth Amendment in compliance with *Strickland v. Washington*.³⁹ Part of the *Strickland* test for ineffective assistance of counsel requires a showing of prejudice, which is a test applied *after* a defendant has been convicted.⁴⁰ Rules of professional conduct and the ABA's ethics opinion are positive solutions to excessive workloads because they bypass the *Strickland* test, which often has been criticized as unworkable.⁴¹

Since the ABA's ethics decision was rendered in 2006, there have been relatively few formal court challenges respecting excessive caseloads. Although it is possible that some defenders have achieved caseload reductions through informal agreements with courts or others responsible for assigning cases, I doubt this has happened with much frequency, considering we know that excessive caseloads are a pervasive national problem. The four most publicized cases in which motions either to stop appointments and/or to permit lawyers to withdraw were filed in New Orleans, Louisiana;⁴² Kingman,

longer the delay in seeking to withdraw from representation, the more likely the client will be prejudiced due to the passage of time.

39. 466 U.S. 668 (1984).

40. *Id.* at 687.

41. See JUSTICE DENIED, *supra* note 2, at 40-41 ("Since *Strickland* was decided, commentators have been virtually unanimous in their criticisms of the opinion. Some have echoed views of Justice Marshall, whereas others have accused the Supreme Court of being insensitive to the very serious problem of adequate representation. Most of all, the decision has been criticized due to the exceedingly difficult burden of proof placed on defendants in challenging counsel's representation and because it has led appellate courts to sustain convictions in truly astonishing situations.").

42. A favorable result in the New Orleans litigation was achieved in the trial court. See *Louisiana v. Edwards*, No. 463-200 (Crim. Dist. Ct. La. Mar. 30, 2007);

Arizona;⁴³ Knoxville, Tennessee;⁴⁴ and Dade County (Miami), Florida.⁴⁵ I am familiar with these cases, since, in each, I served as an expert witness on behalf of the defense and opined that the workloads of the defenders in the various programs prevented them from furnishing representation consistent with their duties under professional conduct rules and defense performance standards. However, none of the motions in these cases was of the kind that I suggested earlier, in which numerous lawyers in the defender programs filed motions seeking relief. Instead, the motions in each jurisdiction were test cases which were extensively prepared before being filed, and, in three of the jurisdictions, the defense programs were represented by pro bono lawyers experienced in civil litigation. The Knoxville⁴⁶ and Dade County⁴⁷ cases are still in the appellate courts, although they are almost two years old now. While a favorable result was achieved in the Arizona case,⁴⁸ the effort in New Orleans did not result in any real reform.⁴⁹

I have enormous empathy for those who manage public defender programs and for the defense lawyers who are on the front lines, furnishing defense services daily under exceedingly difficult circumstances. In order to improve the current situation, I am convinced that more vigorous efforts need to be made by both lawyers and defense programs to deal with the excessive workload problem. Lawyers must do a better job to protect their clients as well as themselves by filing appropriate motions protesting their caseloads. If they routinely let courts and other officials know of their caseload pressures, the media will learn of the situation and will write about the ethical problems constantly faced by defenders due to their caseloads. This can be exceedingly useful because the public, as well as judges and legislators, needs to appre-

however in *Louisiana v. Edwards*, the decision was reversed and remanded. No. 2007-K-0639 (La. Ct. App. Aug. 16, 2007).

43. See *Arizona v. Lopez*, No. 2007-1544 (Mohave County Super. Ct., filed Dec. 17, 2007).

44. The pleadings in the Knoxville, Tennessee, case are available on the website of the Knoxville Community Law Office. See Caseload Petition: Knox County Public Defender Community Law Office, <http://www.pdknox.org/800main.htm> (last visited July 13, 2010).

45. See discussion in JUSTICE DENIED, *supra* note 2, at 124-25.

46. See pleadings referenced in *supra* note 44.

47. The Florida Supreme Court has agreed to hear the appeal in the Dade County case. See *Pub. Defender, Eleventh Judicial Circuit v. State*, No. SC09-1181 (Fla., May 19, 2010).

48. See *Arizona v. Lopez*, No. 2007-1544 (Mohave County Super. Ct., filed Dec. 17, 2007).

49. See JUSTICE DENIED, *supra* note 2, at 123 (“Ultimately, the litigation did not achieve its desired result. While the trial court appointed some private attorneys to handle some of the defender’s case overload, the public defender at the center of the litigation and other public defenders assigned to other criminal courtrooms in Orleans Parish continue to carry extremely high caseloads.”).

ciate the workload problems and ethical difficulties of defenders. The media's focus can help to create a necessary climate for reform.⁵⁰

Ultimately, the issue in criminal and juvenile courts is about fairness to the accused and the accuracy of our criminal and juvenile justice systems. Nearly fifty years after the *Gideon* decision, it is time that we do much better than we are doing now in implementing the right to counsel. Genuine adherence to professional responsibility rules is one of the ways in which the delivery of defense services can be improved.

50. See JUSTICE DENIED, *supra* note 2, at 209 ("Since media attention about the shortcomings of indigent defense can play a vital role in educating the public and in promoting public support for reform, it should be encouraged and facilitated. In recent years, many compelling news articles have highlighted deficiencies in the justice system, such as those dealing with defendants wrongfully convicted, excessive case-loads of public defenders, and the routine failure of jurisdictions to implement effectively the right to counsel. As noted earlier in this report, in addition to educating the public, the media can help to pave the way for improvements.").