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# STUDENT REPRESENTATION OF INDIGENT DEFENDANTS AND THE SIXTH AMENDMENT: ON A COLLISION COURSE?

ROBERT M. HARDAWAY\*

## I. INTRODUCTION

THE PAST TWENTY YEARS HAVE SEEN THE RAPID EXPANSION of clinical legal education programs around the country.<sup>1</sup> Roughly paralleling such expansion has been the broadening of the right to counsel under the

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<sup>1</sup> See COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY (CLEPR), SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION 1978-1979 (1979) [hereinafter cited as CLEPR, SURVEY]. CLEPR's 1978-79 statistics reveal a dramatic increase in the number of clinical programs over the past decade:

Although there has been an increase of only 34% in terms of the number of schools reporting clinical participation that figure now represents 80% of the ABA approved law schools in the country (the true figure is probably closer to 90%) which engage in some form of clinical training. But perhaps the more interesting, and important figure is the one which shows an increase of 185% in the number of clinical programs being offered in law schools over the past ten years. That statistic is most significant in terms of what it says about the depth of commitment on the part of law schools to clinical legal education. Simply put, it means that a number of law schools have moved beyond the stage when they offered one clinical course in order to soothe collective faculty consciences and quiet consumer demand in an effort to adequately meet the skills training needs of law students. The depth of this commitment is further evidenced by the exponential growth in the fields of law that are now being covered in clinical programs. It was important for clinical legal education to break the "mold" of indigent and prisoner representation and move to other areas of the law. With a realization that clinical training lends itself to a host of substantive legal areas will also come an effort to further mainstream clinical legal education into the law school curriculum.

*Id.* at xxi.

For a comprehensive history of clinical education in the United States, see Grossman, *Clinical Legal Education: History and Diagnosis*, 26 J. LEGAL EDUC. 162 (1974) [hereinafter cited as Grossman]. See also Brickman, *CLEPR and Clinical Education: A Review and Analysis*, in CLEPR, CLINICAL EDUCATION FOR THE LAW STUDENT 56-93 (1973). For descriptions of various established clinical programs see generally UNIVERSITY OF CHICAGO LAW SCHOOL, CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE (1970). For a discussion of the law schools which have established clinical programs, see Appendix, *Selected Summaries of Law School Clinical Programs*, 29 CLEV. ST. L. REV. 735 (1980).

sixth amendment of the United States Constitution as mandated by *Gideon v. Wainwright*<sup>2</sup> and *Argersinger v. Hamlin*.<sup>3</sup> In many ways the broadening of the right to counsel has accelerated the development of new clinical programs, and reinforced the status and position of existing ones.<sup>4</sup>

At least three members of the United States Supreme Court have expressly recognized the potential of student representation of indigent defendants in criminal actions,<sup>5</sup> although stopping short of actually legitimizing the use of student representation in situations requiring

<sup>2</sup> 372 U.S. 335 (1963) (right to counsel guaranteed in felony proceedings).

<sup>3</sup> 407 U.S. 25 (1972) (right to counsel guaranteed in any proceeding where incarceration possible, including misdemeanors). For an excellent history of the sixth amendment, see S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, *RIGHT TO COUNSEL IN CRIMINAL CASES* (1976) [hereinafter cited as KRANTZ]. For an often cited history of the sixth amendment prior to 1932, see Mr. Justice Sutherland's excellent discussion in *Powell v. Alabama*, 287 U.S. 45 (1932). For a modern history see Mr. Justice Douglas' opinion in *Argersinger v. Hamlin*, 407 U.S. 25 (1972) and *Scott v. Illinois*, 440 U.S. 367 (1979). See also Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 976 (1926); Kaye, *Petty Offenders Have No Peers*, 26 U. CHI. L. REV. 245 (1959); Note, *People v. Perez: Misapplication of the Right to Counsel*, 6 PEPPERDINE L. REV. 545 (1979).

<sup>4</sup> See CLEPR SURVEY, *supra* note 1. See generally J. KLEIN, S. LELEIKO & J. MAVITY, *BAR ADMISSION RULES AND STUDENT PRACTICE RULES* (1978) [hereinafter cited as KLEIN]; KRANTZ, *supra* note 3, at 274; Clark, *Problems of Change*, 1968 UTAH L. REV. 347; Cohen, *The University of Texas Clinical Justice Project: An Example of Involvement and Clinical Training*, 41 U. COLO. L. REV. 438 (1969); Pincus, *The Clinical Component in University Professional Education*, 32 OHIO ST. L.J. 283 (1971); Sacks, *Remarks on Involvement and Clinical Training*, 41 U. COLO. L. REV. 452 (1969); Vetri, *Educating the Lawyer: Clinical Experience as an Integral Part of the Legal Education*, 50 ORE. L. REV. 57 (1970); Documentary Supplement, *Student Practice as a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 363 (1973); CLEPR, *Argersinger v. Hamlin: The Challenge to the Law Schools*, CLEPR NEWSLETTER No. 4, at 1 (1972).

<sup>5</sup> In his concurring opinion in *Argersinger v. Hamlin*, Justice Brennan, with whom Justice Douglas and Justice Stewart joined, stated: "I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision." 407 U.S. at 41. At least one court of appeals judge has voiced similar sentiments, in the area of prisoner counseling. In *United States v. Simpson*, Judge Leventhal stated: "Use of law students to counsel and advise with prisoners, commended by the ABA report, may well provide the key toward serving a need without excessive drain on community resources." *United States v. Simpson*, 436 F.2d 162, 169 (D.C. Cir. 1970). *Contra* MILLER, *CLINICAL EDUCATION: WORKING PAPERS*: "We are also skeptical about the use of legal clinics as a panacea for the provision of legal services to substantial strata and interests in our society which presently lack access to representation by counsel. The responsibility for making real the guarantees of *Gideon v. Wainwright* . . . and *Argersinger v. Hamlin* . . . must remain the responsibility of the legal profession itself." *Id.* at 101.

effective assistance of counsel under the sixth amendment. The availability of willing and able student defenders in established clinical programs has the potential to increase the manpower pool of "Gideon's Army,"<sup>6</sup> thereby removing many of the barriers to the expansion of the right to counsel.<sup>7</sup>

Although the underlying constitutional parameters of the sixth amendment seem to be established, much remains to be clarified in the area of student practice.<sup>8</sup> The expansion of clinical education and the promulgation of student practice rules continues unabated<sup>9</sup> although at

<sup>6</sup> See Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U. L. REV. 445 [hereinafter cited as Monaghan] (the question of whether students can and should be part of the army committed to carrying out the mandate of *Gideon* is discussed). See also Brown, *The Trumpet Sounds: Gideon—A First Call to the Law School*, 43 TEX. L. REV. 312 (1964).

<sup>7</sup> In his concurring opinion in *Argersinger*, Justice Powell observed:

[I]t is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel. The Solicitor General, who suggested on behalf of the United States the rule the Court today adopts, recognized that the consequences could be far reaching. . . .

Recognizing implicitly that, in many sections of the country, there simply will not be enough lawyers available to meet this demand either in the short or long term, the Solicitor General speculated whether "clergymen, social workers, probation officers, and other persons of that type" could be used "as counsel in certain types of cases involving relatively small sentences." Quite apart from the practical and political problem of amending the law of each of the 50 States which require a license to practice law, it is difficult to square this suggestion with the meaning of the term "assistance of counsel" long recognized in our law.

The majority's treatment of the consequences of the new rule which so concerned the Solicitor General is not reassuring. In a footnote, it said that there are presently 355,200 attorneys and that the number will increase rapidly, doubling by 1985. This is asserted to be sufficient to provide the number of full-time counsel, estimated by one source at between 1,575 and 2,300, to represent all indigent misdemeanants, excluding traffic offenders. It is totally unrealistic to imply that 355,200 lawyers are potentially available. . . .

There is an additional problem. The ability of various States and localities to furnish counsel varies widely. Even if there were adequate resources on a national basis, the uneven distribution of these resources—of lawyers, of facilities, and available funding—presents the most acute problem.

407 U.S. at 55-59 (Powell, J., concurring)

<sup>8</sup> See notes 163-220 *infra* and accompanying text.

<sup>9</sup> As of 1978, according to Klein, *supra* note 4, compilation at 960-69, forty-seven states and the District of Columbia permit some form of student practice:

Alabama, Rule For Legal Internship by Law Students in Alabama; Alaska, Alaska Bar Rule IV-44; Arizona, Supreme Court Rule 28(e); Arkansas, Rule XII of the Rules Regulating the Practice of Law; California, State Bar Rules; Colorado, COLO. REV. STAT. § 12-1-19 (1963), Rule of

a slower pace than in the late sixties and early seventies. Yet, the constitutional ramifications of student representation have been largely unexplored.<sup>10</sup> The few cases that have explored the issue have raised more questions than they have answered.<sup>11</sup>

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Civil Proc. 226; Connecticut, Rules for the Superior Court § 42A; Delaware, Supreme Court Rule 55, Board of Bar Examiners BR-55.2, 55.3; District of Columbia, Court of Appeals Rule 46, III, Superior Court Crim. Civ. Rule 44-1(f); Florida, Article XVIII of the Integration Rule of the Florida Bar; Georgia, GA. CODE ANN. §§ 9-401.1, 9-401.2 (1973); Hawaii, Supreme Court Rule 25; Idaho, Supreme Court and State Bar Rule 123; Illinois, Supreme Court Rule 711; Indiana, Supreme Court Admission and Discipline Rule 2.1; Iowa, Supreme Court Rule 120; Kansas, Supreme Court Rule 215; Kentucky, Court of Appeals Rule 2.540; Louisiana, Supreme Court Rule XX; Maine, Supreme Judicial Court Civ. Pro. Rule 90, Crim Pro. Rule 62, M.R.S.A. Title 4 § 807; Maryland Court of Appeals Rule 18; Massachusetts, Supreme Judicial Court Rule 3:11; Michigan, Administrative Rule GCR 921; Minnesota, Supreme Court Rules on Certified Law Students, Rule 1; Mississippi, MISS. CODE, Art. 5; Missouri, Supreme Court Rule 13; Montana, Montana Student Practice Rule; Nebraska, NEB. REV. STAT. § 7-101.01, Supreme Court Rule, Legal Practice by Approved Senior Law Students; Nevada, No Rule; New Hampshire, Supreme Court Rule 23; New Jersey, New Jersey Rules of Court 1:21-3(c); New Mexico, Supreme Court Rules of Civil Procedure #84; New York, N.Y. JUDIC. LAW §§ 478, 484; North Carolina, Supreme Court Rules Governing Practical Training of Law Students (Appendix IX-A); North Dakota, Supreme Court Rule Limited Practice of Law by Law Students; Ohio, Supreme Court Rule II; Oklahoma, Rules of the Supreme Court on Legal Internship; Oregon, Supreme Court Rules for Admission of Attorneys in Oregon: Law Student Appearances 8.05-8.35; Pennsylvania, Supreme Court Rule 11; Puerto Rico, Rules and Regulations of the Supreme Court, 11(e); Rhode Island, No Rule; South Carolina, Supreme Court Rule 12; South Dakota, S.D. COMPILED LAWS ANN. § 16-18-2.1 et seq.; Tennessee, Supreme Court Rule 37 § 19; Texas, TEX. REV. CIV. STAT. ANN. Art. 320q-1 (Supp. 1975); Rules and Regulations Governing the Participation of Qualified Law Students . . . in the Trial of Cases; Utah, Supreme Court Law Student Assistance Rule; Vermont, No Rule; Virginia, Supreme Court Third Year Student Practice Rule, Paragraph 15 of § IV of the Rules for the Integration of the Bar; Washington, Supreme Court Rule 9; West Virginia, Supreme Court of Appeals Rule 6.000; Wisconsin, Supreme Court Rules for the Practical Training of Law Students; Wyoming, Supreme Court Rule 18, Right to Practice Law.

*Id.* See also Appendix, *Summary of Student Practice Rules*, 29 CLEV. ST. L. REV. 817 (1980).

<sup>10</sup> See Professor Monaghan's discussion in which he anticipated potential sixth amendment problems in the area of student representation, but concluded that the Roxbury Student Defender Program as it existed in 1965 posed "no threat to the policies which lie at the core of the requirement of 'assistance of counsel.'" Monaghan, *supra* note 6, at 457. See also KRANTZ, *supra* note 3 at 381-93; Note, *People v. Perez: Misapplication of the Right to Counsel*, 6 PEPPERDINE L. REV. 545 (1979).

<sup>11</sup> See, e.g., *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 34 (1978), *rev'd*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979); *State v. Daniels*, 346 So.2d 672 (La. 1977); *People v. Masonis*, 50 Mich. App. 615, 228 N.W.2d 489 (1975).

A resolution of the constitutional questions surrounding student representation would be of benefit to clinical programs around the country in managing resources and formulating programs, as well as to courts and agencies responsible for carrying out the mandates of *Gideon* and *Argersinger*. More importantly, a resolution of the constitutional problems of student representation is needed to prevent an ultimate collision between clinical legal education as it is practiced today, and the *Gideon* and *Argersinger* mandates.<sup>12</sup>

This article will review the parallel patterns of development of clinical education and the sixth amendment, highlighting areas in which the practices of the former either conflict, or contain the potential for conflict with the latter. An analysis will be made of the present legal status of law student representation of indigent criminal defendants, with reference primarily to constitutional and sixth amendment considerations, but also to such related matters as the confidentiality of student-client communications, law student professional responsibility,

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<sup>12</sup> A minor collision of this very sort has already occurred in California. In *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 34 (1978), *rev'd*, 24 Cal. 2d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979), a California appellate court agreed with the assertion of the defendant, convicted of burglary, that his representation by a certified third-year law student denied him the right to effective assistance of counsel, even though the student was under the supervision of a public defender. The law student had conducted Perez's entire defense, including direct and cross-examination, objections, motions, and closing arguments to the jury. In addition, the court found that the student's actions constituted the unauthorized practice of law.

The appellate court's decision caused considerable consternation, confusion and glum predictions of the demise of clinical education. See, e.g., Note, *People v. Perez: Misapplication of the Right to Counsel*, 6 PEPPERDINE L. REV. 545 (1979):

*People v. Perez* represents the strongest attack against the use of law students in the judicial process since the inception of Clinical Law in 1957. If this decision is given its fullest interpretation, it will denote California law students to passive onlookers in their respective clinical law programs. In its most diluted form, it will effectively prohibit any law student from participation in criminal defense.

*Id.* at 546.

On appeal to the California Supreme Court, the defendant's assent to law student representation was stressed, as was the valuable service provided to the community by the student internship program. The California Supreme Court, with one judge dissenting, reversed the intermediate appellate decision, *People v. Perez* 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979), and reaffirmed the viability of the California program.

Ironically, when the California Supreme Court reversed the court of appeals decision, and upheld the constitutionality of student representation, a student critic called the decision a "step backward." Note, *People v. Perez: Constitutional Implication of Law Student Representation of Indigent Criminal Defendants*, 13 J. MAR. L. REV. 461, 484 (1980). This student critic viewed student representation as permitting a defendant to be "used as a test case in which the student is allowed to make his first mistake to the detriment of those least likely to protect the poor." *Id.* at 482.

and the applicability to students of state bar disciplinary rules. Finally, guidelines will be proposed regarding the proper scope of student practice and methods by which student representation of indigent defendants can be brought into compliance with the sixth amendment.

## II. CLINICAL LEGAL EDUCATION

### A. *Legal Education (1870-1980)*

A history of clinical education cannot be divorced from the history and the development of legal education in its broader context. In 1870, Dean Langdell of Harvard Law School initiated the case method of instruction to replace a legal educational system in which law schools served more as adjuncts to apprenticeship programs than as self-contained and independent institutions of learning.<sup>13</sup> The changes in teaching methodology were profound.<sup>14</sup> No longer were students instructed in the law from ponderous treatises as a supplement to actual apprenticeship training.<sup>15</sup> Rather, students "gleaned" the law by reading, analyzing, and dissecting selected appellate opinions, and engaging in so-called socratic dialogue.

Although parallel apprentice programs continued to function,<sup>16</sup> the expansion of legal education and the trend toward more uniform educational standards relegated apprenticeship to the back alleys of legal education. To the Langdellians, the bumbling local court hall practitioners would be no match for these titans of the case method system, trained in the great universities, renowned for their scholarship and steel-trap intellects and honed on the exercise of superior socratic skills.<sup>17</sup>

The demise of the apprenticeship system, however, left a void in the minds of some reformers.<sup>18</sup> In 1933, Jerome Frank attacked the case method, charging that "the spirit of Langdell has resulted in sterilizing or numbing the teaching value of even the most experienced men."<sup>19</sup>

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<sup>13</sup> See Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 908 (1933) [hereinafter cited as Frank, *Clinical Lawyer*].

<sup>14</sup> See Grossman, *supra* note 1, at 162-66.

<sup>15</sup> See generally Grossman, *supra* note 1, at 163-65.

<sup>16</sup> See generally P. Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?*, in CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 54, 57 (Kitch ed. 1970).

<sup>17</sup> See generally Frank, *Clinical Lawyer*, *supra* note 13, at 908-09.

<sup>18</sup> See Frank, *What Constitutes a Good Legal Education?*, 19 A.B.A.J. 723 (1934) (reprinted address before ABA Section on Legal Education at Grand Rapids, Mich., Aug. 29, 1933) [hereinafter cited as Frank, *Legal Education*]; Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935); Llewellyn, *The Place of Skills in Legal Education*, 45 COLUM. L. REV. 345 (1945).

<sup>19</sup> Frank, *Clinical Lawyer*, *supra* note 13, at 915 n.8. Frank made no effort to

Frank proposed "a complete abandonment of Langdell's central aim and a reversion to the apprentice system but on a more sophisticated level."<sup>20</sup> According to Frank, attempting to teach a law student the law by compelling him to read appellate decisions was like learning to play golf "by having the teacher talk about golf to the prospective player and having the latter read a book relating to the subject."<sup>21</sup>

Frank's view—that law schools should "once more get in intimate contact with what clients need and with what courts and lawyers actually do"<sup>22</sup>—has been articulated by many latter-day critics. Chief Justice Warren Burger stated in 1969 that "[t]he shortcoming in today's law graduate lies not in any deficient knowledge of law but that he has little, if any, training in dealing with facts or people—the stuff of which cases are really made."<sup>23</sup>

When Langdellians defended that lack of practical legal training in the law school on the ground that such training was available upon employment by a firm, one reformer responded:

Most law offices do not furnish a neophyte with beginner's instructions; they don't send him to court with a supervisor, then post-mortem his performance, then send him again if he did badly. . . . Lawyers who hang up their own shingle are condemned to stagger their way through whatever business comes their way—and suffer the disasters of their untutored mistakes.<sup>24</sup>

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hide his feelings about Professor Langdell's qualification as a legal educator:

When Langdell was himself a law student he was almost constantly in the law library. His fellow students said of him that he slept on the library table. At that time he served for several years as an assistant librarian. One of his friends found him one day in an alcove of the library absorbed in a black-letter folio, one of the year books. "As he drew near," we are told, "Langdell looked up and said, in a tone of mingled-exhilaration and regret, and with an emphatic gesture, 'Oh, if only I could have lived in the time of the Plantaganets!'"

He practiced law in New York City for sixteen years. But he seldom tried a case. He spent most of his time in the library of the New York Law Institute. He led a peculiarly secluded life. His biographer says of him: "In the almost inaccessible retirement of his office, and in the library of the Law Institute, he did the greater part of his work. He went little into company." His clients were mostly other lawyers for whom, after much lucubration, he wrote briefs or prepared pleadings.

*Id.* at 907-08.

<sup>20</sup> Frank, *Legal Education*, *supra* note 18, at 723.

<sup>21</sup> *Id.* at 724.

<sup>22</sup> Frank, *Clinical Lawyer*, *supra* note 13, at 913.

<sup>23</sup> W. Burger, *The Future of Legal Education*, in A.B.A., SELECTED READINGS IN CLINICAL LEGAL EDUCATION 49, 55 (1973).

<sup>24</sup> Conrad, *Letter From the Law Clinic*, 26 J. LEGAL EDUC. 194, 197 (1974).



Defenders of the Langdell case method staunchly opposed practical training as a threat to academic responsibility:

Most importantly, the "how to of thinking" rather than the "how to of doing" must be the principal concern of legal education. Case study, problems analysis and exposition, a search for basic values and abstract principles of law, are clearly more important and more within the practical competence of law schools than the knowledge of where to file what in order to perfect a lien.<sup>25</sup>

By the early 1950's, Frank's crusade for practical learning had been taken up by such critics as Arch Cantrall. He urged law schools to at least teach the basic and more specific skills of lawyering such as examining a title, drafting a will, or closing a real estate transaction.<sup>26</sup>

By the early 1960's, clinical education began to emerge in a form which enabled law schools to avoid having to totally accept or reject the Frank and Cantrell criticisms of legal education.<sup>27</sup>

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<sup>25</sup> Wote, *Modern Trends in Legal Education*, 64 COLUM. L. REV. 710, 721 (1964). Dean Charles Clark, Professor and Dean of Yale Law School 1919-1939, and later a Judge of the United States Court of Appeals for the Second Circuit, also urged resistance to the pressures for practical training. In a letter prepared at the request of the chairman of the Section of Legal Education and Admissions of the American Bar Association for a representation at the meeting of the section in Washington in September 1950, Dean Clark stated:

I regard the repetitive attempts to coerce law schools into offering so-called practical training as at best curiously naive, and in general at odds with sound concepts of legal education. . . . Nor does it seem likely that we in law can reproduce conditions of practice in our training department at all comparable to those of the great medical school with their attached hospitals. One cannot expect, for example, that the public will allow official trials, civil or criminal, to become adjuncts of school training.

Clark, *"Practical" Legal Training: An Illusion*, 3 J. LEGAL EDUC. 424, 425 (1951) (reprinted address).

<sup>26</sup> Cantrall, *Law Schools and the Layman: Is Legal Education Doing Its Job?*, 38 A.B.A.J. 907, 909 (1952).

<sup>27</sup> See Council on Legal Education for Professional Responsibility (CLEPR), *Student Practice: A Commentary*, in STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS 1-7 (2d ed. 1973) [hereinafter cited as CLEPR, COMPARISONS].

The attempt to find a "middle ground" for clinical education has caused some friction. CLEPR's 1979 report notes that reaction of some members of the Harvard Law Faculty to a *Harvard Law Record* special committee report:

[T]here was some expression of concern by some members of the Harvard Faculty that any attempt to recruit professors for clinical programs may shift the balance of the faculty from an academic to 'practical' mode—a reaction which may be questioned in view of what some have called the second-class status of clinical teachers because the law schools all too often do not grant tenure or its equivalent to clinical teachers.

E. Goe, *Survey of Clinical Education*, in CLEPR, SURVEY, *supra* note 1, at xviii.

B. *The Law School Clinic (1958-1980)*

In 1904, the University of Denver College of Law in Colorado established a legal clinic<sup>28</sup> pursuant to the nation's first and most liberal student practice rule.<sup>29</sup> Although the roots of modern, clinical

<sup>28</sup> The Denver University Law School Dispensary was established in the Fall Term of 1904. The 1906 University of Denver Yearbook (1906) states:

During the first seven months of the school year the dispensary has had, from worthy persons, ninety-eight applications, all of which have been handled successfully. Nearly one-third of the cases have gone to trial, resulting in a large majority of victories for the Dispensary. The total number of cases handled by the Dispensary for the year will reach one hundred and fifty. Only meritorious cases of poor persons who are unable to pay attorney's fees are taken. No fee is charged for services and only actual court costs are collected.

The student is given the case on the first application for aid and handles it from the outset. He learns how to meet a client, to draw from him the vital facts of a case and sift out what is essential from a mass of confused, chaotic facts. The Dispensary is conducted on systematic lines, so that the student learns the most approved methods, the careful and accurate way of handling professional business. He must also prepare his evidence for trial, secure witnesses of papers and pleadings, and the learning of how to get into court. In the larger cases briefs are prepared and often the student can cope with experienced lawyers.

Lastly comes the trial in which the student gains practical knowledge and practical experience at every step, matching his powers against trained lawyers, examining and cross-examining witnesses and getting rid of the nervousness that usually troubles the young lawyer.

It is indeed an invaluable training school of legal experience, and several of the large law schools of the United States and Canada have written regarding it.

The Dispensary is no longer an experiment: it is approved success, and during the coming year its work will be broadened and strengthened. It makes the Denver University Law School unique in its superiority over other law schools.

KYNEWISBOK (1906), *reprinted in* DEN. U. COL. OF L., ADVOCACY SKILLS BULLETIN 1 (1980).

<sup>29</sup> The present Colorado Statute, § 12-5-116 provides:

*Legal aid dispensaries—law student practice.* Students of any law school which has been continuously in existence for at least ten years prior to April 23, 1909, and which maintains a legal-aid dispensary where poor persons receive legal advice and services shall, when representing said dispensary and its clients and then only, be authorized to appear in court as if licensed to practice.

COLO. REV. STAT. § 12-5-116 (1963).

The Colorado Rule of Civil Procedure also provides:

Students of any accredited Colorado law school which maintains a legal aid dispensary where poor persons receive legal advice and services, shall, when representing said dispensary and its clients, and then only, be authorized to appear in district, county, and municipal courts of the state as if licensed to practice; provided such representation shall be with the approval of the lawyers in charge of the said legal aid clinic, and the judge of the court in which the student appears.

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legal education can be traced to this program, the history of clinical legal education really began in 1957 when additional states began promulgating student practice rules.<sup>30</sup> Because the progress of establishing clinics was slow, many law students made use of existing rules to volunteer their services through extracurricular activities under the aegis of legal aid and Office of Economic Opportunity programs.<sup>31</sup> A Ford Foundation grant made possible the formation of a National Council on Legal Clinics.<sup>32</sup> In 1968, the Council of Legal Education for Professional Responsibility (CLEPR) was created with another generous grant from the Ford Foundation.<sup>33</sup> CLEPR was instrumental in the establishment and support of clinical education programs at law schools throughout the country. By 1979, approximately eighty percent of the ABA approved law schools reported that they had some form of clinical education.<sup>34</sup>

Even though many law schools were establishing clinical programs, true integration of these programs into the traditional law school curriculum was rare. Often, the result was a clinical program attached to, but not really part of, the law school—the proverbial “orphan child.”<sup>35</sup> The hiring of untenured supervisors, with little or no job security, and the segregation of clinical activities and facilities from the regular law school curriculum gave rise to a new *modus vivendi*. Clinical education was given money and support to operate, and the academic curriculum was left unmolested by clinical contaminants—in short, separate and unequal.<sup>36</sup>

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<sup>30</sup> Leleiko, *State Federal Rules Permitting the Student Practice of Law: Comparisons and Comments*, reprinted in KLEIN, *supra* note 4, at 942 n.3.

<sup>31</sup> CLEPR, COMPARISONS, *supra* note 27, at 1.

<sup>32</sup> See Sacks, *Student Fieldwork as a Technique in Evaluating Law Students in Professional Responsibility*, 20 J. LEGAL EDUC. 291 (1968).

<sup>33</sup> Grossman, *supra* note 1, at 173.

<sup>34</sup> CLEPR, SURVEY, *supra* note 1, at v. This survey also estimates that at least one half of the twenty percent of law schools not reporting have some sort of clinical program.

<sup>35</sup> See note 27 *supra*.

<sup>36</sup> There is a distinction in status between law school staff who are assigned exclusively to supervise students and those individuals who also have a classroom teaching function at the law school. The distinction manifests itself in two ways: The first in terms of titles and the second in terms of tenure opportunities. For example, those individuals who have exclusive assignments to supervise clinical work are given titles such as clinical director, clinical coordinator, staff attorney, or instructor. On the other hand, law school staff who have both a supervisory and a classroom teaching function are most often given traditional academic titles such as professor, or dean, although there even now continues to be some tendency to put the word “clinical” in front of more traditional titles. Perhaps an even more telling distinction in status is that only 17% of those involved exclusively in clinical work are on a tenure producing track. On the other hand, tenure appears to be generally

This process of compromise all too often resulted in a schizophrenic distortion of the goals and purposes of legal education. Such goals must be brought into focus before reasonable standards for student representation can be established to meet the requirements of the sixth amendment and the *Argersinger* mandate.

### C. Student Practice

Although only one state had adopted a student practice program prior to 1957, by 1978 forty-four states had adopted a student practice rule permitting some form of student practice in the state courts.<sup>37</sup> Some form of student practice is also permitted in twenty-four federal district courts and four U.S. courts of appeal.<sup>38</sup>

State and federal courts vary widely in the degree to which they permit student practice. For example, one of the more liberal student practice rules permits students of any accredited law school in the state "which maintains a legal aid dispensary where poor persons receive legal advice and services" to appear in any of the "district, county and municipal courts of the state as if licensed to practice," provided only that "such representation . . . be with the *approval* of the lawyers in charge of the said legal aid clinic, and the judge of the court in which the student appears."<sup>39</sup> This rule appears to permit a student to practice in all civil cases and criminal cases up to and including felony cases without the in-court supervision of a licensed attorney.

Most other states have additional restrictions on student practice relating to student qualifications, including certification, the nature of the case, compensation, the extent and nature of licensed attorney supervision, courtroom presence of the supervisor, supervisor qualifications, and the type of program sponsoring the student.<sup>40</sup> Many states

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available to those who have both clinical supervision and classroom teaching roles in the law school, and is certainly available to traditional teachers who assume clinical teaching assignments out of interest. This lack of tenure availability, coupled with other "second class" signals must certainly be a major factor in the continual turnover among clinicians.

E. Goe, *Survey of Clinical Education*, in CLEPR, SURVEY, *supra* note 1, at xviii.

<sup>37</sup> KLEIN, *supra* note 4, at 960-69.

<sup>38</sup> *Id.* at 972-81.

<sup>39</sup> See note 29, *supra*.

<sup>40</sup> See KLEIN, *supra* note 4, at 994. The American Bar Association's Model Student Practice Rule provides:

. . . III. Requirements and Limitations. In order to make an appearance pursuant to this rule, the law student must: A. Be duly enrolled in this State in a law school approved by the American Bar Association. B. Have completed legal studies amounting to at least four (4) semesters, or the equivalent, if the school is on some basis other than a semester basis. C. Be certified by the dean of his law school as being of good character

require that supervising attorneys be personally present during all trial proceedings conducted by a student.<sup>41</sup> Other states waive this requirement if the client represented by the student has no constitutional right to counsel,<sup>42</sup> or if the lower court specifically agrees to no

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and competent legal ability, and as being adequately trained to perform as a legal intern. D. Be introduced to a court in which he is appearing by an attorney admitted to practice in that court. E. Neither ask for nor receive any compensation or remuneration of any kind for his services from the person on whose behalf he render services, but this shall not prevent a lawyer, legal aid bureau, law school public defender agency, or the State from paying compensation to the eligible law student, nor shall it prevent any agency from making such charges for its services as it may otherwise properly require.

IV. Certification. The certification of a student by the law school dean: A. Shall be filed with the Clerk of this Court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of eighteen (18) months after it is filed, or until the announcement of the results of the first bar examination following the students graduation, whichever is earlier. For any student who passes that examination or who is admitted to the bar without taking an examination, the certification shall continue in effect until the date he is admitted to the bar. B. May be withdrawn by the dean at any time by mailing a notice to that effect to the Clerk of this Court. It is not necessary that the notice state the cause for withdrawal. C. May be terminated by this Court at any time without notice or hearing and without any showing of cause.

ABA, MODEL STUDENT PRAC. R. III and IV.

<sup>41</sup> See, e.g., N.D. SUP. CT. RULES—LIMITED PRACTICE OF LAW BY LAW STUDENTS § II (B): "An eligible law student may also appear in any criminal matter on behalf of the state with written approval of the prosecuting attorney who shall be personally present throughout the proceedings and shall be fully responsible for the manner in which they are conducted."

<sup>42</sup> See, e.g., KLEIN, *supra* note 4, at 1055-56; LA. SUP. CT. R. XX, § 3:

[A]n eligible law student may appear in any court or before any administrative tribunal in this state on behalf of the state, any political subdivision thereof, or any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance and the supervising lawyer has also indicated in writing approval of that appearance, in the following matters: . . . (b) Any criminal matter in which an indigent defendant does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising attorney is not required to be personally present in court if the person on whose behalf an appearance is being made consents to his absence.

The ABA Model Rule provides:

An eligible law student may appear in any court or before any administrative tribunal in this State on behalf of any indigent person if the person on whose behalf he is appearing has indicated in writing his consent to that appearance, in the following matters:

1. Any civil matter. In such cases the supervising lawyer is not required to be personally present in court.
2. Any criminal matter in which the defendant does not have the right

supervision.<sup>43</sup> Elaborate certification procedures for both students and supervisors have been adopted in many states.<sup>44</sup>

The American Bar Association Model Rule requires the presence of a supervising attorney in all cases in which the client has a right to counsel.<sup>45</sup> In addition, the ABA rule requires that a law student must have completed four semesters of law school and be certified by the dean of the law school as being of "good character and competent legal ability."<sup>46</sup> The rule further specifies that the supervising attorney be approved by the dean of the law school in which the student is enrolled and that the supervising attorney "assume personal professional responsibility" for the student's guidance.<sup>47</sup> The ABA rule sets forth no guidelines on student participation in negotiation and counseling.<sup>48</sup>

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to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer is not required to be personally present in court.

3. Any criminal matter in which the defendant has the right to the assignment of counsel under any constitutional provision, statute, or rule of this court. In such cases the supervising lawyer must be personally present throughout the proceedings.

ABA MODEL STUDENT PRAC. R. § II (A).

<sup>43</sup> See, e.g., KLEIN, *supra* note 4, at 1036-37; HAWAII SUP. CT. R. 25.2 (A):

In connection with a clinical program, a law student intern may appear in any court . . . on behalf of a client, provided: (1) that the client has consented in writing to such appearance; and (2) that a supervising lawyer has indicated in writing approval of such appearance. In every such appearance the law student intern shall be accompanied by a supervising lawyer, unless the court or tribunal consents to the law student intern appearing without a supervising lawyer.

<sup>44</sup> See note 40 *supra*; see also the elaborate certification procedures set forth in section III of the State Bar of California Rules Governing the Practical Training of Law Students. CALIF. BAR ASSOC., RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS § 3 (1969).

<sup>45</sup> See note 42 *supra*.

<sup>46</sup> See note 40 *supra*.

<sup>47</sup> ABA MODEL STUDENT PRAC. R. VI:

The member of the bar under whose supervision an eligible law student does any of the things permitted by this rule shall: A. Be a lawyer whose service as a supervising lawyer for this program is approved by the dean of the law school in which the law student is enrolled. B. Assume personal professional responsibility for the student's guidance in any work undertaken and for supervising the quality of the student's work. C. Assist the student in his preparation to the extent the supervising lawyer considers it necessary.

<sup>48</sup> But see, e.g., HAWAII SUP. CT. R. 25, 25.5:

(a) Any law student intern may, with the knowledge and approval of a supervising lawyer and the client, engage in the following activities: (1) Counseling and advising clients, interviewing and investigating witnesses, negotiating the settlement of claims, and preparing and drafting

Parts of the ABA rule have served as a model for the student practice rules of a large number of states, but it is apparent that in such critical areas as student supervision and the requirement of courtroom presence by the supervising attorney, the state rules vary considerably. The lack of clear guidance as to the constitutional requirements of student representation no doubt contributes to the wide disparity in the rules. Although the ABA Model Rule implicitly adopts the position that student representation outside the presence of a supervising attorney does not meet the sixth amendment requirement of right to counsel, the fact that other states permit student representation without courtroom presence of a supervising attorney raises the question of whether these states are in fact complying with *Argersinger* in permitting such representation.

### III. SIXTH AMENDMENT RIGHT TO COUNSEL

#### A. *Before Gideon v. Wainwright*

The right to counsel in certain circumstances was recognized both in England and in the American colonies long before the adoption of the sixth amendment.<sup>49</sup> Two congressional acts, one in 1789,<sup>50</sup> and the other

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legal instruments, pleadings, briefs, abstracts and other documents. Any documents requiring signature of counsel, and any settlement or compromise of a claim, must be signed by a supervising lawyer.

<sup>49</sup> See generally KRANTZ, *supra* note 3. The relevance of the historical development of the right to counsel to a modern analysis has been questioned by scholars and judges alike. Professor Monaghan, for example, writes:

In seeking to define the content of the sixth amendment's requirement of "Assistance of Counsel," I doubt that anything of value is to be gained by rummaging through the writings of the colonial fathers in search of enlightenment. Nor is anything gained by a minute analysis of the history of lay representation in the civil or the criminal courts. Meaningful history begins with *Powell v. Alabama*.

Monaghan, *supra* note 6, at 458 (citations omitted).

The history of the sixth amendment prior to *Powell v. Alabama*, 287 U.S. 45 (1938), seems particularly unhelpful when one realizes that "originally, in England, a person charged with treason or felony was denied the aid of counsel, except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel." *Id.* at 60. In this regard, Justice Rehnquist has noted: "... we cannot fall back on the common law as it existed prior to the enactment of that Amendment, since it perversely gave less in the way of right to counsel to accused felons than to those accused of misdemeanors." Scott v. Illinois, 440 U.S. 367, 372 (1979).

For those who desire a good historical summary in a modern constitutional analysis, the review of Mr. Justice Sutherland in *Powell* is still the most often quoted:

An affirmation of the right to the aid of counsel in petty offenses, and its denial in the case of crimes of the gravest character, where such aid is most needed, is so outrageous and so obviously a perversion of all

sense of proportion that the rule was constantly, vigorously and sometimes passionately assailed by English statesmen and lawyers. As early as 1758, Blackstone, although recognizing that the rule was settled at common law, denounced it as not in keeping with the rest of the humane treatment of prisoners by the English law. "For upon what face of reason," he says, "can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" 4 Blackstone 355. One of the grounds upon which Lord Coke defended the rule was that in felonies the court itself was counsel for the prisoner. 1 Cooley's Const. Lim., . . . [8th ed. 698 *et seq.*] But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

. . . Before the adoption of the federal [sic] Constitution, the Constitution of Maryland had declared "That, in all criminal prosecutions, every man hath a right . . . to be allowed counsel; . . ." (Art. XIX, Constitution of 1776). The Constitution of Massachusetts, adopted in 1780 (Part. the First, Art. XII), the Constitution of New Hampshire, adopted in 1784 (Part I, Art. XV), the Constitution of New York of 1777 (Art. XXXIV), and the Constitution of Pennsylvania of 1776 (Art. IX), had also declared to the same effect. And in the case of Pennsylvania, as early as 1701, the Penn Charter (Art. V) declared that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors"; and there was also a provision in the Pennsylvania statute of May 31, 1718 (Dallas, Laws of Pennsylvania, 1700-1781, Vol. 1, p. 134), that in capital cases learned counsel should be assigned to the prisoners.

In Delaware, the Constitution of 1776 (Art. 25), adopted the common law of England, but expressly excepted such parts as were repugnant to the rights and privileges contained in the Declaration of Rights; and the Declaration of Rights, which was adopted on September 11, 1776, provided (Art. 14), "That in all Prosecutions for criminal Offences, every Man hath a Right . . . to be allowed Counsel, . . ." In addition, Penn's Charter, already referred to, was applicable in Delaware. The original Constitution of New Jersey of 1776 (Art. XVI) contained a provision like that of the Penn Charter, to the effect that all criminals should be admitted to the same privileges of counsel as their prosecutors. The original Constitution of North Carolina (1776) did not contain the guarantee, but C. 115, § 85, Sess. Laws. N. Car., 1777 (N. Car. Rev. Laws, 1715-1796, Vol. 1, 316), provided ". . . That every person accused of any crime or misdemeanor whatsoever, shall be entitled to council in all matters which may be necessary for his defence, as well to facts as to law; . . . "Similarly, in South Carolina the original Constitution of 1776 did not contain the provision as to counsel, but it was provided as early as 1731 (Act of August 20, 1731, § XLIII, Grimke, S. Car. Pub. Laws, 1682-1790, p. 130) that every person charged with treason, murder, felony, or other capital offense, should be admitted to make full defense by counsel learned in the law. In Virginia there was no constitutional provision on the subject, but as early as August, 1734 (c. VIII, § III, Law of Va., 8th Geo. II, Hening's Stat. at Large, Vol. 4, p. 404), there was an act declaring that in all trials for capital offenses the prisoner, upon his petition to the court, should be allowed counsel.



in 1790,<sup>51</sup> provided for counsel, the latter even providing for assignment of counsel in capital crimes.

In 1938, the Supreme Court, defining the right to counsel in federal criminal cases, declared in *Johnson v. Zerbst*<sup>52</sup> that:

A court's jurisdiction at the beginning of trial may be lost "in the course of the proceedings" due to the failure to complete the court—as the Sixth Amendment requires—by providing counsel for an accused who is unable to obtain counsel, who has not intelligently waived this constitutional guaranty, and whose life or liberty is at stake.<sup>53</sup>

In *Powell v. Alabama*,<sup>54</sup> the Supreme Court held that where the circumstances involved a capital crime, and the notice and terms of appointment were unclear, "the failure of the [state] trial court to make an effective appointment of counsel was . . . a denial of due process within the meaning of the Fourteenth Amendment."<sup>55</sup> In that case,

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The original Constitution of Connecticut (Art I, § 9) contained a provision that "In all criminal prosecutions, the accused shall have the right to be heard by himself and by counsel"; but this Constitution, was not adopted until 1818. However, it appears that the English common law rule had been rejected in practice long prior to 1796. See Zephaniah Swift's "A System of the Laws of the State of Connecticut," printed at Windham by John Byrne, 1795-1796, Vol. II, Bk. 5, "Of Crimes and Punishments," c.XXIV, "Of Trials," pp. 398-399.

The original Constitution of Georgia (1777) did not contain a guarantee in respect of counsel, but the Constitution of 1798 (Art. III, § 8) provided that " . . . no person shall be debarred from advocating or defending his cause before any court or tribunal, either by himself or counsel, or both." What the practice was prior to 1798 we are unable to discover. The first constitution adopted by Rhode Island was in 1842, and this constitution contained the usual guarantee in respect of the assistance of counsel in criminal prosecutions. As early as 1798 it was provided by statute, in the Federal Constitution, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence; . . ." An Act Declaratory of certain Rights of the People of this State, § 6, Rev. Pub. Laws, Rhode Island and Providence Plantations, 1798. Furthermore, while the statute itself is not available, it is recorded as a matter of history that in 1668 or 1669 the colonial assembly enacted that any person who was indicted might employ an attorney to plead in his behalf. 1 Arnold, History of Rhode Island, 336.

*Powell v. Alabama*, 287 U.S. 45, 60-64 (1938) (Sutherland, J.).

<sup>50</sup> Judiciary Act, ch. 20, § 35, 1 Stat. 73 (1798).

<sup>51</sup> Ch. 9, § 29, 1 Stat. 112 (1790).

<sup>52</sup> 304 U.S. 458 (1938).

<sup>53</sup> *Id.* at 468.

<sup>54</sup> 287 U.S. 45 (1932).

<sup>55</sup> *Id.* at 56-57. The Court observed from the record that:

It thus will be seen that until the very morning of the trial no lawyer

seven young black youths were charged with sexual assault on two white girls in Alabama. Counsel was appointed immediately before trial so that there was little time to prepare and in a climate of community hostility, the defendants were subsequently tried and sentenced to death.

Apparently not even considering the possibility that the sixth amendment in its entirety might be extended to the states via the fourteenth amendment, the court grappled with the problem of whether the sixth amendment's right to counsel in specific terms precluded the application of any right to counsel through the more general due process clause of the fourteenth amendment. Although there was ample authority for the view that the right was not "within the intendment of the due process of law clause,"<sup>56</sup> the Court nevertheless extended some elements of the right to counsel to the states.<sup>57</sup>

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had been named or definitely designated to represent the defendants. Prior to that time, the trial judge had "appointed all the members of the bar" for the limited "purpose of arraigning the defendants." Whether they would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court. Such a designation, even if made for all purposes, would, in our opinion, have fallen far short of meeting, in any proper sense, a requirement for the appointment of counsel. . . . In any event, the circumstances lend emphasis to the conclusion that during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

*Id.*

<sup>56</sup> *Id.* at 66. Justice Sutherland rejected the contention that the fourteenth amendment's due process clause did not embody the sixth amendment's right to counsel in regard to state action.

That some such distinction must be observed is foreshadowed in *Twinning v. New Jersey*, 211 U.S. 78, 99, where Mr. Justice Moody, speaking for the court, said that "... it is possible that some of the personal rights safeguarded by the first eight amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." While the question has never been categorically determined by this court, a consideration of the nature of the right and a review of the expressions of this and other courts, makes it clear that the right to the aid of counsel is of this fundamental character.

287 U.S. at 67-68.

<sup>57</sup> *Id.* at 71.

In the light of the facts outlined in the forepart of this opinion—the ignorance and illiteracy of the defendants, their youth, the cir-

The *Powell* case was an important turning point in the development of the right to counsel. It not only recognized a constitutional right to counsel in capital cases, but for the first time the Supreme Court found the legal mechanism for extending to the states at least some of the elements of the sixth amendment, if not the sixth amendment itself.

In the 1941 case of *Betts v. Brady*,<sup>58</sup> an indigent defendant was denied counsel on a felony charge and was sentenced to eight years in jail after a trial to the court. Without discussion, the Supreme Court again assumed that the sixth amendment applied only in the federal courts. As in *Powell*, however, the court considered the contention that the sixth amendment nevertheless "expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the fourteenth amendment."<sup>59</sup>

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cumstances of public hostility, the imprisonment and the close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them was necessarily difficult, and above all that they stood in deadly peril of their lives—we think the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due process.

But passing that, and assuming their inability, even if opportunity had been given, to employ counsel, as the trial court evidently did assume, we are of opinion that, under the circumstances just stated, the necessity of counsel was so vital and imperative that the failure of the trial court to make an effective appointment of counsel was likewise a denial of due process within the meaning of the Fourteenth Amendment.

*Id.*

As a general statement, Justice Sutherland's view on the importance of counsel is often quoted:

The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

*Id.* at 68-69.

<sup>58</sup> 316 U.S. 455 (1942).

<sup>59</sup> *Id.* at 465.

Rejecting this argument and noting that a great majority of states had determined that appointment of counsel was "not a fundamental right, essential to a fair trial,"<sup>60</sup> the Court held that the due process clause did not obligate the states to provide counsel in every case requested.<sup>61</sup> This did not mean that the states could deny counsel in every case for the Court acknowledged that a "denial by a state of rights and privileges specifically embodied in that and others of the first eight amendments may, in certain circumstances, or in connection with other elements, operate, in a given case, to deprive a litigant of due process of law in violation of the Fourteenth."<sup>62</sup>

In affirming the conviction, the Court distinguished *Powell*, noting that there the defendants were "ignorant and friendless negro youths, strangers in the community, without friends or means to obtain counsel."<sup>63</sup> Presumably such circumstances were of the special type which would trigger the right to counsel via the due process clause.

Although the *Betts* decision suffered extensive abuse at the hands of critics and commentators,<sup>64</sup> and was later attacked as an "abrupt break with its own well-considered precedents"<sup>65</sup> and an "anachronism when handed down,"<sup>66</sup> it was not, in fact, a major step backward.

*Betts* was a logical extension of *Powell*, acknowledging that special circumstances might exist in a non-capital as well as a capital case. Certainly there was ample precedent for not incorporating the sixth amendment into the fourteenth amendment and applying it in its entirety to the States.<sup>67</sup> Indeed, had the *Betts* Court found special circumstances triggering the right to counsel, *Betts* would probably be looked upon today as a logical step in the development of this right. In fact, in the decade after *Betts*, there were only a few Supreme Court cases in which "special circumstances" were not found, and then only in closely split decisions.<sup>68</sup> By 1963, when *Gideon v. Wainwright*<sup>69</sup> was

<sup>60</sup> *Id.* at 471.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 462.

<sup>63</sup> *Id.* at 463.

<sup>64</sup> See, e.g., Kamisar, *Betts v. Brady, Twenty Years Later: The Right to Counsel and Due Process Values*, 61 MICH. L. REV. 219 (1962); Kamisar, *The Right to Counsel and the Fourteenth Amendment: A Dialogue on "The Most Pervasive Right" of an Accused*, 30 U. CHI. L. REV. 1 (1962); Symposium, *The Right to Counsel*, 45 MINN. L. REV. 693 (1961).

<sup>65</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>66</sup> *Id.* at 345.

<sup>67</sup> See Justice Sutherland's discussion of *Hurtado v. California*, 110 U.S. 516 (1884), in *Powell v. Alabama*, 287 U.S. 45, 65 (1932).

<sup>68</sup> See, e.g., *Gryger v. Burke*, 334 U.S. 728 (1948); *Bute v. Illinois*, 333 U.S. 640 (1948).

<sup>69</sup> 372 U.S. 335 (1963).

decided, Justice Harlan could not find cases, after 1950, in which the Court failed to find "special circumstances" in non-capital cases.<sup>70</sup>

At the time of *Gideon*, the very notion that a person under any circumstances might lose his liberty without having had the benefit of the "guiding hand"<sup>71</sup> of counsel was repugnant to the human, if not the legal sensibilities of a growing number of critics, commentators, and judges.<sup>72</sup>

### B. *Gideon v. Wainwright*<sup>73</sup>

*Gideon v. Wainwright* is considered the landmark case in the history of the right to counsel because it established for the first time a clear right to counsel standard applicable to the states. In *Gideon*, the defendant was charged with a felony under Florida law.<sup>74</sup> He requested appointed counsel, but this was refused and he was subsequently convicted. The United States Supreme Court reversed the conviction, incorporating by reference much of its language in prior decisions recognizing the right to counsel in federal cases.<sup>75</sup> But more importantly, the Court enunciated the basic principle that the right to counsel under the sixth amendment was a provision of the Bill of Rights that was "fundamental and essential to a fair trial,"<sup>76</sup> thereby requiring that the sixth amendment be made obligatory on the states through the fourteenth amendment.<sup>77</sup>

The Court could have taken the view of Justice Harlan that the case could best be disposed of by abandoning the "special circumstances"

<sup>70</sup> *Id.* at 351 (Harlan, J., concurring). "Special circumstances" were found in even routine cases on the grounds that complicated issues were present. *See, e.g.,* *Chewning v. Cunningham*, 368 U.S. 443 (1962); *Williams v. Kaiser*, 323 U.S. 471 (1945).

<sup>71</sup> *See* note 57 *supra*.

<sup>72</sup> *See generally* Brown, *The Trumpet Sounds: Gideon—A First Call to the Law School*, 43 TEX. L. REV. 312 (1965); Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

<sup>73</sup> 372 U.S. 335 (1963).

<sup>74</sup> FLA. STAT. ANN. § 810.051 (repealed 1974).

<sup>75</sup> 372 U.S. at 343 (*citing* *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938)).

<sup>76</sup> *Id.* at 344.

<sup>77</sup> *Id.* The Court noted the cases in which certain Bill of Rights guarantees had been recognized as being so fundamental so as to make them obligatory on the states via the fourteenth amendment. *Id.* at 341 n.4. *See* *Edwards v. South Carolina*, 372 U.S. 229 (1963) (speech, assembly, petition for redress of grievances); *Louisiana ex rel. Gremillion v. NAACP*, 336 U.S. 293, 296 (1961) (association); *Shelton v. Tucker*, 364 U.S. 479, 486, 488 (1960) (association); *Staub v. City of Baxley*, 335 U.S. 313, 321 (1958) (speech); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (religion); *Lovell v. Griffin*, 303 U.S. 444, 450 (1938) (speech and press); *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937) (assembly); *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936) (press); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (speech and press).

rule as applied to non-capital cases, thus giving *Betts* a "more respectful burial."<sup>78</sup> The strong language of the Court in applying the sixth amendment to the states,<sup>79</sup> however, set the stage for *Argersinger* and its determination of the scope of this new right.

### C. *Argersinger v. Hamlin*<sup>80</sup>

It is significant that no Justice sitting on the *Gideon* Court found it necessary to refer to the financial or practical consequences flowing from any significant expansion of the right to counsel. The fact that there was little concern for the practical consequences of extending the right to counsel to all state felony trials is shown by the fact that in *Gideon*, a total of twenty-two states, as friends of the Court, argued that *Betts* should be over-ruled, while only two states, in addition to Florida, argued in favor of retaining *Betts*.<sup>81</sup> By the time *Argersinger v. Hamlin*<sup>82</sup> resolved the hotly debated issue of whether the *Gideon* mandate applied to misdemeanors as well as felonies, the question of availability of legal resources was being interjected into the Constitutional discussions.<sup>83</sup>

<sup>78</sup> 372 U.S. at 349 (Harlan, J., concurring).

<sup>79</sup> We accept *Betts v. Brady*'s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights.

*Id.* at 341.

<sup>80</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972). Prior to *Argersinger*, specific elements of the sixth amendment right to counsel had been made applicable to the States via the fourteenth amendment. *See, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Washington v. Texas*, 388 U.S. 14 (1967) (right to speedy and public trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to compulsory process for obtaining witnesses); *In re Oliver*, 333 U.S. 257 (1948) (right to public trial).

<sup>81</sup> 372 U.S. 335, 335-36 (1963). The States which argued in favor of retaining *Betts* were Alabama and Oregon; only one brief was filed on behalf of the 22 States. In addition the American Civil Liberties Union filed an *amici curiae* arguing against the retention of *Betts*. *Id.*

<sup>82</sup> 407 U.S. 25 (1972).

<sup>83</sup> Justice Powell, concurring in the result in *Argersinger*, expressed great concern for the practical consequences of requiring the states to provide indigent defendants with counsel in misdemeanor cases:

... Perhaps the most serious potential impact of today's holding will be on our already overburdened local courts. . .

The ability of various States and localities to furnish counsel varies widely. Even if there were adequate resources on a national basis, the uneven distribution of these resources—of lawyers, of facilities, and available funding—presents the most acute problem.

*Id.* at 58-59 (Powell, J., concurring).

Justice Powell further interjected: "[T]he successful implementation of the

The *Argersinger* case is significant in an analysis of the present legal status of student representation of indigent defendants for several reasons. First, the decision came at a time when clinical education at the nation's law schools was expanding rapidly, and when more student practice rules were being adopted.<sup>84</sup> Second, the decision takes into account the problem of the availability of legal resources.<sup>85</sup> Finally, and perhaps most importantly, the concurring opinion of Justice Brennan joined by Justices Douglas and Stewart, not only acknowledged the legal resource problem, but specifically suggested that "law students . . . may provide an important source of legal representation for the indigent."<sup>86</sup>

The petitioner in *Argersinger* was charged with carrying a concealed weapon, a misdemeanor.<sup>87</sup> He was not represented by counsel and was subsequently convicted and sentenced to ninety days in jail. In his writ of *habeas corpus*, the defendant argued that without assigned counsel, he was unable, as an indigent person, to properly defend himself.<sup>88</sup>

The problem confronting the court in its attempt to define a precise line where a right to counsel began was complicated by parallel developments in the right to a jury trial. In *Duncan v. Louisiana*,<sup>89</sup> the Court held that the sixth amendment right to a jury trial applied to the states via the fourteenth amendment. There, the defendant was denied a jury trial on a misdemeanor charge and was later convicted. The charge, simple battery, carried a maximum sentence of two years in jail

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majority's rule would require state and local governments to appropriate considerable funds, something they have not been willing to do. Three States with 21% of the Nation's population provide more than 50% of all state appropriations for indigent defense." *Id.* at 61 n.30 (Powell, J., concurring). See generally H. JAMES, *CRISIS IN THE COURTS* (1968).

<sup>84</sup> See notes 1, 3 *supra* and accompanying text.

<sup>85</sup> Justice Douglas disputed Justice Powell's doubt about the availability of legal resources.

It has been estimated that between 1,575 and 2,300 full-time counsel would be required to represent all indigent misdemeanants, excluding traffic offenders. Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L. Rev. 1249, 1260-1261 (1970). These figures are relatively insignificant when compared to the estimated 355,200 attorneys in the United States (Statistical Abstract of the United States 153 (1971)), a number which is projected to double by the year 1985. See Ruud, *That Burgeoning Law School Enrollment*, 58 A.B.A.J. 146, 147. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the "estimated 14,500 average annual openings." *Id.* at 148.

407 U.S. at 37 n.7.

<sup>86</sup> *Id.* at 40.

<sup>87</sup> FLA. STAT. ANN. § 790.01(1) (West, 1969).

<sup>88</sup> 407 U.S. at 26.

<sup>89</sup> 391 U.S. 145 (1968).

and a \$300 fine,<sup>90</sup> but the defendant was only sentenced to sixty days in jail plus a \$150 fine. Louisiana argued that even if the sixth amendment required the right to trial by jury in "serious" criminal cases, the relevant yardstick was not the maximum sentence authorized for an offense, but the sentence actually *imposed*.<sup>91</sup> The Court specifically rejected that contention, stating:

[T]he *penalty authorized* for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgment . . . of the crime in question."<sup>92</sup>

This language, purporting to establish the punishment authorized instead of the punishment actually imposed as the relevant yardstick in determining the sixth amendment's line of demarcation, is important to consider in comparing the parallel sixth amendment analysis in *Argersinger*.<sup>93</sup>

In *Baldwin v. New York*,<sup>94</sup> the Court further refined this test by defining "serious" and "petty" for purposes of determining the applicability of the sixth amendment right to a jury trial. The Court held that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is *authorized*."<sup>95</sup>

Interestingly enough, the Court in *Argersinger* changed course and applied a yardstick based on punishment "imposed," *i.e.*, actual incarceration, rather than the *Duncan/Baldwin* yardstick of punishment "authorized," in setting the standard for right to counsel.<sup>96</sup> The resulting "double" standard under the sixth amendment for the twin rights to jury trial and counsel can be explained, in part, by the different history of each right.<sup>97</sup> Part of the difference can also be explained by the desire of the Court in both *Duncan* and *Argersinger* to limit their holdings to the specific facts. The Court acknowledged that its decision in *Argersinger* would not affect the "run of misdemeanors."<sup>98</sup> As a result the standard set forth was that, "absent a knowing and intelligent waiver,

<sup>90</sup> LA. REV. STAT. ANN. § 14:35 (West, 1942).

<sup>91</sup> 391 U.S. at 149.

<sup>92</sup> *Id.* at 159-60 (emphasis added) (citations omitted).

<sup>93</sup> See notes 82-85 *supra* and accompanying text.

<sup>94</sup> 399 U.S. 66 (1970).

<sup>95</sup> *Id.* at 69 (emphasis added).

<sup>96</sup> 407 U.S. at 40.

<sup>97</sup> For a review of the parallel histories of right to counsel and right to jury trial see *Argersinger v. Hamlin*, 407 U.S. at 44-46 (Powell, J., concurring). See also *id.* at 29-31 (opinion of Justice Douglas).

<sup>98</sup> *Id.* at 40.



no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he is represented by counsel at his trial."<sup>99</sup>

Several problems have emerged from this standard.<sup>100</sup> First, *Argersinger's* own rationale is inconsistent with the double standard that emerged from the decision. In justifying a standard giving a right to counsel in situations where there was no right to a jury—that is, where a defendant is charged with a crime punishable by less than six months—the court observed that “while there is historical support for limiting the ‘deep commitment’ to trial by jury to ‘serious criminal cases,’ there is no such support for a similar limitation on the right to assistance of counsel.”<sup>101</sup> Despite the Court’s implication that the right to counsel is more fundamental to a fair proceeding than the right to trial by jury,<sup>102</sup> the Court’s standard actually results in a right to counsel standard that is “more restrictive than the standard for granting a right to jury trial.”<sup>103</sup>

<sup>99</sup> *Id.* at 37.

<sup>100</sup> See generally KRANTZ, *supra* note 3, at 69-117. Mr. Justice Powell recognized an equal protection problem:

Indeed, one of the effects of this ruling will be to favor defendants classified as indigents over those not so classified, yet who are in low-income groups were engaging counsel in a minor petty-offense case would be a luxury the family could not afford. The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from State to State and often resulting in serious inequities to accused persons. The Court’s new rule will accent the disadvantage of being barely self-sufficient economically. . . .

. . . The new rule announced today also could result in equal protection problems: There may well be an unfair and unequal treatment of individual defendants, depending on whether the individual judge has determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel. Since the services of counsel may be essential to a fair trial even in cases in which no jail sentence is imposed, the results of this type of pretrial judgment could be arbitrary and discriminatory.

407 U.S. at 50-54 (Powell, J., concurring).

<sup>101</sup> *Id.* at 30.

<sup>102</sup> Justice Brennan, dissenting in *Scott v. Illinois*, 440 U.S. 367 (1979), characterized the majority view in *Argersinger* as holding that “the right to counsel was more fundamentally related to the fairness of criminal prosecutions than the right to jury trial and was in fact essential to the meaningful exercise of other Sixth Amendment protections.” *Id.* at 379 (Brennan, J., dissenting).

Justice Powell, concurring in *Argersinger*, restated the majority’s view. “[T]he interest protected by the right to have guilt or innocence determined by a jury—tempering the possibly arbitrary and harsh exercise of prosecutorial and judicial power—while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel.” 407 U.S. at 46 (Powell, J., concurring).

<sup>103</sup> *Scott v. Illinois*, 440 U.S. 367, 380 (1979) (Brennan, J., dissenting).

Second, the *Argersinger* standard has inherent problems in application.<sup>104</sup> In his concurring opinion Chief Justice Burger noted that under the standard set forth:

[T]he trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term. . . . As to jury cases, the [prosecuting attorney] should be prepared to inform the judge as to any prior record of the accused, the general nature of the case against the accused, including any use of violence, the severity of harm to the victim, the impact on the community, and the other factors relevant to the sentencing process.<sup>105</sup>

It is probably bad practice for a prosecutor to inform a judge before trial of aggravating matters prejudicial to the defendant<sup>106</sup> because such pre-trial disclosure may jeopardize the judge's appearance of impartiality. If done in an *ex parte* manner, the procedure may also violate the American Bar Association Standards relating to the func-

<sup>104</sup> See KRANTZ, *supra* note 3, at 69-117. The authors raise several questions concerning the implementations of *Argersinger*. For example, what is a prosecutor's standing to object to a failure to appoint counsel, which failure would preclude a jail sentence for the defendant? Is there a usurpation of power if a court refuses to appoint counsel in a case where a minimum jail sentence is mandated by the legislature? This book also examines the many *Argersinger* complications resulting from retrial and mistrial situations. After analyzing the possible alternative in implementing *Argersinger*, the authors conclude that the "imprisonment-in-law standards" should be the *Argersinger* standard. Under this standard, first envisioned in *Junker, The Right to Counsel in Misdemeanor Cases*, 43 WASH. L. REV. 685 (1968), counsel would be appointed for any indigent defendant charged with an offense for which a jail sentence is authorized. This is the standard which the Supreme Court specifically rejected in *Scott v. Illinois*, 440 U.S. 367 (1979).

<sup>105</sup> 407 U.S. at 42 (Burger, C.J., concurring).

<sup>106</sup> Courts have traditionally taken the view that judges are presumed to be intellectually disciplined enough to make decisions and findings of fact without considering inadmissible evidence which the judge has heard in the pre-trial process. See, e.g., *Webster v. United States*, 330 F. Supp. 1080 (E.D. Va. 1971). Krantz *et al*; however, have argued that "by far the better practice is to restrict even judges from learning the type of information that would be in a presentence report or would be the basis for an individualized prediction." KRANTZ, *supra* note 3, at 88. The authors have also noted that the Federal Rules of Criminal Procedure require that "The (presentence) report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or has been found guilty." FED. R. CRIM. P. 32 (c)(1). In addition, the Court in *Gregg v. United States*, 394 U.S. 489 (1969) held that "(t)o permit the *ex parte* introduction of this sort of material . . . would seriously contravene the rule's purpose of preventing possible prejudice from premature submission of the presentence report." *Id.* at 492.

tion of the trial judge.<sup>107</sup> Although it is not unusual for a trial judge to hear inadmissible evidence as a prelude to making rulings thereon, there would appear to be little justification for deliberately providing a trial judge with prejudicial information concerning a defendant before trial if it is already conceded by a prosecutor that such information would be inadmissible on the issue of guilt or innocence.<sup>108</sup>

Although Chief Justice Burger seems to acknowledge that "[i]n a *nonjury* case the prior record of the accused should not be made known to the trier of fact except by way of traditional impeachment,"<sup>109</sup> this does not take into account the trial judge's role in a jury trial of judging the facts in ruling on motions such as a motion for acquittal. Furthermore, since many criminal trials are to the court, the proviso all but eliminates the means in most cases for making the predictive determination the Chief Justice views as necessary under the *Argersinger* rule.<sup>110</sup>

*Argersinger* also presents special problems in the area of student representation. Since there is no absolute standard for determining the right to counsel where no judicial predictive analysis is performed *before* trial and sentencing, a student cannot be sure whether his representation will satisfy sixth amendment requirements, or is merely being given gratuitously to a client who has no constitutional right to counsel. The distinction between the former and the latter can be significant. In the former case, a trial judge may open the door to incarceration of a defendant by appointing student counsel who otherwise would not be assigned any counsel because of the minor nature of the offense. In the latter case the jailhouse door would remain shut. It would indeed be ironic if *Argersinger* resulted in students providing a court with a cheap and convenient means for making a defendant eligible for a jail term. On the other hand, if a student's representation is viewed as not being representation contemplated by the sixth amendment, students would be free to represent indigent defendants without the fear of opening the jailhouse doors to their clients.<sup>111</sup>

<sup>107</sup> "The trial judge should insist that neither the prosecutor nor the defense counsel nor any other person discussed a pending case with him *ex parte*, except after adequate notice to all other parties and when authorized by law or in accordance with approved practice." ABA STANDARDS CRIM. JUST., *Functions of the Trial Judge* § 1.6 (1974). Since it may be presumed that no defense counsel would consent to *ex parte* disclosure by a prosecutor to a judge of matters potentially damaging to the defendant, some sort of hearing would be required. Such a hearing, or course, raises new questions of procedure and evidence, such as the burden of proof. There is also the persistent question of equal protection, since only indigents requesting counsel would be required to submit to such a hearing and suffer the consequences of potentially damaging disclosures prior to trial.

See generally KRANTZ, *supra* note 3.

<sup>108</sup> See note 106 *supra*.

<sup>109</sup> 407 U.S. at 42 n.\* (emphasis added).

<sup>110</sup> See note 105 *supra* and accompanying text.

<sup>111</sup> See notes 128-32 *infra* and accompanying text.

D. *Post-Argersinger*

If there were any doubts that the right to counsel under the *Argersinger* test applied only to offenses for which a jail sentence was ultimately imposed, those doubts were put to rest in *Scott v. Illinois*.<sup>112</sup> In *Scott*, the defendant was charged with shoplifting, which carried a maximum authorized punishment of \$500 fine or one year in jail, or both. The Supreme Court adopted "actual imprisonment as the line defining the constitutional right to appointment of counsel."<sup>113</sup> Justices Brennan, Marshall and Stevens dissented, unable to reconcile the

<sup>112</sup> 440 U.S. 367 (1979).

<sup>113</sup> *Id.* at 373. It is interesting to note that in seeking a constitutional "line" the Court gives little attention to the collateral consequences of a misdemeanor conviction. In *Argersinger*, for example, Justice Powell noted several important areas of civil disabilities resulting from misdemeanor convictions, even where no jail sentence is imposed:

Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken-driving conviction or a hit-and-run escapade. Losing one's driver's license is more serious for some individuals than a brief stay in jail. In *Bell v. Burson*, 402 U.S. 535 (1971), we said:

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.* at 539. When the deprivation of property rights and interests is of sufficient consequence, denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.

407 U.S. at 42 (Powell, J., concurring).

Justice Powell also recognized other collateral consequences such as "forfeiture of public office, *State v. Kruger*, 280 Mo. 293, 217 S.W. 310 (1919); disqualification for a licensed profession, CAL. BUS. & PROF. CODE § 3094 (1962) (optometrists); N.C. GEN. STAT. § 93A-4(b) (1965) (real estate brokers); and loss of pension rights, FLA. STAT. ANN. § 185.18(3) (1966) (police disability pension denied when injury is result of participation in fights, riots, civil insurrections, or while committing crime)." 407 U.S. at 48, n.11 (Powell, J., concurring).

See also PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CORRECTIONS (1967), reprinted in 23 VAND. L. REV. 929 (1970):

As a general matter civil disability law has simply not been rationally designed to accommodate the varied interest of society and the individual convicted person. There has been little effort to evaluate the whole system of disabilities and disqualifications that has grown up. . . . As a result, convicted persons are generally subjected to numerous disabilities and disqualifications which have little relation to the crime committed, the person committing it or, consequently, the protection of society. They are often harsh out of all proportion to the crime committed.

*Id.* at 88, 23 VAND. L. REV. at 929.

majority's opinion with the jury trial standard under the sixth amendment:

The Court's reasoning in applying the right to counsel in the case before it—that the right to counsel is more fundamental to a fair proceeding than the right to jury trial and that the historical limitations on the jury trial right are irrelevant to the right to counsel—certainly cannot support a standard for the right to counsel that is more restrictive than the standard for granting a right to jury trial. As my Brother Powell commented in his concurring opinion in *Argersinger*, . . . "It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial." *Argersinger* then established a "two dimensional" test for the right to counsel: the right attaches to any "non-petty" offense punishable by more than six months in jail and in addition to any offense where actual incarceration is likely regardless of the maximum authorized penalty.<sup>114</sup>

*Scott* has significance for clinical programs since it removed from the purview of the sixth amendment all cases carrying an authorized punishment of incarceration, but for which a jail term is not expected to be imposed. Therefore, students representing clients charged with such offenses need not meet the sixth amendment standards for counsel. However, the uncertainty with regard to the effect of student representation on the client's potential for a jail term remains since little has been done to resolve the *Argersinger-Scott* problems of "individualized prediction."<sup>115</sup>

In *Baldasar v. Illinois*,<sup>116</sup> the Court was again plagued by complications resulting from attempts to apply the *Argersinger* standard. Baldasar was convicted in May, 1975, of theft, under a statute which authorized a maximum punishment of imprisonment of one year and a fine of \$1,000. Baldasar was not represented by a lawyer and did not waive his right to an attorney. Within the bounds of *Argersinger*, Baldasar was fined \$159 and placed on probation for one year. In August, 1976, Baldasar was convicted a second time for theft. Under Illinois law, a second theft conviction may be treated as a felony with a prison term of one to three years.<sup>117</sup> At the second trial, the record of the first conviction was admitted into evidence over the objection of Baldasar, who was subsequently convicted and sentenced to one to three years in prison.<sup>118</sup>

<sup>114</sup> 440 U.S. at 380 (citation omitted).

<sup>115</sup> See note 104 *supra* and accompanying text.

<sup>116</sup> 446 U.S. 222 (1980).

<sup>117</sup> ILL. REV. STAT. ch. 38, § 1005-8-1(b)(5) (1975).

<sup>118</sup> 446 U.S. at 223.

Baldasar's argument on appeal was a simple one: Since *Argersinger* had held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense unless he was represented by counsel at his trial,"<sup>119</sup> he could not be sentenced to jail on the basis of a prior case in which he was convicted without the benefit of counsel.<sup>120</sup> At first blush Baldasar's contention appeared to be consistent with both *Argersinger* and *Scott*, but four dissenting members of the Court rejected this simplistic approach. They argued that "this line of argument misapprehends the nature of the enhancement statutes,"<sup>121</sup> for such laws do not affect a prior sentence, but merely subject a person to increased punishment if that person decides to commit the second crime. Thus, as long as the first conviction was valid (which it was because no prison term was imposed and thus no counsel required) it should be permitted to be introduced into evidence in the same manner as any other constitutionally valid conviction. The dissent's rule simply states, then, that the conviction was either valid or it was not; but if it was valid, it could be used to enhance the sentence of a later conviction.

The other five Justices, speaking through three separate opinions, disagreed, holding that a conviction may be constitutionally valid for some purposes, but not for others.<sup>122</sup> Justice Stewart looked at the ultimate result, holding that it is "clear . . . that this prison sentence violated the constitutional rule of *Scott v. Illinois*."<sup>123</sup> He argued that

<sup>119</sup> 407 U.S. at 37.

<sup>120</sup> 446 U.S. at 224 (Stewart, J., concurring).

<sup>121</sup> *Id.* at 232 (Burger, C.J., Powell, J., White, J., Rehnquist, J., dissenting).

<sup>122</sup> *Id.* at 224-30.

<sup>123</sup> *Id.* at 224. *Cf. Lewis v. United States*, 445 U.S. 55 (1980) (conviction upheld even though an earlier underlying conviction was subject to attack on sixth amendment grounds). In *Lewis*, the defendant was convicted of a felony in 1961, without benefit of counsel. Subsequently, he was charged and convicted under 18 U.S.C. APP. § 1202(a)(1) (1976) which prohibits possession of a firearm by a convicted felon. The Supreme Court upheld the firearm violation despite the fact that the underlying state felony conviction was subject to collateral attack on sixth amendment grounds. The Court reasoned:

Use of an uncounseled felony conviction as the basis for imposing a civil firearms disability, enforceable by a criminal sanction is not inconsistent with *Tucker* [404 U.S. 443 (1973)], *Loper* [405 U.S. 473 (1978)], and *Burgett* [389 U.S. 190 (1967)]. In each of those cases this Court found that the subsequent conviction or sentence violated the Sixth Amendment because it depended upon the reliability of a past uncounseled conviction. The federal gun laws, however, focus not on reliability, but on the mere fact of conviction. . . .

445 U.S. at 67.

Justice Brennan, dissenting, observed that the "[p]etitioner has already been imprisoned in violation of the Constitution. In the absence of any clear congressional expression of its intent, I cannot accept a construction of § 1202(a)(1) that

had it not been for the prior conviction, the petitioner could not have been sentenced to more than one year for the present offense. Justice Marshall's concurring opinion stated: "[A] conviction which is invalid for the purpose of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeater-offender statute."<sup>124</sup>

Justice Powell, dissenting, complained that this holding creates a "hybrid" conviction which may be "valid for the purposes of their own penalties as long as the defendant receives no prison term,"<sup>125</sup> but "invalid for the purpose of enhancing punishment upon a subsequent misdemeanor conviction."<sup>126</sup> Justice Marshall's opinion rejected this notion that it had created a "hybrid," arguing that "a conviction invalid for imposing a prison term directly, but valid for imposing a prison term collaterally, would be an illogical and unworkable deviation from our previous cases."<sup>127</sup> Justice Blackmun, in his concurring opinion, remained adamant that the standards for right to counsel and right to a jury trial must be made consistent, and continued to advocate his "bright line" approach, which would give a right to counsel to any defendant prosecuted for an offense "punishable by more than six months imprisonment . . . or whenever the defendant is convicted of an offense and is actually subjected to a term of imprisonment."<sup>128</sup>

Although Justice Blackmun's approach would resolve the right to

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reflects such an indifference to petitioner's plight. . . ." *Id.* at 70. (Brennan, J., dissenting).

In any case, the holding in *Lewis* is difficult to reconcile with that of *Baldasar*. Justice Blackmun in a footnote to his concurring opinion in *Baldasar*, observed:

Today's decision [*Baldasar*] is all the more puzzling in view of the Court's recent ruling in *Lewis v. United States* . . . that an uncounseled felony conviction is a proper predicate for imposing federal sanctions for possession of a firearm by a felon. Although I dissented on statutory grounds in *Lewis*, the opinion's constitutional holding squarely conflicts with today's decision. Unlike misdemeanors, all uncounseled felony judgments are constitutionally invalid. . . . Yet *Lewis* held that even though the federal firearm statute imposes a prison sentence solely because the defendant had an uncounseled—and thus void—felony conviction to "support guilt or enhance punishment." . . . In this case, the Court refuses to permit sentence enhancement on the basis of a constitutionally valid misdemeanor conviction. The conflict between the two holdings could scarcely be more violent.

446 U.S. at 232 n.3 (Blackmun, J., concurring) (citations omitted) (emphasis added).

<sup>124</sup> 446 U.S. at 228 (Marshall, J., concurring) (citations omitted) (emphasis added).

<sup>125</sup> *Id.* at 232 (Powell, J., concurring).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 228-29 (Marshall, J., concurring).

<sup>128</sup> *Id.* at 229 (Blackmun, J., concurring) (emphasis added).

counsel conflict with the right to a jury trial under *Duncan*, neither Blackmun's nor the plurality's approach resolves the inherent contradictions and problems associated with the implementation of *Argersinger/Scott*. In fact, under *Baldasar* the "individualized prediction" process, which has already been the subject of much scholarly criticism, becomes even more impractical and invites further prejudice to a criminal defendant.

In *Argersinger*, Chief Justice Burger stated that "the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term."<sup>129</sup> Under *Baldasar* a court must make further predictions as to the likelihood that a person will commit a second offense. The impact will be to widen the difference in procedure required for indigent, and non-indigent defendants, further exacerbating the potential due process problems in implementing such widely different procedures.<sup>130</sup>

The questions raised by each post-*Argersinger* decision seem to be rising exponentially.<sup>131</sup> For example, must an indigent defendant really be subject to a "predictive analysis" involving pre-trial disclosure of prior bad acts, convictions, and other detrimental information, while the non-indigent remains immune from such prejudice-creating scrutiny? If so, what kind of hearing is the indigent defendant entitled to insure accurate disclosure? As the dissent in *Baldasar* questions, may uncounseled misdemeanor convictions be used to impeach a defendant's testimony, or may they be considered by a judge in imposing a sentence?<sup>132</sup>

*Baldasar* also raises important issues concerning the student defender. Under *Baldasar*, it is still not clear whether representation of an indigent defendant by a student defender in a case resulting in conviction renders that defendant subject to an increased jail sentence upon conviction of a second offense under a state enhancement statute. Such answers are important not only to judges and those who administer the criminal justice system, but to the student defenders themselves who, at a minimum, should be able to advise their indigent clients of the effect of student representation on the client's potential exposure to a jail term.

### E. *Effective Assistance of Counsel*

Standards relating to the right to appointment of counsel under the sixth amendment have, in large part, evolved separately from the stan-

<sup>129</sup> 407 U.S. at 42.

<sup>130</sup> See note 107 *supra* and accompanying text.

<sup>131</sup> See note 104 *supra*.

<sup>132</sup> 446 U.S. at 232.



dards for determining effective assistance of counsel.<sup>133</sup> The right to counsel has been defined as a right to *effective* assistance of counsel,<sup>134</sup> but clear cut standards for determining what is effective counsel have not been determined.<sup>135</sup> Most courts which have considered the question have declined to presume prejudice even where some ineffectiveness of counsel has been shown.<sup>136</sup> Thus, the issue has now become focused on who has the burden of showing prejudice, and the quantum of prejudice required for reversal.<sup>137</sup>

The issue of ineffective assistance of counsel is important to the stu-

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<sup>133</sup> In 1974 one critic envisioned a new sixth amendment frontier:

Just as the cutting edge of the law of criminal procedure has been the extension and exposition of the right to counsel, the substance of that right will provide tomorrow's forward thrust. Increasingly, in sixth amendment litigation, the courts will have to define the right to *effective* counsel, not the sweep of the *right* to counsel.

Lee, *Right to Effective Counsel: A Judicial Heuristic*, 2 AM. J. CRIM. L. 277, 277-278 (1974) (footnotes omitted) (emphasis added).

Another commentator has noted that the history of the evolution of effective assistance standards are "of comparatively recent vintage." Note, *Incompetency of Counsel*, 25 BAYLOR L. REV. 299, 299 (1973). The use of the term "effective" in describing counsel can be traced to Justice Sutherland's opinion in *Powell v. Alabama*, 287 U.S. 45, 71 (1932). See note 57 *supra*. There are numerous comprehensive histories of the evolution of standards for effective counsel. See generally *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); *Gard, Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483 (1976); *Strazzella, Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977); *Schwarzer, Dealing with Incompetent Counsel—The Trial Judge's Role*, 93 HARV. L. REV. 633 (1980); Note, *Effective Assistance of Counsel: A Constitutional Right in Transition*, 10 VAL. L. REV. 509 (1976); Comment, *Assuring the Right to An Adequately Prepared Defense*, 65 J. CRIM. L. & CRIMINOLOGY 302 (1974); Comment, *Current Standards for Determining Ineffective Assistance: Still a Sham, Farce or Mockery*, 1979 S. ILL. U.L.J. 132; Comment, *Defects in Ineffective Assistance Standards Used by State Courts*, 50 U. COLO. L. REV. 389 (1979).

<sup>134</sup> *Powell v. Alabama*, 287 U.S. 45, 71 (1932); *United States v. Woods*, 487 F.2d 1218, 1219 (5th Cir. 1973).

<sup>135</sup> KRANTZ, *supra* note 4, at 170.

<sup>136</sup> See, e.g., *United States v. Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973); *but see*, e.g., *Glasser v. United States*, 315 U.S. 60 (1942) (prejudice presumed where attorney had conflict of interest).

<sup>137</sup> *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973) (once defendant shows ineffective assistance, the burden of showing lack of prejudice shifts to the state); *Coles v. Peyton*, 389 F.2d 224 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968) (burden on state to establish lack of prejudice resulting from ineffective representation). Cf. *Chapman v. California*, 386 U.S. 18 (1967) (court must declare a belief that a constitutional error is harmless beyond a reasonable doubt); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970) (late appointment of counsel raises presumption of prejudice).

dent practitioner since the student has an interest in insuring that his representation not only meets the sixth amendment requirements of proper appointment of counsel, but also meets the additional sixth and fourteenth amendment requirements of effective assistance. If a student defender's compliance with the latter can be attached solely on the basis of the student's status as an unlicensed practitioner, his position will always be tenuous.

At present there are probably as many standards for determining effective assistance of counsel as there are courts grappling with the issue. The old "sham" and "mockery of justice" standard appears to be yielding to the pressure of scholarly and judicial criticism.<sup>139</sup> Under that standard, relief from conviction based on incompetence of counsel could be granted only when the trial was a farce, a mockery of justice, was shocking to the conscience, or when the lawyer's representation was in bad faith, a sham, or a pretense.<sup>140</sup> Based on the due process clause of the fifth and fourteenth amendments, rather than the more stringent requirements of the sixth amendment, this standard probably deserves the criticism of Judge Bazelon that it "requires such a minimum level of performance from counsel that [it] is itself a mockery of the sixth amendment."<sup>141</sup> Certainly a student practitioner could have

<sup>138</sup> See, e.g., *Dyer v. Crisp*, 613 F.2d 275 (10th Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 100 S. Ct. 1342 (1980); *United States v. Dolan*, 570 F.2d 1177 (3d Cir. 1978); *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976); *United States v. Twomey*, 510 F.2d 634 (7th Cir. 1975); *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970); *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967); *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957); *People v. Pope*, 23 Cal.3d 412, 152 Cal. Rptr. 732, 590 P.2d 859 (1979); *Lower v. People*, 100 Cal. App. 3d 144, 161 Cal. Rptr. 24 (1980); *People v. Bliss*, 44 Ill. 2d 363, 255 N.E.2d 405 (1970); *People v. Nelson*, 42 Ill. 2d 172, 246 N.E.2d 244 (1969); *People v. Gonzales*, 40 Ill. 2d 233, 239 N.E.2d 783 (1968); *People v. Haywood*, 79 Ill. App. 3d 303, 398 N.E.2d 179 (1976); *Joos v. Auto-Owners Ins. Co.*, 94 Mich. App. 419, 288 N.W.2d 443 (1980); *People v. O'Guin*, 26 Mich. App. 419, 288 N.W.2d 443 (1970); *Trimble v. State*, 593 S.W.2d 542 (Mo. 1980); *Burroughs v. State*, 590 S.W.2d 695 (Mo. App. 1979); *Sturrock v. State*, 95 Nev. 938, 604 P.2d 341 (1979). See generally *Finer*, *supra* note 133; *Stone*, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Charging Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427 (1975); *Comment*, *Defects in Effective Assistance Standards Used by State Courts*, 50 U. COLO. L. REV. 389 (1979).

<sup>139</sup> See generally note 133 *supra* and accompanying text; *Comment*, *Criminal Law—Constitutional Requirement of Effective Counsel for a Criminal Defendant if Judged by the Standard of "Reasonably Effective Assistance" and not "Farce-Mockery"*, 6 TEX. TECH. L. REV. 1115 (1975).

<sup>140</sup> See, e.g., *United States v. Mancusi*, 429 F.2d 104 (2d Cir. 1970), cert. denied, 402 U.S. 909 (1971); *Diggs v. Welch*, 148 F.2d 667 (D.C. Cir.), cert. denied, 325 U.S. 889 (1945).

<sup>141</sup> Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 28 (1973). Judge Bazelon refers to his own court which has adopted what appears to be a more stringent standard:

A defendant is required to show that counsel's "gross incompetence

little satisfaction in knowing that his performance met constitutional requirements because it was a little better than a "farce." Although many courts retain the "sham and farce" standards<sup>142</sup> or a variation of it, the trend is clearly towards more stringent requirements for effective assistance of counsel. For example, some courts, while retaining the semantics of the "sham" test, have nevertheless required a showing that there was no "denial of fundamental fairness;"<sup>143</sup> other variations include "flagrant shortcomings"<sup>144</sup> or "so lacking in competence that it becomes the duty of the court or the prosecution to observe it and correct it."<sup>145</sup> Still other variations include "travesty" or "gross incompetence"<sup>146</sup> as the applicable standards.

A modern trend towards a standard of "reasonably competent assistance of an attorney" appears to be highlighted by the case of *United States v. Decoster*.<sup>147</sup> Variations of this test include "reasonable skill and diligence,"<sup>148</sup> and "genuine and effective representation."<sup>149</sup> The United States Supreme Court in *McMann v. Richardson*,<sup>150</sup> while referring to a standard "range of competence demanded of attorneys"<sup>151</sup> did not attempt to define the term, but rather relegated that matter to the "good sense and discretion of the trial courts with the admonition that if the right to counsel . . . is to serve its purpose, defendants cannot be left to the services of incompetent counsel."<sup>152</sup> The Court's reference to

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blotted out the essence of a substantial defense". This test permits the court to concentrate on a single defense rather than the entire trial. But, like "mockery of justice," "gross incompetence" is too vague a concept to provide courts and lawyers with any notice of what "effective assistance" requires. The vagueness and cryptic application of our standard rob it of any prophylactic effect.

*Id.* at 29.

<sup>142</sup> See, e.g., *McMillan v. New Jersey*, 408 F.2d 1375 (3d Cir. 1969); *United States v. Wilkins*, 351 F.2d 892 (2d Cir.), cert. denied, 383 U.S. 916, rehearing denied, 383 U.S. 963 (1965); *Davis v. Bomar*, 344 F.2d 84 (6th Cir.), cert. denied, 382 U.S. 883 (1965); *Davis v. State*, 253 Ark. 484, 486 S.W.2d 904 (1972).

<sup>143</sup> E.g., *People v. White*, 182 Colo. 417, 423, 514 P.2d 69, 73 (1973).

<sup>144</sup> E.g., *People v. Rice*, 37 Colo. App. 346, 348, 551 P.2d 1081, 1083 (1976).

<sup>145</sup> E.g., *Williams v. Beto*, 354 F.2d 698, 704 (5th Cir. 1966).

<sup>146</sup> E.g., *Bruce v. United States*, 379 F.2d 113, 116 (D.C. Cir. 1967).

<sup>147</sup> 487 F.2d 1197 (D.C. Cir. 1973).

<sup>148</sup> E.g., *People v. Geiger*, 10 Mich. App. 339, 159 N.W.2d 383 (1968).

<sup>149</sup> *Isijola v. State*, 340 A.2d 844 (Del. 1975).

<sup>150</sup> 397 U.S. 759 (1970).

<sup>151</sup> *Id.* at 771.

<sup>152</sup> *Id.* The lack of any definition of ineffectiveness from the Supreme Court has been noted by Judge Bazelon. "The Supreme Court has never directly confronted the issue of ineffectiveness. This may be because the Court is still developing the law on the threshold question—when and where the right to counsel exists. . . . Hopefully the Court will not delay much longer in addressing

"gross errors" and "serious dereliction" has been adopted by some lower courts.<sup>153</sup> Other courts have incorporated,<sup>154</sup> at least in part, the proposed American Bar Association standards for defense counsel which include specific steps an attorney must take to insure effective assistance.<sup>155</sup>

The traditional view has been that actual prejudice must be shown before a conviction can be voided on the basis of ineffective assistance of counsel.<sup>156</sup> Although this requirement has been relaxed in certain situations,<sup>157</sup> the "harmless error" doctrine<sup>158</sup> has been consistently applied. One formulation has required the defendant to show lack of effective assistance of counsel, but shifted the burden of showing lack of prejudice to the prosecution.<sup>159</sup> Other courts have placed the burden of showing prejudice on the defendant.<sup>160</sup>

The issue of the constitutional requirements of effective assistance of counsel may arise in a variety of situations in the context of student representation. At least one lower court has asked whether a student supervisor who merely sits in the back of a courtroom and observes

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the question of what effectiveness means." Bazelon, *supra* note 141, at 21-22. See also KRANTZ, *supra* note 4: "The Supreme Court should define the minimum standards required to comply with the Sixth Amendment right to effective assistance of counsel." *Id.* at 175.

<sup>153</sup> See, e.g., *Marzullo v. Maryland*, 561 F.2d 540 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *Commonwealth v. Marsh*, 440 Pa. 590, 593, 271 A.2d 481, 483 (1970).

<sup>154</sup> See *Coles v. Peyton*, 389 F.2d 224, 226 (4th Cir.), *cert. denied*, 393 U.S. 849 (1968); *State v. Harper*, 57 Wis.2d 543, 205 N.W.2d 1 (1973).

<sup>155</sup> See ABA PROJECT ON STANDARDS FOR CRIM. JUST., STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *The Defense Function* (1974). "As soon as practicable, the lawyer should seek to determine all relevant facts known to the accused. . . ." *Id.* § 3.2(a); "The lawyer should inform the accused of his rights forthwith and take all necessary action to vindicate such rights. . . ." *Id.* § 3.6; "It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case. . . ." *Id.* § 4.1; "[T]he lawyer should advise the accused . . . concerning all aspects of the case. . . ." *Id.* § 5.1(a); "[T]he lawyer for the accused should explore the possibility of an early diversion of the case from the criminal process. . . ." *Id.* § 6.1(a); "After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and the defendant's right of appeal." *Id.* § 8.2(a).

<sup>156</sup> See, e.g., *United States v. Twomey*, 510 F.2d 634 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973).

<sup>157</sup> See, e.g., *Glasser v. United States*, 315 U.S. 60 (1942).

<sup>158</sup> See, e.g., *Chapman v. California*, 386 U.S. 18 (1967); but see *Beasley v. United States*, 491 F.2d 687, 696 (6th Cir. 1974) (harmless error tests do not apply in regard to the deprivation of a procedural right so fundamental as the effective assistance of counsel).

<sup>159</sup> See, e.g., *Chapman v. California*, 386 U.S. 18 (1967).

<sup>160</sup> See, e.g., *Cooper v. Fitzharris*, 586 F.2d 1325 (9th Cir. 1978).

the performance of a student in trial meets the constitutional requirements of "'zealous and active counsel' and [for] representation in a 'substantial sense' not merely 'pro forma'.'"<sup>161</sup>

Raising this question crystallizes the problem. If sixth amendment compliance of student representation is to rest upon the law license of the supervisor, and if the supervisor takes only a passive role while letting the student conduct the trial, does this arrangement meet the *overall* requirement of effective assistance? At least one state court, although subsequently overruled, has answered this question affirmatively.<sup>162</sup>

Determining the student's status becomes even more important when determining whether student representation in and of itself meets the requirements of the sixth amendment. If student representation does meet those requirements, must the legality and propriety of such representation depend on 1) the credentials of the supervisor, 2) a defendant's waiver of sixth amendment rights, or 3) the fact that a client possesses no sixth amendment rights in the case in question?

#### IV. STUDENT PRACTICE AND THE SIXTH AMENDMENT

##### A. *Generally*

The question of whether student practice complies with sixth amendment requirements has been raised in very few cases.<sup>163</sup> In even fewer cases has that specific question been resolved.

In *State v. Daniels*,<sup>164</sup> the defendant was represented by two law students who were supervised by a licensed attorney. The defendant consented in writing to this representation. Shortly before the trial, a new supervisor was substituted for the original supervisor, but no new consent form was signed by either the defendant or the new supervisor. On appeal, the defendant claimed that there was a violation of Louisiana Supreme Court Rule XX, which required written consent by both a client and a supervisor as a prerequisite to student representation.<sup>165</sup> The defendant also claimed that the student representation constituted ineffective assistance of counsel.<sup>166</sup> The Court found that defendant's oral consent on the record was sufficient to meet the requirements of Rule XX, but refused to consider the claim that student

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<sup>161</sup> *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 34, 42 (1978), *rev'd*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979).

<sup>162</sup> *Id.*

<sup>163</sup> See notes 175-93 *infra* and accompanying text.

<sup>164</sup> 346 So.2d 672 (La. 1977).

<sup>165</sup> *Id.* at 674. See LA. SUP. CR. R. xx.

<sup>166</sup> 346 So.2d at 676.

representation was ineffective assistance since the issue of ineffective assistance was not raised at trial.<sup>167</sup>

In *People v. Masonis*<sup>168</sup> the defendant, represented by student counsel, was convicted of driving while intoxicated and sentenced to thirty days in jail or a one hundred dollar fine. The trial court failed to advise the defendant that he was represented by student counsel. The appellate court held that the student's introduction of himself as a student at the trial was sufficient to comply with the local student practice rule and that defendant's representation was not in violation of effective assistance of counsel standards.<sup>169</sup>

In *State v. Cook*,<sup>170</sup> the defendant was prosecuted by a student legal intern. The defendant argued that such prosecution by a student was illegal under a statute that required deputy prosecutors to be "admitted as an attorney . . . of the courts of this state."<sup>171</sup> Under a state statute which authorized the prosecuting attorney to "employ . . . other necessary employees,"<sup>172</sup> the court found that the representation was adequate since the student had otherwise complied with the local student practice rule. The court also noted that there was no showing of prejudice to the defendant.<sup>173</sup> A New York court rejected this approach and denied, without explanation, permission for third year law students from a university legal aid clinic to represent persons "accused of a crime."<sup>174</sup>

In *People v. Perez*,<sup>175</sup> the question of the sixth amendment qualifications of a student attorney was directly addressed. The California Court of Appeals for the Fourth District found that the mere presence of a supervising attorney at a felony jury trial in which the defendant's defense was conducted by a student "did not amount to representa-

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<sup>167</sup> *Id.*

<sup>168</sup> 58 Mich. App. 615, 228 N.W.2d 489 (1975). The Supreme Court of California in *People v. Perez*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176, cites this case for the proposition that the state "held that the participation of a supervised law student did not violate the defendant's right to assistance of counsel." *Id.* at 139, 594 P.2d at 4, 155 Cal. Rptr. at 179.

<sup>169</sup> 58 Mich. App. at 618, 228 N.W.2d at 491.

<sup>170</sup> 84 Wash. 2d 342, 525 P.2d 761 (1974).

<sup>171</sup> WASH. REV. CODE § 36.27.010 (1974).

<sup>172</sup> *Id.* § 36.61.070.

<sup>173</sup> 84 Wash. 2d at 349, 525 P.2d at 767.

<sup>174</sup> *In re Application of Cornell Legal Aid Clinic*, 26 A.D.2d 790, 790, 273 N.Y.S. 2d 444, 446 (1966) ("Application insofar as it requests approval of representation by law students of indigent persons at hearings in post-conviction proceedings and on appeals in criminal actions and habeas corpus proceedings, and of indigent mental patients at commitment and sanity hearings denied.").

<sup>175</sup> 147 Cal. Rptr. 34 (1978), *rev'd*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979).

tion . . . within the constitutional concept of representation by counsel."<sup>176</sup> The background facts and extent of supervision were characterized by the appellate court as follows:

On the first day of trial, Perez appeared with Edward Zinter, his appointed counsel (deputy public defender) and Jack Loo, a certified law student. Mr. Zinter identified himself and told the court he was appearing on behalf of defendant. At that time a form was filed, signed by Perez consenting to representation by Mr. Loo. Mr. Loo was identified therein as a law student under the supervision of Mr. Zinter. The conduct of Perez's defense was carried on wholly by Mr. Loo. He examined and cross-examined witnesses, made objection and motions, made argument to the jury. Mr. Zinter, however, was present throughout the entire three-day trial. He uttered a total of 36 words. The record does not reflect the nature or the extent of any private conversations between Mr. Loo and Mr. Zinter in the course of the trial. From this record, we conclude Mr. Zinter's interest in the trial was not of a "continuing and substantial nature."<sup>177</sup>

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<sup>176</sup> 147 Cal. Rptr. at 43. The California Court of Appeals did take note of Justice Brennan's *Argersinger* opinion that "law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of poor in many areas *including cases reached by today's decision*." 407 U.S. at 41 (emphasis added by the California Court of Appeals, 147 Cal. Rptr. at 39). The Court used this quote to support its contention that there is nothing in *Argersinger*, which was a misdemeanor case, sanctioning student representation of a defendant charged with a felony. The court of appeals cautioned against the "dangers inherent in the practice of law by a student." *Id.*, 147 Cal. Rptr. at 42.

[A]ny law student . . . is apt to overlook relevant facts, to base his opinion of the law on a century-old case in a minority jurisdiction, to be unaware of statutory or administrative regulation which has supplanted the common law, and to fail to recognize the available defenses. Because the law is, in fact, a "seamless web", it is impossible to give competent advice in one area without a partial understanding of all the law.

*Id.* quoting Johnson, *Unauthorized Practice by Law Students: Some Legal Advice About Legal Advice*, 36 TEX. L. REV. 346, 348 (1958).

The court further observed:

An experienced trial judge can only watch with horror as a neophyte destroys his own case by inept questioning. The immediate presence of the experienced lawyer cannot undo the harm done by a single disastrous question. He cannot unring the bell; he cannot rehabilitate the effect of clumsy or disastrous handling of a difficult witness. There may be but one moment of time in the course of a trial when the right act, word or decision can be made and the case won. A reasonable doubt may be created. If that moment of opportunity passes, no amount of post-verdict advice to or critique of the law student's performance will give solace to a defendant in prison.

147 Cal. Rptr. at 42.

<sup>177</sup> *Id.* at 36-37.

Although the defendant had not contended that his representation was incompetent, the court found the defendant's representation to be deficient under sixth amendment standards rendering defendant's conviction reversible *per se* despite what would otherwise be considered "overwhelming evidence of guilt of the defendant."<sup>178</sup>

The reversal of the trial court's conviction was based upon the following points: 1) the defendant was not represented by "licensed" counsel since the supervisor's passive role at the trial was merely "*pro forma*";<sup>179</sup> 2) the student was engaging in the unauthorized practice of law since the rule under which the student was practicing had never been approved by the State Supreme Court;<sup>180</sup> 3) the defendant's written waiver of counsel and consent to student representation was invalid because it was not knowingly and understandably made;<sup>181</sup> and 4) an unlicensed student does not meet the sixth amendment requirement of assistance of "adequate" counsel because the student's "moral standards . . . are largely unknown,"<sup>182</sup> and because the student lacks training and experience.

The California Supreme Court reversed the appellate court and reinstated the conviction holding that the defendant was properly represented by a student under the supervision of a licensed attorney as authorized by State Bar rules.<sup>183</sup> The court found the question of

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<sup>178</sup> *Id.* at 43.

<sup>179</sup> *Id.* at 37.

<sup>180</sup> *Id.* at 38-39.

<sup>181</sup> *Id.* at 41.

<sup>182</sup> *Id.* at 42-43. The court also observed:

[I]n evaluating whether representation by a law student with a licensed attorney in silent presence is the functional equivalent of assistance of counsel, another factor should be considered. The admission to practice law in California depends upon moral fitness as well as demonstrated knowledge of the law. The State Bar not only scrutinizes the moral reputation of applicants, but also requires that they take and pass a Professional Responsibility Examination in which they must demonstrate an understanding of and ability to apply the ethical standards of the profession. . . . By contrast the certified law student's moral standards and working knowledge of professional ethics are largely unknown.

*Id.*

<sup>183</sup> 24 Cal.3d 133, 139-42, 594 P.2d 1, 4-7, 155 Cal. Rptr. 176, 180-82 (1979).

The State Bar Rules here rest on the premise that although only a member of the bar is competent to undertake to represent a defendant without supervision, an advanced law student is competent to do so if he received immediate supervision from experienced counsel. If such Rules in fact serve to provide defendants with competent defense, we find no abridgment of constitutional protections. . . . A doctrinaire adherence to the fiction that admission to the bar, and that alone, confers competence to appear on behalf of a criminal defendant would seriously impede pro-



whether the student was engaged in the unauthorized practice of law to be irrelevant, since, unlike cases in which a defendant is represented by an impostor, the student's conduct gave rise to no moral irresponsibility and caused no actual prejudice to the defendant.<sup>184</sup> Additionally, waiver of counsel necessary to meet sixth amendment requirements was not required since the student's representation under supervision of a licensed attorney constituted representation of the type contemplated by the sixth amendment. In any event, the written waiver signed by defendant did meet the waiver requirements of the California student practice rule.<sup>185</sup> Finally, the court held that the student's representation must be judged by the same standards applicable to representation in cases not involving students and since there was no allegation that the student's representation was incompetent, the student's representation met the sixth amendment standards for effective assistance.<sup>186</sup>

Justice Moore, in a vigorous dissent, argued that the majority had inaccurately phrased the question and that, in fact, the issue was whether the sixth amendment was impaired "when attorneys are assisted by law students," *not* "when it is the law student who is assisted by the attorney."<sup>187</sup> Justice Moore shared the court of appeals'

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gress toward the objective of providing defendants with counsel who are able in fact to provide a reasonably competent defense. The realities of the matter thus compel the conclusion that a defendant such as the one before us today who has received reasonably competent representation pursuant to a program replete with safeguards designed to ensure the competency of representation has not been denied his constitutional right to assistance of counsel merely because one of the two persons who appeared on his behalf was not yet a member of the bar.

*Id.*, 594 P.2d at 4-7, 155 Cal. Rptr. at 180-82.

<sup>184</sup> *Id.* at 142-43, 594 P.2d at 7, 155 Cal. Rptr. at 182.

<sup>185</sup> The State Bar Rules themselves should, of course, be read to require that any consent be knowingly and intelligently executed. But since constitutional rights are not at stake, the presumption that "official duty has been regularly performed" [CAL. EVID. CODE § 664] should be sufficient to place on defendant the burden of showing the invalidity of the consent. Defendant has not attempted to carry that burden; in fact, he has never expressly claimed that his consent was unknowing or unintelligent, and never described the circumstances under which he executed the consent.

24 Cal. 3d at 144, 594 P.2d at 8, 155 Cal. Rptr. at 183.

<sup>186</sup> *Id.* at 145, 594 P.2d at 9, 155 Cal. Rptr. at 183. "[A]ny challenge to the effectiveness of the representation afforded defendant by the supervising attorney and certified law student must be judged by the same standards as those governing cases which do not involve certified students; here defendant makes no claim that his representation was inadequate by those standards." *Id.*, 594 P.2d at 9, 155 Cal. Rptr. at 183.

<sup>187</sup> *Id.* at 145-46, 594 P.2d at 9, 155 Cal. Rptr. at 184.

concern over "the dangers inherent in the practice of law by a student," and concluded, without reservation, that "a competent law student is not the constitutional equivalent of a competent counsel."<sup>189</sup>

The court's holding with regard to waiver rests on its conclusion

<sup>188</sup> *Id.* at 150-51, 594 P.2d at 12, 155 Cal. Rptr. at 187.

<sup>189</sup> *Id.* at 147-48, 594 P.2d at 10, 155 Cal. Rptr. at 185. Justice Moore stated, however, that he was:

[N]ot unsympathetic to law school clinical programs. They are a useful adjunct to the classroom and are likely to produce more able and resourceful practitioners in the future. *But there are pragmatic limits to the professional services that students should be permitted to undertake. A felony trial transcends those limits.* . . . However desirable practical experience may be to the law student, protection of a defendant's fundamental right to competent counsel prevents approval of a scheme to move the moot court program into the felony courtroom.

*Id.* at 152, 594 P.2d at 13, 155 Cal. Rptr. at 188 (emphasis added).

A student critic has echoed Justice Moore's sentiments that the student attorney in *Perez* exceeded the pragmatic limits of student representation. This critic's argument seems to rest on two propositions: 1) that "assistance of counsel" has been interpreted by all federal courts and most state courts to mean "representation by a duly licensed attorney, admitted to the bar of the jurisdiction in which he practices," and 2) that representation by counsel is sufficient only if the participation of counsel is, unlike the student in *Perez*, of a "controlling" or a "continuing substantial" nature. Note, *People v. Perez—Constitutional Implications of Law Student Representation of Indigent Criminal Defendants*, 13 J. MAR. L. REV. 461 (1980).

The cases cited in support of the first proposition, however, are not applicable to a situation where a student has in fact been authorized to practice within certain limits. For example, in *Turnee v. American Bar Ass'n.*, 407 F. Supp. 451 (N.D. Tex. 1975), a case cited by the critic, the plaintiffs claimed a constitutional right to have unlicensed lay counsel assist them in court proceedings. The court, after surveying in detail the history of the term "counsel," merely concluded that "this court has found no case which has interpreted this statute so as to allow an unlicensed layman to represent a party other than himself in a civil or criminal proceeding." *Id.* at 475. Likewise, in *United States v. Afflerback*, 547 F.2d 522 (10th Cir.), *cert. denied*, 429 U.S. 1098 (1977), also cited by the critic, the court merely denied an accused tax evader the right to be represented by an unlicensed lay person. *People v. Agnew*, 114 Cal.2d 841, 250 P.2d 369 (1952), held that representation by the layman husband of the defendant, who was not permitted to give legal advice, did not provide legal assistance to which she was entitled. None of these cases appears analogous to a case in which a student, pursuant to a special rule or limited license, represents a client within the limits of the rule or license.

The cases cited in support of the critic's second proposition are also inapplicable, as they merely stand for the proposition that where both a lawyer and a lay person appear with a defendant, the lawyer and not the lay person must "control" the representation. See, e.g., *People v. Cox*, 12 Ill.2d 265, 146 N.E.2d 19 (1957); *State v. Riggs*, 235 Ind. 499, 135 N.E.2d 247 (1956). In *Perez*, however, the student was not a mere lay person but a law student at least purportedly authorized to practice law by a bar rule. Both propositions relied upon by the critic were considered and rejected by the California Supreme Court.

that competent student representation, under supervision and in compliance with a student practice rule, constitutes compliance with all sixth amendment standards. A critical link in the court's analysis is its rejection of the court of appeals' implication that representation by any person not a member of the bar compels reversal of the judgment.<sup>190</sup> One critic of the court of appeals' decision has observed that "the question is not who was counsel, but what did counsel do?"<sup>191</sup> This is exactly the question which was asked and answered by the *Perez* majority: "[The] defendant in fact received competent representation. Thus, even if . . . [the student's] conduct might be considered the unauthorized practice of law—an issue we do not decide today—defendant incurred not the slightest prejudice as a consequence."<sup>192</sup>

The *Perez* majority has already been followed in at least one case in which a student represented a defendant. In *People v. Nelson*,<sup>193</sup> a

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<sup>190</sup> 24 Cal. 3d at 146, 594 P.2d at 9, 155 Cal. Rptr. at 184.

<sup>191</sup> Note, *People v. Perez—Misapplication of the Right to Counsel*, 6 PEPPERDINE L. REV. 545, 565 (1979).

<sup>192</sup> 24 Cal. 3d at 142-43, 594 P.2d at 7, 155 Cal. Rptr. at 182.

<sup>193</sup> 94 Cal. App. 3d 42, 156 Cal. Rptr. 244 (1979).

At a pretrial suppression hearing defendant was represented by a deputy public defender assisted by a law student certified under the State Bar Rules Governing The Practical Training Of Law Students. Before the hearing, defendant executed a document denominated "CONSENT TO REPRESENTATION." Therein he gave his permission that the certified law student "represent me at my Motion to Suppress" with the understanding that the student "will be supervised by an attorney licensed to practice." At commencement of the hearing, in response to trial court inquiries, defendant acknowledged that he understood he was being attended by a student who was not a licensed attorney; defendant stated he "freely and voluntarily" consented to participation of the law student in the hearing. At the suppression hearing the student examined the witnesses under the direct supervision of a deputy public defender with whom he consulted from time to time. The student's cross-examination of the People's sole witness was vigorous and reflected a high degree of preparation: his examination of defendant's witnesses successfully brought out factual conflicts helpful to defendant's case.

Defendant contends participation by the law student in his suppression hearing abridged his constitutionally guaranteed right to counsel, a right which, defendant claims, he did not waive.

The public defender was appointed to represent defendant at his arraignment in superior court. That appointment remained in effect throughout all further proceedings in the trial court. Although at the suppression hearing the public defender's exertions in defendant's behalf were largely conducted through the certified law student, such participation by a certified law student does not as a matter of law impair defendant's right to effective assistance of counsel. Defendant was in fact at all times represented by counsel, the public defender, and thus a waiver of his right to assistance of counsel was not required as a condi-

California appellate court held that the participation by a certified student at a defendant's suppression hearing did not impair the defendant's sixth amendment rights.

In most states, the student practitioner will not be faced with the *Perez* complication of a student practice rule which has not been approved by the state's highest judicial body. Under the *Perez* rationale, a properly promulgated student practice rule would certainly meet any authorized counsel requirements under the sixth amendment.<sup>194</sup> The only remaining inquiry would concern the student's competence at trial and whether any prejudice to the defendant resulted due to incompetence. Of course, this is the same inquiry that would be conducted in *any* case raising the issue of effective assistance of counsel.

The above discussion suggests three types of cases in which student representation would be proper: 1) cases in which no sixth amendment right to counsel attaches, 2) cases in which the right to counsel attaches, but where a constitutionally valid waiver of counsel has taken place, and 3) cases in which the right to counsel attaches and where the nature of the student representation is such that it satisfies the sixth amendment requirements. Each of these types of cases will be considered separately.

#### B. *Student Representation Where No Right to Counsel Exists*

At first blush, the student practitioner would appear to be on the safest ground when representing a client who has no right to counsel. Unfortunately, the matter is not so simple. As already discussed, *Scott* and *Baldasar* have muddled the waters to the point where it is not always possible for the student to determine ahead of time whether or not a client has a right to counsel.<sup>195</sup>

For example, consider the following: an indigent defendant is charged with a second drunken driving offense in a jurisdiction in which the penalty imposed by judges for such an offense sometimes, but not always, includes a jail term. The trial judge is not sure whether the "likelihood" of jail is high enough to merit invading the funds set aside for compensating appointed counsel. To avoid having to make Justice Burger's "predictive analysis" of whether a right to counsel exists,<sup>196</sup> the trial judge appoints a willing and able student counsel without cost to

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tion of the certified law student's participation in the suppression hearing.

*Id.* at 48, 156 Cal. Rptr. at 250 (citations omitted).

<sup>194</sup> 24 Cal. App. 3d at 142-43, 594 P.2d at 6-7, 155 Cal. Rptr. 181-82.

<sup>195</sup> See notes 112-32 *supra* and accompanying text.

<sup>196</sup> See *Argersinger v. Hamlin*, 407 U.S. 25, 42 (1972). See also notes 129-32 *supra* and accompanying text.

the court or to the defendant.<sup>197</sup> This enables the judge to hedge his bets, leave the court funds intact, and avoid a situation in which he makes a "wrong" prediction. Is the student now representing a client who has no right to counsel? Or is the student now representing a client with a sixth amendment right to counsel? Presumably the student will soon find out. If his client is sent to jail, the student may assume that his representation has been deemed in compliance with the sixth amendment. If the client is not given a jail term, the student can only assume that *either* his representation was deemed gratuitous, in the sense that it was rendered to a client who had no right to appointed counsel, *or* that the judge decided not to give a jail sentence in any event.

In cases in which no jail term is authorized, it does appear that a student practicing in compliance with a properly promulgated student practice rule would not have any sixth amendment concerns, except in the matter of effective assistance. Once a student assumes responsibility for representation of a client, the student and his supervisor will be held to the same standards of effective assistance as any other licensed attorney, regardless of whether the client has a right to appointed counsel.<sup>198</sup>

### C. *Student Representation Pursuant to Waiver of Right to Sixth Amendment Counsel*

A student practitioner may be faced with a situation in which it is not clear whether a right to appointed counsel attaches. In addition, the applicable student practice rule may require a written waiver by a client as a prerequisite to student representation.<sup>199</sup> In such a situation,

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<sup>197</sup> The cost of appointing counsel might not be the only reason a judge may decline making an appointment in marginal cases. According to Judge Bazelon, the judicial system provides incentives for waiver of counsel entirely. Judge Bazelon cites a Massachusetts study showing that "defendants who waive counsel generally get lower sentences than those who do not." S. BING & S. ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON* (1970). Assuming that most law students will be eager and enthusiastic in their representation, attempting to leave no stone unturned, the system also provides judges with an incentive for avoiding student representation. As Judge Bazelon observed, "consciously or not, many judges are looking for, as the labor cases put it, a 'sweetheart' lawyer. They just do not want lawyers to present a lot of motions or to put a lengthy trial." Bazelon, *supra* note 141, at 15 (emphasis added).

<sup>198</sup> See, e.g., *People v. Perez*, 24 Cal. 3d 133, 142-43, 594 P.2d 1, 7, 155 Cal. Rptr. 176, 182 (1979) (the student's representation is judged by the same standards as licensed attorneys).

<sup>199</sup> See, e.g., ABA MODEL STUDENT PRAC. R. II. B. and II. C:

(B) An eligible law student may also appear in any criminal matter on behalf of the State with the written approval of the prosecuting attorney and the supervising Lawyer. (C) In each case the written consent

a waiver must be judged by two different standards. Where the client is clearly entitled to appointed counsel under the sixth amendment, but there is a question as to whether student representation is of the type contemplated by the sixth amendment, any waiver of right to counsel which is used as a basis for student representation must meet the sixth amendment requirements for waiver. Where student representation is deemed to satisfy sixth amendment requirements, a waiver must only meet the requirements of the applicable student practice rule.<sup>200</sup>

Although waiver of counsel has long been recognized,<sup>201</sup> the courts indulge every reasonable presumption against waiver of fundamental rights<sup>202</sup> and do not presume acquiescence in the loss of fundamental rights.<sup>203</sup> In *Johnson v. Zerbst*,<sup>204</sup> the Supreme Court held that any waiver of the sixth amendment right to counsel must be an "intelligent waiver," and must "depend, in each case, upon the particular facts and circumstances surrounding the case, including the background, experience, and conduct of the accused."<sup>205</sup> The court also cautioned that "it would be fitting and appropriate for that determination to appear upon the record."<sup>206</sup>

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and approval referred to above shall be filed in the record of the case and shall be brought to the attention of the judge of the court or the presiding officer of the administrative tribunal.

This provision is typical of many state student procedure rules. See note 9 *supra*.

<sup>200</sup> See, e.g., *People v. Perez*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979).

Because defendant was at all times represented by both an actively participating supervising attorney and a certified law student, he did have representation of counsel. Accordingly, no waiver of his right to counsel was required by either [the] state or federal Constitution.

We are left only with the question whether the waiver complied with the Rules.

*Id.* at 144, 594 P.2d at 8, 155 Cal. Rptr. at 183.

But see Justice Mosk's dissenting opinion in *Perez*: "The majority opinion is an enigma on the issue of defendant Perez's consent to representation by the law student Loo. On the one hand the opinion declares that no waiver of right to counsel was required, and on the other hand it relies upon the written consent signed by Perez." 24 Cal.3d at 147, 594 P.2d at 10, 155 Cal. Rptr. at 185 (Mosk, J., dissenting).

<sup>201</sup> See, e.g., *Adams v. United States*, 317 U.S. 269, 279 (1942) ("An accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel.").

<sup>202</sup> See, e.g., *Brewer v. Williams*, 430 U.S. 387 (1977).

<sup>203</sup> See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969); *Carnley v. Cochran*, 369 U.S. 506 (1962).

<sup>204</sup> 304 U.S. 458 (1938).

<sup>205</sup> *Id.* at 464.

<sup>206</sup> *Id.* at 465. See also *Carnley v. Cochran*, 369 U.S. 506, 515 (1962).

It has since been held that the record "must show that the accused was offered counsel but intelligently and understandingly rejected the offer."<sup>207</sup> The record must further establish that the defendant, in waiving his right to counsel "knows what he is doing and his choice is made with eyes open."<sup>208</sup>

Three component parts of a valid waiver have been articulated: "[W]aivers of constitutional rights not only must be *voluntary*, but must be *knowing*, *intelligent* acts done with sufficient awareness of the relevant circumstances and likely consequences."<sup>209</sup> Thus, the waiver cannot be the result of threats or promises and cannot be the result of mental incompetence, insanity, or intoxication.<sup>210</sup> The Supreme Court has elaborated on the "knowing" requirement as follows:

To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter.<sup>211</sup>

The American Bar Association standards require that "an accused should not be deemed to have waived the assistance of counsel until the entire process of offering counsel has been completed and a thorough inquiry into the accused's comprehension of that offer and his capacity to make that choice intelligently and understandably has been made."<sup>212</sup>

In *Faretta v. California*,<sup>213</sup> the Supreme Court held that a state may not constitutionally force a lawyer upon a defendant who insists upon conducting his own defense. The court added that a defendant should first "be made aware of the dangers and disadvantages of self-representation."<sup>214</sup> Should this standard be made applicable to student representation based on waiver of right to sixth amendment counsel? So applied, such a waiver must be preceded by a statement to the defendant of the "dangers and disadvantages" of *student* representation.

<sup>207</sup> *Carnley v. Cochran*, 369 U.S. 506, 516 (1962).

<sup>208</sup> *Faretta v. California*, 422 U.S. 806, 835 (1975).

<sup>209</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970) (emphasis added).

<sup>210</sup> See, e.g., *Virgin Islands v. Niles*, 295 F. Supp. 266 (D.V.I. 1969); *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588 (1961). See also ABA PROJECT ON STANDARDS FOR CRIM. JUST., STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE, *General Principles* § 7.2 (1974) [hereinafter cited as ABA STANDARDS]: "No waiver should be found to have been made where it appears that the accused is unable to make an intelligent and understanding choice because of the mental condition, age, education, experience, the nature or complexity of other factors."

<sup>211</sup> *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948).

<sup>212</sup> ABA STANDARDS, *supra* note 210, *General Principles* § 7.2.

<sup>213</sup> 422 U.S. 806 (1975).

<sup>214</sup> *Id.* at 835.

In *Perez*, the defendant's written "waiver" was nothing more than a simple statement that "I . . . consent to allow . . . [the student] to represent me under . . . direct supervision."<sup>215</sup> The Court of Appeals recognized that such a waiver did not meet sixth amendment standards since the record did not reveal any of the circumstances surrounding the signing of the waiver which would show that the waiver was voluntary, knowing and intelligent.<sup>216</sup> In reversing the Court of Appeals, the California Supreme Court did not find it necessary to determine whether the *Perez* waiver met constitutional standards since it had already determined that the student representation in the case had complied with sixth amendment requirements.<sup>217</sup>

In addition to the guidelines already discussed for waiver of right to counsel, a waiver resulting in student representation of an indigent defendant should include an advisement and explanation of the advantages and disadvantages of *student representation*. For example, the advisement of advantages might include such factors as low caseload of the student and the time available to work on the client's case. Disadvantages should include the student's lack of experience and the possible consequences that might flow from such inexperience. The client should also be advised of the degree to which the moral qualifications of the student have been examined and the nature and extent of supervision of the student, if any, by a licensed practitioner. The advisement should further include a statement as to the effect that representation by a student would have on the client's exposure to a jail sentence. A signed consent form including these and other standard sixth amendment advisements should satisfy not only most student practice rules, but also the sixth amendment—provided, however, that the signed waiver is followed up by a court inquiry on the record to ensure that the consent form was signed intelligently and knowingly. Student counsel should take the initiative in insuring that the record reveals such a waiver.

<sup>215</sup> *People v. Perez*, 24 Cal. 3d 133, 144 n.12, 594 P.2d 1, 8 n.12, 155 Cal. Rptr. 176, 183 n.12 (1979). The full waiver form read:

I, Carlos Perez consent to allow Jack R. Loo, a California State Bar Certified Law Student, to represent me under the direct supervision of Edward Zinter, my court-appointed counsel, who will assume personal, professional, responsibility in the matter entitled *People of the State of California v. Carlos Perez*, court docket #20630, pending in the Superior Court of Imperial County, Department III.

This consent extends to all matters in and outside of court, these matters being those set out by the California State Bar as proper for such Certified Law Students to engage in a representative capacity pertaining to the practice of law.

Consented to and signed this 6th day of September, 1977.

*Id.*

<sup>216</sup> *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 34, 40-41 (1978).

<sup>217</sup> See note 198 *supra* and accompanying text.



A question arises as to whether a proper student representation waiver can be intelligently given. In cases within the purview of the sixth amendment, a defendant who is truly made to understand that he has a right to a more experienced member of the bar might often reject student counsel. In many cases, a student lawyer's best advice to the client might be to reject student counsel and insist upon a licensed attorney. In cases in which it is clear that a court will not authorize the expenditure of funds for appointed counsel, the student counsel's best advice to the defendant might be to reject student counsel to insure immunity from a jail sentence. In any case, it is clear that a requirement of a full inquiry on the record could drastically reduce the cases available for student representation. Nevertheless, a waiver including anything less than the advisements discussed presents a constitutional problem.

As the Supreme Court has noted, "no system of criminal justice can, or should survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness."<sup>218</sup>

In commenting upon a waiver form of the type now often used as a basis for student representation, one critic has observed:

First, it is argued that the indigent himself consents to student representation and thus he waives any right he might have to "more effective" counsel. This is hardly tenable. If an indigent is entitled to have the assistance of "more effective counsel," his consent to student representation is not a "waiver" of that right, under the rigorous conception of waiver operable in this area. The waiver form carefully refrains from indicating that the indigent has a different choice available, and the harried, troubled defendant cannot be compelled to read between the lines. Accordingly, I conclude that any argument based on the defendant's "consent" is a makeweight.<sup>219</sup>

Most waiver procedures now being used are considered sufficient under a state's student practice rule.<sup>220</sup> But such waivers, if they do not include the advisements already discussed, should not be considered as a satisfactory long-term solution to the sixth amendment problems of student representation.

## V. PRESENT LEGAL STATUS OF STUDENT REPRESENTATION OF INDIGENT DEFENDANTS

### A. *Unauthorized Practice*

Most state supreme courts have reserved plenary power over the admission and discipline of those seeking to practice in the courts of the

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<sup>218</sup> *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

<sup>219</sup> Monaghan, *supra* note 6, at 462.

<sup>220</sup> See note 190 *supra* and accompanying text.

state.<sup>221</sup> Some courts have held that the authority of the supreme court over the discipline of attorneys is exclusive and absolute<sup>222</sup> and does not depend upon statute.<sup>223</sup>

Problems with the unauthorized practice by student attorneys have arisen only where a statute or state bar rule purporting to regulate the practice of student attorneys has not been formally approved by the state supreme court.<sup>224</sup> For this reason, any student practice program or clinic should be sure to obtain the judicial approval of its state's highest judicial body, preferably by a promulgated rule.<sup>225</sup> Where such approval is obtained, no student practicing within the proscribed limits of that approval need be concerned with the problem of unauthorized practice.

Nevertheless, problems can still arise in the interpretation of those proscribed limits.<sup>226</sup> A student representing an indigent client without proper authority is not only risking sixth amendment problems, but may also be violating state law. As already discussed, the California Supreme Court, in reversing the Court of Appeals' *Perez* decision on other grounds, found it unnecessary to resolve the controversy as to whether the student's representation constituted the unauthorized practice of law.<sup>227</sup> It did note, however, that the student's representation gave rise to "no inference of professional or moral responsibility"<sup>228</sup> since the student "appeared on behalf of defendant in good faith, relying upon rules promulgated by the State Bar."<sup>229</sup> The court clearly distinguished between student representation based on State Bar rules and cases in which impostors or lay persons engaged in the practice of law.<sup>230</sup> The court distinguished several other cases on the grounds that "the person who represented the defendant acted without supervision from qualified counsel; moreover, those decisions rest on the fact that

<sup>221</sup> *Sullivan v. Alaska Bar Ass'n.*, 551 P.2d 531 (Alaska 1976); *Brotsky v. State Bar Ass'n.*, 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962); *In re Lavine*, 2 Cal. 2d 324, 41 P.2d 161 (1935); *Kentucky Bar Ass'n. v. Vincent*, 538 S.W.2d 39 (Ky. 1976); *In re Logan*, 70 N.J. 222, 358 A.2d 787 (1976); *Graham v. Washington State Bar Ass'n.*, 86 Wash. 2d 624, 548 P.2d 310 (1976).

<sup>222</sup> *See, e.g.*, *Graham v. Washington State Bar Ass'n.*, 86 Wash.2d 624, 548 P.2d 310 (1976).

<sup>223</sup> *See, e.g.*, *Kentucky Bar Ass'n v. Vincent*, 538 S.W.2d 39 (Ky. 1976).

<sup>224</sup> *See* notes 178-82 *supra* and accompanying text.

<sup>225</sup> After the Court of Appeals decision in *Perez*, the California State Bar petitioned for court approval of the State Bar Student Practice Rules. The California Supreme Court provisionally approved the rules before rendering its decision in *Perez*. *See People v. Perez*, 24 Cal. 3d 133, 142 n.11, 594 P.2d 1, 7 n.11, 155 Cal. Rptr. 176, 182 n.11 (1979).

<sup>226</sup> *See* notes 174-90 *supra* and accompanying text.

<sup>227</sup> *See* note 182 *supra* and accompanying text.

<sup>228</sup> *People v. Perez*, 24 Cal. 3d 133, 143, 594 P.2d 1, 7, 155 Cal. Rptr. 176, 182 (1979).

<sup>229</sup> *Id.*, 594 P.2d at 7, 155 Cal. Rptr. at 182.

<sup>230</sup> *Id.* at 139, 594 P.2d at 4, 155 Cal. Rptr. at 179.

defendant did not know that his representative was not a member of the bar."<sup>231</sup>

Since the California Supreme Court has provisionally approved of the student practice rules in California, it would now appear that a student who complies with the State Bar Student Practice rule has a special status entitling him to practice law within the confines of the rule.<sup>232</sup> If the student remains within those confines, he need not be concerned with unauthorized practice. In addition, in those other states in which the highest judicial body has approved a form of student practice, it would also appear that a student practicing within the rule is not engaging in the unauthorized practice of law.<sup>233</sup>

### B. *Student Practice and Bar Discipline*

As already noted, the supreme court of a state, usually acting through the established bar, expresses ultimate authority over the discipline of attorneys.<sup>234</sup> Unfortunately, court promulgated student practice rules

<sup>231</sup> *Id.* citing *People v. Cox*, 12 Ill. 2d 265, 146 N.E.2d 19 (1957); *People v. Washington*, 87 Misc. 2d 103, 384 N.Y.S.2d 691 (1976); *Baker v. State*, 19 Okla. Crim. 62, 130 P. 820 (1912).

<sup>232</sup> See *Kentucky Bar Ass'n. v. Vincent*, 538 S.W.2d 39 (Ky. 1976).

<sup>233</sup> But see Justice Douglas' dissenting opinion in *Hackin v. Arizona*, 389 U.S. 143 (1967). In *Hackin*, the defendant was a layman who appeared in a state *habeas corpus* proceeding on behalf of an indigent prisoner. The layman was later convicted of practicing law without a license. The Supreme Court in a *per curiam* decision dismissed the defendant's appeal for want of a substantial federal question. Justice Douglas dissented:

Moreover, what the poor need, as much as our corporate grants, is protection before they get into trouble and confront a crisis. This means "political leadership" for the "minority poor". . . . Lawyers will play a role in that movement; but so will laymen. The line that marks the area into which the layman may not step except at his peril is not clear. I am by no means sure the line was properly drawn by the court below where no lawyer could be found and this layman apparently served without a fee . . . .

Certainly the States have a strong interest in preventing legally untrained shysters who pose as attorneys from milking the public for pecuniary gain. . . . But it is arguable whether this policy should support a prohibition against charitable efforts of nonlawyers to help the poor. . . . It may well be that until the goal of free *legal* assistance to the indigent in all areas of the law is achieved, the poor are not harmed by well-meaning, charitable assistance of laymen. On the contrary, for the majority of indigents, who are not so fortunate to be served by neighborhood legal offices, lay assistance may be the only hope for achieving equal justice at this time.

*Hackin v. Arizona*, 389 U.S. 143, 150-52 (1967) (Douglas, J., dissenting) (emphasis in original) (citations omitted). See also *Johnson v. Avery*, 393 U.S. 483 (1969). In *Johnson*, the petitioner was disciplined for violating a prison regulation prohibiting inmates from assisting other prisoners in preparing writs. The court held the regulation invalid. Justice Douglas, concurring, stated: "Laymen—in and out

are not always explicit in defining the extent of student compliance with the standards of professional ethics and state disciplinary rules and procedures.

The American Bar Association model rule requires that the supervising attorney "assume professional responsibility for the student's guidance."<sup>235</sup> The student himself need only be certified as "being of good moral character."<sup>236</sup> The rule does not specifically hold the student personally responsible for his own professional responsibility. Instead it places the burden on the supervising attorney.

The majority of student practice rules that speak to professional responsibility follow the ABA model rule in holding that the supervisor must "assume personal professional responsibility for the student's work."<sup>237</sup> Other states, while continuing a similar provision, also require that a student "certify in writing that he has read and is familiar with the Code of Professional Responsibility. . . ."<sup>238</sup> Few of the rules provide specific sanctions against a student violating professional ethics, presumably because it is the supervisor who will be deemed responsible and subject to formal disciplinary procedures. However, many rules do provide for "withdrawal of certification" of the student practitioner by the judge of the court in which the student is practicing or by the certifying dean or supervising attorney.<sup>239</sup> Several states require that the student subscribe an oath promising to "conduct myself strictly in accordance with all the terms and conditions of those rules."<sup>240</sup> However, such rules contain no specific sanctions.

The student practice rule of Hawaii is more specific. It requires the supervisor to "provide professional guidance in every phase of such practice with special attention to matters of professional responsibility and legal ethics."<sup>241</sup> The rule provides that the student "shall be governed by the rules of conduct applicable to lawyers generally,"<sup>242</sup> and further provides that any court order designating an applicant as a law

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of prison—should be allowed to act as 'next friend' to any person in the preparation of any paper or document or claim, so long as he does not hold himself out as practicing law or as being a member of the Bar." *Id.* at 498 (Douglas, J., concurring).

<sup>234</sup> See note 219 *supra* and accompanying text.

<sup>235</sup> ABA MODEL STUDENT PRAC. R. II. B., reprinted in COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS 29 (1970).

<sup>236</sup> *Id.* at III. C.

<sup>237</sup> See, e.g., CONN. SUPER. CT. R. § 42A(2)(b).

<sup>238</sup> See, e.g., CAL. ST. B. R. III (C)—Rules governing the Practical Training of Lawyers; KAN. SUP. CT. R. 229(b)(7); W. VA. SUP. CT. APP. R. 6.000(III)(F).

<sup>239</sup> See, e.g., CAL. ST. B. R. IV (B)—Rules governing the Practical Training of Lawyers; CONN. SUPER. CT. R. § 42A(5)(c); ILL. SUP. CT. R. 711(e)(3) & (4).

<sup>240</sup> See, e.g., DEL. SUP. CT. R. 55(b).

<sup>241</sup> HAWAII SUP. CT. R. 25.

<sup>242</sup> *Id.*

student intern "may be terminated by this court for cause consisting of violation . . . of any act or omission which, in the part of an attorney, would constitute misconduct and ground for discipline under Rule 16."<sup>243</sup> Subsection 25.7 of the Rule articulates specific sanctions: "[T]he termination of practice shall be the exclusive sanction for disciplinary infractions which occur during authorized practice; except that such discipline infractions shall be considered by a court or agency authorized to entertain applications for the admission to the practice of law."<sup>244</sup>

Thus, the Hawaiian rule not only provides for termination of a student's certification for cause, but specifically contemplates that disciplinary infractions of a student will be a factor in admission to the bar.

The requirement that terminations of certification be "for cause" is significant in that it implies some sort of hearing procedure to determine good cause, although no such hearing procedure is specifically mentioned in the rule. Even more significant is the fact that the student is held *personally* responsible for his acts and omissions and is subject to a possible denial of admission to the bar.

There seems to be some correlation between supervision requirements and the ethical responsibilities imposed. The ABA Model Rule requires the personal presence of the supervisor in any criminal matter "in which the defendant does not have the right to assignment of counsel under any constitutional provision, statutes, or rule of this court."<sup>245</sup> In turn, the supervisor assumes personal professional responsibility for the student's work. But in Hawaii where the student assumes personal professional responsibility for his own acts, a student court appearance without a supervisor is permitted where "the court or tribunal consents."<sup>246</sup>

The rationale for in-court supervision appears to be based on the theory that where an indigent defendant is constitutionally entitled to appointed counsel, compliance with the right to counsel ultimately rests on the credentials of the licensed supervisor. This being so, it follows that the ultimate professional responsibility also rests on the supervisor. It may be argued that where supervision is not required (even in cases in which a defendant has a constitutional right to counsel), compliance with the canons of professional ethics should rest squarely on the student.

The language of the various student practice rules appears to bear out this theory.<sup>247</sup> Accordingly, it may be argued that where the practice rules specify who bears ultimate professional responsibility, such responsibility rests on a student personally if the rule permits a student

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> ABA MODEL STUDENT PRAC. R. II.A.2.

<sup>246</sup> HAWAII SUP. CT. R. 25.2(A).

<sup>247</sup> See note 9 *supra*.

court appearance without in-court supervision, but rests on the supervisor if in-court supervision is made a prerequisite to student practice. In other words, the question of professional responsibility depends on whether student counsel is himself considered as a sixth amendment counsel.

Clearly, the best course would be for both student and supervisor to consider themselves responsible. In any case, a student must certainly assume that unprofessional acts committed under student practice will be considered at the time of his application to the Bar.

### C. *Malpractice*

Regardless of whether a student is acting as sixth amendment counsel, malpractice is a consideration. A student acting as sixth amendment counsel will be held to the same standards of effective assistance as a licensed attorney.

At least two state's student practice rules require that the supervising attorney maintain a professional malpractice policy covering the acts and omissions of the qualified law student.<sup>248</sup> Certainly it should not be more difficult to cover a closely supervised student than to cover an attorney's paralegal. In jurisdictions where in-court supervision is not required, or where students are permitted greater independence from the supervisor, the question arises as to whether a student needs his own personal malpractice coverage.<sup>249</sup> Such questions can only be resolved when a determination is made as to whether a student's representation is itself in compliance with the sixth amendment, or whether compliance rests on the license and credentials of the supervising attorney.

The California Supreme Court in *Perez* held that there was sixth amendment representation since the defendant was "at all times represented by both an actively participating supervising attorney and a certified law student."<sup>250</sup> Although the court did not consider whether student representation without in-court supervision would have constituted sixth amendment representation, it may be surmised that supervision was a critical element. Nevertheless, the independent role of the student, as evidenced by his being the only person present at the counsel table, suggests that a personal malpractice policy for the student would be a prudent course.

### D. *Student Attorney-Client Relationship*

The attorney-client privilege protects from disclosure communications between a lawyer and a client seeking professional advice. The

<sup>248</sup> See, e.g., GA. CODE ANN. § 9-401.1 (1973); TEX. REV. CIV. STAT. ANN. art. 320a-1 § 10 (1979).

<sup>249</sup> See KLEIN, *supra* note 4, at 919.

<sup>250</sup> 24 Cal. 3d at 144, 594 P.2d at 8, 155 Cal. Rptr. at 183.

privilege has been extended to agents and subordinates of licensed attorneys, such as paralegals, investigators, and law students. However, the subordinate must be acting as an agent of the licensed attorney in order to come within the privilege.

In *Dabney v. Investment Corporation of America*,<sup>251</sup> a third year law student worked as an administrative assistance for Investment Corporation of America (ICA). After admission to the bar, the student was called upon to give deposition testimony regarding his communications with his client prior to his admission to the bar. The district court held that since the law student did not appear to be working directly under the supervision of a licensed attorney, the attorney-client privilege did not extend to the student. The court rejected the arguments that "in all respects save formal licensing, . . . [the student] was a qualified professional legal advisor,"<sup>252</sup> and that the student "was performing the duties of an attorney, was regarded and treated as an attorney, and was made privy to certain confidential information that would have been disclosed only to an attorney."<sup>253</sup> The court therefore declined to extend the privilege to law students in their own capacity, holding that "confidential legal communications with a law student were no more privileged than similar communication with a blacksmith."<sup>254</sup>

Students acting pursuant to a properly promulgated student practice rule would be in a different category from the student in *Dabney*. If the student is acting under the direct supervision of a licensed attorney, he should certainly be considered as an agent of the licensed attorney and therefore within the privilege. If, on the other hand, a student is considered to be sixth amendment counsel or is permitted to practice without direct supervision, the privilege is probably compelled by the sixth amendment. A student practicing pursuant to a properly promulgated student practice rule is, in effect, a limited licensee to whom the privilege should extend in any case.

#### E. *Student Representation as Sixth Amendment Counsel*

*Perez* was the first decision of a state's highest judicial body to specifically approve student representation under supervision. As such it constitutes part of the foundation for the legitimacy of student practice as sixth amendment counsel. Certainly, *Perez* will be cited in other jurisdictions when issues concerning student representation arise and its mandate for student representation is likely to be followed by other jurisdictions in light of the pressures engendered by *Argersinger* and its progeny, the favorable attitude toward student representation as

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<sup>251</sup> 82 F.R.D. 464 (E.D. Pa. 1979).

<sup>252</sup> *Id.* at 465.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 466.

expressed by three Supreme Court justices, and the steady expansion of clinical education in general.

Nevertheless, uncertainties remain. The "prediction" problems engendered by *Scott* will continue to plague the student lawyer until a more clearly definable standard of "right to counsel" can be devised.

The role and extent of supervision required to meet sixth amendment standards still awaits judicial determination. It is unfortunate that in most cases, such a determination can still only be made upon adjudication of an actual case in which student representation is directly or collaterally attacked. In states where advisory opinions are permitted, such determinations should be encouraged. Student practice rules with more specific sixth amendment references may also resolve some of the uncertainties. Until then, the student can be assured that practice within the confines of a properly promulgated student practice rule has a substantial and legitimate legal foundation.

## VI. CONCLUSION

The "predictive" analysis required by *Argersinger*, *Scott* and *Baldasar* poses substantial obstacles to the student counsel. Extension of the right to counsel to cases in which any jail is authorized would be a clearly ascertainable standard and eliminate the uncertainties and problems associated with the predictive analysis now apparently required. Such an extension would allow a student counsel to know in advance whether his representation is gratuitous or whether it constitutes sixth amendment counsel.

Student law practice under properly promulgated rules has a firm legal foundation. However, student practice under the general supervision of a licensed attorney should be generally recognized as sixth amendment representation in its own right, and not solely dependent upon the license and credentials of the supervising attorney. Such recognition should be limited to misdemeanors to avoid many of the strong objections raised by the court of appeals and supreme court dissent in *Perez*. Where student practice is not so recognized, hearing procedures must be devised to ensure that the client and student can determine the student's status in advance of trial, preferably before appointment of student counsel. Waivers should be required pursuant to student practice rules, but will be unnecessary for sixth amendment purposes if student representation is recognized as meeting sixth amendment requirements. In no case should waiver of counsel be used as the basis of legitimacy for sixth amendment student representation.

A flat requirement of in-court supervision should not be a prerequisite to sixth amendment representation by student counsel. Indeed, it is difficult to see how Justice Brennan's vision that "law students may provide an important source of legal representation of the indigent"<sup>255</sup>

<sup>255</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 41 (1972).



can be realized if a practicing attorney must always be present in court with a student. Rather the requirement of in-court supervision should be at the discretion of the trial court depending on the circumstances and the type of case. Absent such a requirement imposed by the court, the matter of in-court supervision should be left to the supervisor. Consequently, professional responsibility should be joint between the student and supervisor. The sanctions of termination of student certification for cause, and consideration of misconduct at time of bar admission application should be imposed on all student practitioners and made known to them.

Certification procedures for ensuring a minimum level of competence, good moral character, and knowledge and understanding of the Code of Professional Responsibility should be established where none exist. Such procedures should in fact be a prerequisite to sixth amendment representation by a student.

A "limited license" issued pursuant to a properly promulgated student practice rule to students under the general supervision of a licensed attorney, which would certify that a student has a minimum level of competence, moral character, and knowledge of legal ethics to provide sixth amendment representation in misdemeanor cases would be a positive format. Only on such a basis can Justice Brennan's vision of student representation be realized and the threat of a collision between student practice and the sixth amendment be avoided.