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People v. Perez - Constitutional Implications of Law Student Representation of Indigent Criminal Defendants, 13 J. Marshall L. Rev. 461 (1980)

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*PEOPLE V. PEREZ**
CONSTITUTIONAL IMPLICATIONS OF LAW STUDENT REPRESENTATION OF INDIGENT CRIMINAL DEFENDANTS

In 1972, the United States Supreme Court declared that an indigent[1] defendant could not be imprisoned upon conviction, unless he had been afforded assistance of counsel in his defense.[2] The *Argersinger* decision greatly extended the sixth

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* 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979).

1. Various criteria are used in determining whether a defendant is entitled to appointment of counsel without cost. In Oklahoma, for example, an indigent is described as a "person who has no means." OKLA. STAT. ANN. tit. 22, § 1271 (West 1979). In Rhode Island, an indigent eligible for aid is defined as a "person who does not have property or a source of income to furnish him a living nor anyone able to support him to whom he is entitled to look for support." R.I. GEN. LAWS § 12-15-8 (1969). In Florida, a person is eligible "[i]f the court determines that the defendant . . . is insolvent." FLA. STAT. ANN. § 925.035(1) (West 1977).

Federal programs for the representation of indigent defendants offer legal assistance without requiring that the defendant exhaust all sources of income from family or friends. *See* 18 U.S.C. § 3006A (1974). Such programs look, instead, to providing competent legal representation. M. PAULSEN, THE AVAILABILITY OF LEGAL SERVICES 9 (1972); *see* United States v. Dangdee, 608 F.2d 807 (9th Cir. 1979) (federal Criminal Justice Act of 1964 contemplates early appointment of counsel whose services are to continue through every stage of the proceedings). *But see* United States v. O'Neill, 478 F. Supp. 852 (E.D. Pa. 1979) (spouse is obligated, to extent of financial ability, to reimburse government for cost of Federal Defender appointed to represent indigent defendant). *See generally* Comment, *The Definition of Indigency: A Modern-Day Legal Jabberwocky*, 4 ST. MARY'S L.J. 34 (1972); ABA PROJECT ON MINIMAL STANDARDS FOR CRIMINAL JUSTICE (1978) (proposes offering free counsel to any person financially unable to obtain adequate representation without substantial hardship to himself or family).

2. Argersinger v. Hamlin, 407 U.S. 25 (1972). The United States Supreme Court in *Argersinger* held that whether an offense was labeled a felony or a misdemeanor was not determinative of whether defendant had a right to court-appointed counsel. Previously, some states, including Florida where Argersinger was convicted, had held that appointed counsel was available only to defend indigents charged with felonies. *See* Winters v. Beck, 239 Ark. 1093, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907 (1966) (prosecution for "immorality"; municipal court had no duty to advise defendant of nature of charge, right to make objections, cross-examine witnesses, present witnesses in own behalf, or have a trial *de novo* in county court; defendant neither questioned vagueness of charge against him nor validity of converting his 30 day sentence into 9 1/2 month incarceration solely because of his poverty); State v. Heller, 154 Conn. 743, 226 A.2d 521, *cert. denied*, 389 U.S. 902 (1967) (no right to assistance of counsel in prosecution for being "found intoxicated" where defendant was subject to as much as 30 days imprisonment); State v. DeJoseph, 3 Conn. Cir. Ct. 624, 222

amendment right to assistance of counsel,[3] which previously had been interpreted to apply only to defendants charged with felonies.[4] This more liberal interpretation was viewed as a momentous step toward the goal of providing equal justice under the law to rich and poor alike.[5]

While the indigent's right to counsel may appear lofty in theory, it is often illusory in practice.[6] The lawyer supplied to the indigent defendant[7] is too often inadequate, ill-trained, and

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A.2d 752, *cert. denied*, 385 U.S. 982 (1966) (repeated requests for assistance of counsel denied due to defendant's failure to request findings on issue of his indigency in conformance with local practice rules); State *ex rel.* Argersinger v. Hamlin, 236 So. 2d 442, 443 (Fla. 1970), *rev'd sub nom.* Argersinger v. Hamlin, 407 U.S. 25 (1972).

Justice Douglas, writing for the *Argersinger* Court, stated that "[a]bsent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel." *Id.* at 37. *See also* Comment, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

In Scott v. Illinois, 440 U.S. 367 (1979), however, the Court refused to extend *Argersinger* to a case where an indigent defendant was charged with a statutory offense for which imprisonment upon conviction was authorized but not actually imposed. *See generally* Herman & Thompson, *Scott v. Illinois and the Right to Counsel: A Decision in Search of a Doctrine?*, 17 AM. CRIM. L. REV. 71 (1979).

3. The sixth amendment provides that in all criminal prosecutions "the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI.

4. Gideon v. Wainwright, 372 U.S. 335 (1963). The *Gideon* Court held that an accused who is "haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The right to counsel was deemed "fundamental" and was, therefore, mandated by the due process clause of the fourteenth amendment. *Id.* at 342-43.

5. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344.

6. R. HERMANN, E. SINGLE & J. BOSTON, COUNSEL FOR THE POOR (1977) [hereinafter cited as HERMANN]; S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES (1976) [hereinafter cited as KRANTZ]; Bazelon, *Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973) [hereinafter cited as Bazelon]; Oliphant, *Reflections on the Lower Court System: The Development of a Unique Clinical Misdemeanor and a Public Defender Program*, 57 MINN. L. REV. 545 (1973) [hereinafter cited as Oliphant].

7. With the extension of the right to counsel to misdemeanor as well as felony defendants, a heavy burden was placed upon the states to provide counsel for those who were unable to pay for a lawyer. The number of indigent defendants eligible for state-provided defense assistance nearly qua-

indifferent. Frequently, the court-appointed attorney is more concerned with generating fees or a quick disposition than with the rights and needs of his client.[8] The result is a system which processes the indigent defendant through a judicial assembly-line, often leaving him bitter towards a society which professes

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drupled. KRANTZ, *supra* note 6, at 11. This situation may have influenced the Court in Scott v. Illinois, 440 U.S. 367 (1979), in its refusal to extend *Argersinger* to a case where an indigent defendant was charged with a statutory offense for which imprisonment upon conviction was authorized but not actually imposed. The Court noted that while *Argersinger* had proven reasonably workable, "any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States." *Id.* at 373.

8. The states have attempted to implement the constitutional guarantee of counsel primarily through two systems: the public defender and the court-appointed attorney. The public defender, usually operated as a state agency, provides defense services to about two-thirds of all indigent defendants. Because salaries are often not competitive with private practice, public defenders are usually recent law school graduates. For example, in the Los Angeles Public Defender organization, generally acknowledged as one of the best, 95% of the attorneys hired are recruited directly out of law schools. HERMANN, *supra* note 6, at 33. With little or no prior exposure to the criminal justice system, and routine caseloads of five hundred clients per year, the neophyte attorney quickly embraces the judicial "system." Bazelon, *supra* note 6, at 6; *see* Comment, *Caseload Ceilings on Indigent Defense Systems to Insure Effective Assistance of Counsel*, 43 U. CIN. L. REV. 185 (1974). The quick disposition of a case through plea bargaining often takes precedence over considerations of justice or concern for the rights of any individual defendant. Bazelon, *supra* note 6, at 6.

In addition, since both the public defender and the prosecutor are paid by the state and work together closely on a daily basis, there may be charges of cronyism and lack of independence on the public defender's part. Where the public defender is directly controlled by the trial judge, the attorney may be further torn between his duty to the client and his duty to help relieve the court's crowded calendar; a director of one defender organization even checked occasionally with the trial judges to be sure his lawyers were not being too aggressive or taking too much of the court's time. *Id.* at 7. As a result of this attitude, defendants often have the feeling that the prosecutor, court, and public defender are in "cahoots" and there is no one to speak for him. *See* NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE OTHER FACE OF JUSTICE (1973). Indeed, in enacting the Criminal Justice Act of 1964, which provides compensation for attorneys appointed to represent indigent defendants in federal criminal trials, Congress expressed concern that appointed counsel funded by a government subsidy would not exercise the same independence from the government as retained counsel. The Senate version provided for public defenders; the House bill did not include such a provision, at least partly out of concern that full time public defenders would be too closely identified with the government's efforts. Representative Moore, the author of the bill, remarked:

> The Senate bill, in addition to authorizing the appointment of private counsel, would have empowered the Federal Government to establish Federal public defender offices in any or all of the judicial districts throughout the country. This would have had the effect of placing the administration of justice totally in the hands of the Federal Government. An individual, accused of a crime, would have been tried before a Federal judge, prosecuted by a Federal district attorney, and defended by a Federal public defender. Thus, the total right of a fair trial and to the preservation of one's right to liberty would be solely dependent

high ideals of fairness for all, but betrays such ideals in prac-

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upon men appointed by the Federal Government and compensated out of the Federal Treasury.

This condition could easily have led to the establishment of totalitarian justice with the well-known unfairness and inequities found in totalitarian states. In addition, this condition could have severely undermined the duties and responsibilities of members of the bar who I believe are under an obligation to defend individuals, even those without funds and even [those] charged in an unpopular cause. The burdens of preserving a healthy society have been gradually eroded in recent years through too great a dependence upon the Federal Government. It did not seem desirable to a majority of the Members of the House to further this erosion. The House bill, then, adopted a philosophy totally different from that reported in the Senate.

110 CONG. REC. 18,558 (1964). The House view prevailed at the conference, and the 1964 version of the Act contained no provision for public defenders. It was not until 1970, after a study of the need for public defenders, that Congress amended the Criminal Justice Act to permit the establishment of public defenders to supplement individual appointments of defense counsel. Ferri v. Ackerman, 100 S. Ct. 402, 407 n.16 (1979).

While the public defender organization has many problems, it has the advantage of being comprised of attorneys who presumably have chosen voluntarily to engage in criminal defense work. When counsel are assigned by the court, however, even this advantage may be lacking. Bazelon, *supra* note 6, at 11. Although theoretically "defense counsel . . . appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer," Burger, *Council for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AM. CRIM. L.Q. 1, 6 (1969), the majority of assigned counsel are "court-room regulars," a "cadre of mediocre lawyers who wait in the courtroom in the hope of receiving an appointment," and whose expertise at extracting a fee far exceeds their ability to defend a criminal case. Bazelon, *supra* note 6, at 7. Since there are statutory limits on the amount of compensation allowed appointed counsel, regulars must strive for a high volume of cases, leaving little time for the investigation or preparation of any particular case. *Id.* Again, plea bargaining is the key to an efficient, high volume business, and pressure tactics are often used to discourage a defendant from going to trial and wasting the lawyer's time. *Id.* In one case, a defendant plead guilty to a capital charge after a 15-minute interview with his court-appointed attorney. The attorney refused to consider exculpatory witnesses suggested by the defendant, saying that the judge had promised to invoke the death penalty if the case went to trial and defendant was convicted. Defendant capitulated, but the plea was later held to have been involuntary. Colson v. Smith, 315 F. Supp. 179 (N.D. Ga. 1970); *cf.* Jacques v. State, 376 So. 2d 821 (Ala. Crim. App. 1979) (appointed counsel challenged as having spent more time plea bargaining than in preparing case for trial).

In addition to the regulars, lawyers established in other fields of law are sometimes recruited to participate as defense counsel. Notwithstanding the fact that such attorneys may be willing, they may lack the experience or know-how to conduct a criminal trial. Bazelon, *supra* note 6, at 11. *But see* State v. Rush, 46 N.J. 399, 405-07, 217 A.2d 441, 444-45 (1966) (contending that prior experience in criminal matters is not essential because few cases turn upon skill of the advocate, but rather on facts and applicable law). There is also a "culture shock" when the middle or upper-class lawyer is confronted by the indigent defendant. Such attorneys "are not prepared . . . to learn that their client is neither middle class nor cast in their image of the 'deserving poor.'" Bazelon, *supra* note 6, at 12.

Another method of assigning counsel is to assign indigent defense cases to new members of the bar. The major problem with this approach is

tice.[9]

Several solutions have been proposed to upgrade the quality of representation provided by defense counsel. One suggestion is to certify lawyers as criminal specialists to insure minimum levels of competence, as is done in the medical profession.[10] Another would require appointment of defense attorneys by a separate agency rather than by the trial judge. This would help curb the judge's influence over defense proceedings, leaving the defense attorney in a more independent position.[11] If, however, a truly effective, long term solution is to be found, much of the responsibility must be borne by the law schools.[12]

The majority of law students today graduate without any

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obvious: the new attorney totally lacks experience. "The ordinary law school graduate trying his first criminal case not only does not know what to do next; he does not know what to do first." *Id.* at 13. Few, if any, on-the-job training programs exist, and the new lawyer can easily become confused, overwhelmed, and buried by the criminal justice system. More disturbing, however, is the fact that the recent graduate soon embraces the system.

In addition to the problems which already exist, court-appointed counsel may find themselves subjected to malpractice suits by their former clients. In Ferri v. Ackerman, 100 S. Ct. 402 (1979), an attorney was appointed by a federal judge to represent the indigent defendant. While the judgment of conviction was on appeal to the United States Court of Appeals for the Third Circuit, the indigent filed a malpractice suit against the attorney in Pennsylvania state court alleging that the attorney's failure to plead an applicable statute of limitations resulted in a sentence of 10 additional years imprisonment. *Id.* at 405 n.7. The Supreme Court, in reversing the state courts' dismissal of the suit, held that, as a matter of federal law, an attorney appointed to represent an indigent in a federal criminal trial was not entitled to absolute immunity in a state malpractice suit brought against him by his former client. While the Court expressed no opinion on whether a state court could grant absolute immunity to appointed counsel as a matter of state law, members of the private bar may seek to avoid being appointed to represent indigent defendants. *See* Sparks v. Parker, 368 So. 2d 528 (Ala.), *appeal dismissed*, 100 S. Ct. 22 (1979) (system whereby eligible attorneys were appointed to represent indigent defendants challenged as violative of involuntary servitude provision of thirteenth amendment, due process clause of fifth and fourteenth amendments, fifth amendment's prohibition against taking private property for public use without just compensation, and equal protection clause).

9. "It becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 55 (1967).

10. Bazelon, *supra* note 6, at 18.

11. *Id.* at 19.

12. Oliphant, *supra* note 6; *see* Burger, *The Future of Legal Education*, 15 STUDENT LAW J. 18 (1970); Frank, *Why Not a Clinical Lawyer-School*, 81 U. PA. L. REV. 907 (1933); Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 651 (1935); *cf.* Peden, *Role of Practical Training in Legal Education: American and Australian Experience*, 24 J. LEGAL EDUC. 503 (1972) (proposing that practical skills course after graduation is preferable to clinical programs during law school).

practical legal experience. Legal education is composed almost entirely of the case method, and no period of apprenticeship or initial supervision is required before the new lawyer tries his first case.[13] Consequently, the new lawyer often acquires experience at the expense of his initial clients.

In an attempt to alleviate this situation, many states have instituted programs for the student practice of law.[14] Their purpose is primarily to educate the student through involvement in actual cases while simultaneously interesting him in criminal

13. Prior to the twentieth century, legal education was usually acquired through an apprenticeship which consisted of copying legal papers and reading the law books of the lawyer-employer. A. Reed, *Training for the Public Profession of the Law*, CARNEGIE FOUNDATION BULL. No. 15 (1929). Law schools were virtually unknown. The apprentice system declined, however, and a new approach was initiated by which principles of law were abstracted from cases. This "case method" was first instituted at Harvard Law School; by 1920 nearly all law schools had instituted three-year programs utilizing the case method. The teaching method was criticized as early as 1930, however, because it ignored the value of practical skills and excluded considerations of the human side of the law and the interplay of personalities in the office and courtroom. Frank, *What Constitutes a Good Legal Education*, 19 A.B.A.J. 723 (1933). Indeed, law schools have recently come under increased attack. Gerry L. Spence, a successful trial attorney, speaking before a convention of the American Bar Association, contended that the legal system is built on intimidation:

> The prime culprits, he alleged, are the law schools, "places which are run by the morticians of the profession." Law professors instill in students a fear of their teachers, which he said later becomes a fear of judges and a terror of opponents.
>
> Professors turn students into "pedantic pedagogical polemicists" who are experts at intellectual tricks but not at communicating with people. . . .

Chicago Sun-Times, Nov. 12, 1979, at 14, cols. 2-3.

14. *See* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW (1973). While a few states had student practice programs in the 1960's, the real growth in student practice occurred after the promulgation of the American Bar Association's Model Rule in 1969. Currently, 90% of ABA-approved law schools operate some sort of clinical law program. SURVEY OF CLINICAL LEGAL EDUCATION, 1977-78, COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY REPORTER (1978). Student practice programs were stimulated primarily by two developments in the legal field. The first was a general recognition that the case method, used by most law schools, did not provide essential practical legal training. *See* Stolz, *Clinical Experience in American Legal Education: Why Has It Failed?, reprinted in* CLINICAL EDUCATION AND THE LAW SCHOOL OF THE FUTURE 54 (E. Kitch ed. 1970). The second was the dramatic increase in the demand for legal assistance due to the extension of the right to counsel to misdemeanor defendants brought about by Argersinger v. Hamlin, 407 U.S. 25 (1972). Student practice programs were immediately recognized as an important resource for meeting the increased demand for legal representation. *See* note 7 *supra*; Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. Rev. 445 (1965) [hereinafter cited as *Gideon's Army*]. Indeed, Justice Brennan, concurring in *Argersinger*, noted that "[l]aw students . . . may provide an important source of legal representatives for the indigent." 407 U.S. at 40-41 (Brennan, J., concurring).

defense work. These goals are implemented through student representation of indigent defendants under the supervision of a licensed attorney.[15] While clinical programs have been lauded as an educational tool,[16] thus far little attention has been paid to the students' clients and the effect of such representation on them.[17] In *People v. Perez*,[18] the California Supreme Court was recently confronted with the first assault upon the validity of law student representation in terms of the sixth amendment right to effective assistance of counsel.

This note will examine whether a supervised law student provides the constitutional guarantee of the "assistance of counsel." It will analyze the circumstances of the *Perez* defendant's alleged acquiescence to such representation to determine if it was given in a "knowing and intelligent" manner. Finally, the *Perez* court's decision will be explored in terms of whether the rights of the indigent defendant are preserved by law student representation, or whether such representation, while benefit-

15. Oliphant, *supra* note 6.

16. *See generally* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS (1971); Broden, Jr., *A Role for Law Schools in OEO's Legal Services Program*, 41 NOTRE DAME LAW. 898 (1965); Cleary, *Law Students in Criminal Law Practice*, 16 DE PAUL L. REV. 1 (1966); *Gideon's Army*, *supra* note 14; Documentary Supplement, *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. & MARY L. REV. 353 (1973); Comment, *Law Student Representation of Indigent Criminal Defendants in Illinois*, 2 J. MAR. J. OF PRAC. & PROC. 364 (1969); Note, *People v. Perez, Misapplication of the Right to Counsel*, 6 PEPPERDINE L. REV. 545 (1979).

17. *But see* Documentary Supplement, *Student Practice as a Method of Legal Education and a Means of Providing Legal Assistance to Indigents: An Empirical Study*, 15 WM. &. MARY L. REV. 353 (1973). In this study, judges, prosecutors, and defense attorneys with first hand experience in all aspects of student practice were questioned. Generally, the respondents indicated "slight agreement" with the proposition that law students render constitutionally adequate representation, although judges had some reservations about the use of students in the courtroom. *Id.* at 396. The students' performance in the areas of interviewing clients, research, briefwriting, and preparation of motions was considered adequate. In trial practice skills, however, such as negotiating settlements, using discovery techniques, choosing trial arguments, engaging in direct and cross-examination, and making timely objections, students were found by the respondents to be less than constitutionally adequate. *Id.* at 398. It should be noted that although students may not have reached constitutionally adequate levels in their trial techniques, their performances were seen as equal to or slightly better than that of newly licensed attorneys, except in cross-examination of witnesses and raising objections. In these areas, students were considered below average. *Id.* at 401. When law students were compared with a typical attorney of average experience, however, law students were considered to be slightly less competent in *all* areas except research and the preparation of appellate briefs. *Id.* at 402.

18. 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979).

ting the student, is a further betrayal of the rights of the indigent defendant.

FACTS AND FINDINGS OF THE LOWER COURTS

Defendant Perez was arraigned on a charge of second degree burglary.[19] A deputy public defender was appointed to represent him because he was indigent. Perez, who spoke only Spanish,[20] signed a written form[21] allowing a certified law student to represent him under the supervision of the public de-

19. Police officers, responding to the sound of broken glass, found Perez standing next to a broken store window holding bags of merchandise with new price tags. He had cuts on his hands and arms. As the California Supreme Court noted, the evidence strongly supported Perez' guilt. *Id.* at 135, 594 P.2d at 3, 155 Cal. Rptr. at 178.

20. An interpreter for Perez was required throughout the trial. People v. Perez, 82 Cal. App. 3d 45, 52, 147 Cal. Rptr. 34, 40 (1978), *rev'd*, 24 Cal. 3d 133, 594 P.2d 1, 155 Cal. Rptr. 176 (1979). The California Supreme Court, however, made only passing reference to this fact; the court merely noted, in an offhand manner, that "[c]ounsel also points out that defendant does not speak English." 24 Cal. 3d at 140, 594 P.2d at 8, 155 Cal. Rptr. at 183. Thus, that which severely limited Perez' comprehension of his trial proceedings was virtually ignored by the court.

21. The consent form which Perez signed read as follows:

> 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*. . . .
>
> 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. . . .

Id. at 140 n.12, 594 P.2d at 8 n.12, 155 Cal. Rptr. at 183 n.12. The consent form signed by Perez is, however, virtually indistinguishable from other documents found insufficient to establish a waiver of the right to counsel. An "unsubstantiated statement in an official document, . . . does not provide a sufficient basis . . . to conclude that [Perez] voluntarily and knowingly waived his right to counsel." United States v. Lewis, 486 F.2d 217, 218-19 (5th Cir. 1973). In Dulin v. Henderson, 448 F.2d 1238 (5th Cir. 1971), the court refused to presume that the defendant had voluntarily and knowingly waived his right to counsel on the basis of the following docket entry: "Defendant Dulin is called before the bar and advised by the Court of his right to have counsel represent him and that the Court will appoint an Attorney for him if he has no funds, and defendant waives his right to counsel." *Id.* at 1239-40. In Craig v. Beto, 458 F.2d 1131 (5th Cir. 1972), the docket sheet read as follows:

> 3/8/51 Defendant present—admits his true name as William C. Craig. Information read—Defendant is advised of his right to counsel. Defendant stated that he did not desire Counsel and wanted to plead.
>
> Thereupon Defendant pleads guilty. Defendant thereupon sentenced to a term of six years in the State Penitentiary.
>
> Defendant advised of his right of appeal.

Id. at 1134-35. The court held that the mere recitation that defendant was "advised of [his] right to counsel" was not a sufficient manifestation of an understanding and intelligent waiver of counsel and that the docket sheet

fender, pursuant to California's program for the practical training of law students.[22] The law student conducted Perez' entire defense. He examined and cross-examined witnesses, made objections and motions, and presented final argument to the jury. The public defender was present throughout the trial, but his actual on-the-record participation amounted to only thirty-six words during the course of a three-day trial.[23] The jury

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did not show that defendant was advised of his right to appointed counsel. *Id.*

In Moran v. Estelle, 607 F.2d 1140 (5th Cir. 1979), the State of Texas introduced the following minute entry to establish that defendant had knowingly and voluntarily waived his right to counsel:

> 55,651—*State v. Thomas Moran*: The Court asked the accused if he was represented by counsel; to which he answered in the negative. The Court then asked the accused if he desired to employ counsel or to have the Court appoint counsel for him; to which the accused answered that he did not wish to have an attorney to represent him.
>
> APPROVED: ATTEST
> s/ Walter M. Hunter s/Zetta Rogers
> JUDGE Deputy Clerk

Id. at 1143-44. The court refused to hold that this docket entry sufficiently evidenced that defendant had waived his sixth amendment right to counsel even though, with the judge's signature, the entry was a far more meaningful recitation of the proceedings at trial than a "rubber stamped, fill-in-the-blanks" form. The form only indicated that defendant had waived his rights, not how or why he did so. Thus, the form did not give the court adequate information to determine whether the waiver was knowingly and intelligently made.

22. California's Rules Governing the Practical Training of Law Students were adopted in 1970, amended in 1976, and provisionally approved in 1978 to allow the following participation by law students:

> Rule VI: Activities requiring direct supervision. (A) A student may engage in the following activities only if the client on whose behalf he acts shall approve in writing the performance of such acts by such students or generally by any student and then only with the approval, under the direct and immediate supervision and in personal presence of the supervising lawyer. . . . (3) Appearing on behalf of the client in any public trial, hearing or proceeding pertaining thereto in a court, or tribunal or before any public agency, referee, commissioner, or hearing officer, State or Federal, to the extent approved by such court, public agency, referee, commissioner, or hearing officer. . . . (B) In all instances when, under these Rules, a student is permitted to appear in any trial, hearing or proceeding, the student shall, as a condition of appearance, first file with the court, tribunal, public agency, referee, commissioner or hearing officer, a copy of the written approval of the client required by Paragraph (A) of this Rule VI.
>
> Rule III. . . . (B) (4) A student's eligibility to participate in activities under these rules may be terminated by the Supreme Court or by the State Bar at any time without a hearing and without any showing of cause.

RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS (1970), *reprinted in* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS (1971).

23. The *Perez* court was generous in its characterization of the public defender's contributions, noting that "he made objections, gave his ap-

found Perez guilty.

On appeal, Perez contended that his right to assistance of counsel was substantially impaired because of his representation by a certified law student rather than a licensed attorney. He further claimed that his consent to student representation was not knowingly made; that the purported consent was, in effect, a waiver of his sixth amendment rights; and that a strict standard should have been applied to ensure that the waiver was knowingly and intelligently made. The court of appeals agreed and held that representation by a certified law student abridged defendant's right to assistance of counsel. The court further found the student's courtroom activities constituted the unauthorized practice of law.

OPINION OF THE CALIFORNIA SUPREME COURT

The California Supreme Court upheld law student practice programs and reversed the intermediate appellate decision. In examining the rules governing law student participation in criminal trials,[24] the court found that they provided reasonable assurances that each defendant would receive a competent defense. The court rejected Perez' argument that representation by a law student could be analogized to representation by an "imposter."[25] The court stated that the cases which involved imposters and subsequent reversals of convictions rested on the defendants' lack of knowledge as to the true identities of their representatives.[26] The court further equated constitutionally adequate representation with *competent representation* and

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proval to jury instructions and verdict forms, participated in court conferences, and participated in other ways in Perez' defense." 24 Cal. 3d at 135, 594 P.2d at 3, 155 Cal. Rptr. at 178. It is strange, however, that this ostensibly high degree of participation only resulted in thirty-six words on the trial record.

24. *See* note 22 *supra.*

25. 24 Cal. 3d at 136, 594 P.2d at 4, 155 Cal. Rptr. at 179.

26. While the *Perez* court stressed that the imposter cases' convictions were largely overturned because of lack of knowledge of the defendant's representative's true identity, the court did not inquire thoroughly as to Perez' knowledge of the identity of *his* representative. In fact, the dissent in *Perez* noted the following exchange between the prosecutor and Perez, which would seem to indicate that Perez thought he was represented by two attorneys:

> By Mr. SIDDELL (the District Attorney) Q: You're represented by counsel in this action; is that correct?
>
> By Mr. PEREZ A: An attorney? A lawyer? A lawyer?
>
> By Mr. SIDDELL Q: Yes, have you been contacted by an attorney?
>
> By Mr. PEREZ A: Just the two . . .

This exchange indicates that Perez thought he was being represented by two lawyers, or that he did not know the difference between his appointed public defender and the law student to whose representation he theoreti-

stressed that an unconditional insistence that a defense be conducted by licensed counsel would not serve to provide every defendant with reasonably competent assistance.[27] While conceding the law students' inexperience, the court noted that all attorneys must have a first trial, and it was preferable that their initiation occur under the supervision of a more experienced attorney.[28]

The *Perez* court rejected defendant's contention that representation by a law student was a waiver of defendant's right to counsel. Since a licensed attorney had been present at all times, the court found that the defendant did have assistance of counsel; no waiver of constitutional rights was involved. The court found that Perez' consent to law student representation was valid. The form which was signed by Perez and filed with the court satisfied procedural requirements. Therefore, the court applied a presumption of official regularity and shifted to defendant the burden of proving that his consent had been unknowing. In conclusion, the court praised the law student representation program for the valuable training and experience it provided the student and for its benefit to the defendant, who had gained the participation of an enthusiastic young advocate with more time and energy to devote than the often overworked public defender.[29]

The one dissenting justice agreed with the court of appeals, noting that since crucial aspects of the trial were conducted almost entirely by a layman supervised passively by a licensed attorney, the defendant did not receive constitutionally required zealous advocacy.[30] The dissent further questioned whether Pe-

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cally consented. *Id.* at 143, 594 P.2d at 11, 155 Cal. Rptr. at 186 (Mosk, J., dissenting).

27. *See* text accompanying note 46 *infra*.

28. *See* note 22 *supra*.

29. The *Perez* court paid little attention to two other issues raised by defendant: (1) the claim that police had failed to retain the glass particles found in his hands and arms as potentially exculpatory evidence; and (2) whether the law student's representation constituted the unauthorized practice of law. In considering the first issue, the court found that the police were not required to conduct an intensive scientific investigation at the scene of the crime or to preserve every piece of evidence conceivably relevant. The court found no denial of due process in the actions taken by police. 24 Cal. 3d at 140, 594 P.2d at 8, 155 Cal. Rptr. at 183. In considering the unauthorized practice of law issue, the court placed significance on the fact that the law student had exercised no independent judgment and was appearing only under direct supervision. Thus, the court concluded he had not engaged in the unauthorized practice of law. *Id.* at 139, 594 P.2d at 11, 155 Cal. Rptr. at 186.

30. "The constitutional requirements are for 'zealous and active counsel' and representation in a 'substantial sense' and not merely 'pro forma.'" *Id.* at 143, 594 P.2d at 11, 155 Cal. Rptr. at 186 (Mosk, J., dissenting) (citing Powell v. Alabama, 287 U.S. 45, 57-58 (1932)).

rez had given a knowing consent to law student representation since the consent form was not written in defendant's native language, and there was no indication that its contents had been explained to him. While not entirely opposed to student representation programs, the dissenting justice felt that the practice must be limited and that a felony trial surpassed the bounds of permissibility.[31]

CONSTITUTIONAL ADEQUACY OF REPRESENTATION BY LAW STUDENTS

The *Perez* court relied on three cases to support the constitutionality of representation by a supervised law student. In fact, however, none of these cases turned on that particular issue. While each case involved a law student's participation in courtroom activities, these decisions were based on collateral issues, such as the failure to obtain the supervising attorney's written consent to the student's presence;[32] the failure of the trial court to specifically advise the defendant that he was being represented by a law student;[33] and the defendant's challenge to

31. 24 Cal. 3d at 152, 594 P.2d at 13, 155 Cal. Rptr. at 188 (Mosk, J., dissenting). The dissent's belief that law student representation may be constitutionally adequate for misdemeanor defendants, but not felony defendants, is not without problems. In Argersinger v. Hamlin, 407 U.S. 25 (1972), the Court mandated that if conviction would result in imprisonment, the distinction between "misdemeanor" and "felony" is not controlling; the quality of representation must be equivalent.

32. State v. Daniels, 346 So. 2d 672 (La. 1977). In *Daniels*, the rules under which law students were allowed to represent indigent defendants required the written consent of the defendant and the supervising attorney. The supervising attorney who had begun the defense left town prior to trial but after giving his consent. The attorney who then assumed the supervisory position inadvertently failed to consent to the student's participation, and defendant sought reversal based on this non-compliance with the rules. The court held that there had been substantial compliance and refused to reverse defendant's conviction on the basis of a technicality. There was, however, no discussion of whether defendant's sixth amendment right to assistance of counsel had been violated by law student representation.

33. People v. Masonis, 58 Mich. App. 615, 228 N.W.2d 489 (1975). In *Masonis*, defendant contended, *inter alia*, that the trial court had failed to specifically advise him that he was being represented by a law student. The Michigan Court of Appeals dismissed the claim since the student had introduced himself as a student at the outset of the trial. While the *Masonis* court noted that the representation complied with court rules, it did not discuss the issue of the constitutionality of law student representation. The *Perez* court may have relied on the statement in *Masonis* that the representation by the student complied with Michigan's standards for determining whether a defendant received effective assistance of counsel. This reliance, however, ignores the fact that effective assistance, in terms of competent representation, was not at issue in *Perez*. Rather, the *Perez* court was faced with a challenge to the constitutional adequacy of law student representation.

state authorization of a legal intern to act as a prosecutor.[34]

Competent Representation May Not Be Constitutionally Sufficient

The *Perez* court stressed the fact that the defendant had received competent representation[35] and that he did not claim otherwise. The court's reasoning, however, misconstrued the constitutional guarantee which requires neither reasonably competent nor excellent representation.[36] Rather, the Constitution appears to mandate that the defendant be represented by a *licensed* attorney and nothing less.[37]

All federal courts and most state courts have interpreted "assistance of counsel" to mean representation by a duly licensed attorney, admitted to the bar of the jurisdiction in which he practices.[38] In enforcing this guarantee, courts have held that the right to counsel was denied where the defendant was

34. State v. Cook, 84 Wash. 2d 342, 525 P.2d 761 (1974). In *Cook*, a legal intern represented the state in a prosecution for driving under the influence of alcohol. Defendant claimed that the law student was not authorized to represent the state. The court refused to overturn the conviction because defendant was unable to show that she was prejudiced by the student acting as a prosecutor; it could not be assumed that another prosecutor would have plea bargained more extensively. This case supported the *Perez* decision only to the extent that it authorized the presence of a law student in court; it did not involve the sixth amendment right to counsel and, significantly, any error made by the student prosecutor probably would have *favored* the defendant.

35. 24 Cal. 3d at 138, 594 P.2d at 4, 155 Cal. Rptr. at 179.

36. People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979). In *Felder*, the defendant was ably represented by an imposter who had practiced law for 12 years. Notwithstanding the admitted competence of the imposter, the court reversed defendant's conviction. It interpreted the sixth amendment right to the assistance of counsel to mean assistance of a duly licensed attorney and nothing less. The court went on to state:

> Harmless error analysis is not available in all instances of constitutional error. There are some errors which operate to deny [an] individual defendant his fundamental right to a fair trial, [in which event] the reviewing court must reverse the conviction and grant a new trial, quite without regard to any evaluation as to whether the errors contributed to the defendant's conviction. Among such errors is the denial of the constitutional right to assistance of counsel.

Id. at 291, 391 N.E.2d at 1279, 418 N.Y.S.2d at 299; *accord*, United States v. Laura, 607 F.2d 52, 58 (3d Cir. 1979).

37. For a review of the evolution of the term "counsel" as it is used in the sixth amendment, see Turner v. American Bar Ass'n, 407 F. Supp. 451, 473-75 (N.D. Tex. 1975). The *Turner* court concluded that the term "counsel" means that law may be practiced only by those who meet certain criteria. *Id.* at 475.

38. United States v. Irwin, 561 F.2d 198 (10th Cir. 1977); United States v. Afflerbach, 547 F.2d 522 (10th Cir. 1976); United States v. Grismore, 546 F.2d 844 (10th Cir. 1976); Achtien v. Dowd, 117 F.2d 989 (7th Cir. 1941); People v. Agnew, 114 Cal. App. 2d 841, 250 P.2d 369 (1952); People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957).

represented by an imposter posing as an attorney;[39] a disbarred attorney;[40] an attorney not admitted to the bar because of moral defects in his character;[41] and lay persons.[42] These courts held that the right to counsel was denied even absent a claim by the defendant that he was not effectively represented.[43] Many of

39. People v. Felder, 47 N.Y.2d 287, 391 N.E.2d 1274, 418 N.Y.S.2d 295 (1979). In *Felder*, defendant's imposter attorney had practiced for 12 years in New York without a law school degree or admission to the bar. Defendant, while represented most ably by the imposter, was granted a reversal of his conviction because the court interpreted "counsel" as requiring "nothing less than a licensed attorney-at-law." The court further stated that a lay person, "regardless of his educational qualifications or experience, is not a constitutionally acceptable substitute for a member of the Bar." *Id.* at 298, 391 N.E.2d at 1276, 418 N.Y.S.2d at 297. The court found significant the fact that defendant was not aware of the non-licensed status of his representative. *Id.; see* People v. Washington, 87 Misc. 2d 103, 384 N.Y.S.2d 691 (1976) (holding that there was no substitute for constitutional mandate that defendant be represented by duly licensed attorney); Baker v. State, 9 Okla. Crim. 62, 130 P.2d 820 (1903) (right to counsel means representation by one admitted to bar; this right should be strictly guarded by states).

See also People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957). In *Cox*, an unlicensed imposter was retained by the mother of a 14-year-old defendant. The Illinois Supreme Court interpreted the right to counsel not to be a mere formality in criminal proceedings, but rather the right to representation by a duly licensed and qualified lawyer. While the court stated that representation by a non-attorney did not *ipso facto* require reversal, it noted that the important consideration was overall fundamental fairness. *Accord*, Higgins v. Parker, 354 Mo. 888, 191 S.W.2d 668, *cert. denied*, 328 U.S. 801 (1945). In *Higgins*, the defendant had served 12 years of a robbery conviction before discovering that his trial attorney had been unlicensed. The court denied defendant's writ of habeas corpus because he could not show that he would not have been convicted if his representative had possessed a license. In addition, the court found influential the fact that defendant had also been represented at trial by a licensed attorney.

40. United States v. Jordan, 508 F.2d 750 (7th Cir.), *cert. denied*, 423 U.S. 842 (1975) (disbarred attorneys not allowed to represent defendant); *accord*, United States v. Grismore, 546 F.2d 844 (10th Cir. 1976).

41. Huckleberry v. State, 337 So. 2d 400 (Fla. 1976). In *Huckleberry*, defendant plead guilty on the advice of his court-appointed counsel and was sentenced to life imprisonment. Defendant later discovered that his representative had not been admitted to the bar due to his failure to meet requisite moral standards. In overturning the conviction, the Florida Supreme Court rejected the state's argument that competence of representation was the sole factor to be considered, citing the importance of moral character in the attorney-client relationship. *See* note 48 *infra*.

42. *See* United States v. Wilhelm, 570 F.2d 461 (3d Cir. 1978) (court denied defendant's request for representation by lay person not legally trained, reasoning that professional qualifications are presumed to be required in all criminal proceedings); Harkins v. Murphy & Bolanz, 51 Tex. Crim. App. 568, 112 S.W. 137 (1908). In *Harkins*, the court stated that the Constitution authorizes the accused in criminal prosecutions to represent himself or have counsel represent him. The word "counsel," the court continued, has a definite meaning. "[I]t means an advocate, counselor, or pleader. . . . It does not mean one not admitted to practice law." *Id.* at 569, 112 S.W. at 138.

43. Some courts, in considering whether a defendant's sixth amendment rights have been violated, will evaluate the performance of counsel. Various standards are employed. Under the "mockery of justice" test used

these decisions rested on the fact that the defendant did not know that his representative was not a member of the bar. The *Perez* court noted that lack of knowledge of the status of one's representative is highly significant, yet seemed reluctant to confront Perez' claim that he was unaware that he was being represented by a law student.[44] The dissenting opinion pointed out, however, that Perez seemed to think that he was being represented by two attorneys.[45]

The *Perez* court was correct in stating that admission to the bar does not automatically confer competency. Licensing and

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by about one-half the states, defendant is entitled to a reversal of his conviction if counsel's incompetence resulted in a trial which "shocked the conscience of the court and made the proceedings a farce and mockery of justice." *See, e.g.*, Diggs v. Welch, 148 F.2d 667 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945); Smith v. State, 396 N.E.2d 898 (Ind. 1979); Royal v. State, 396 N.E.2d 390 (Ind. 1979); State v. Gray, 601 P.2d 918 (Utah 1979). The "mockery" test has been vehemently criticized by commentators because it "requires such a minimal level of performance that it is itself a mockery of the Sixth Amendment." Bazelon, *supra* note 6, at 28.

Another standard measures the performance of defense counsel against a "range of competence required of attorneys representing defendants in criminal cases." Parker v. North Carolina, 397 U.S. 790, 797-98 (1970). This standard has been articulated in various ways: counsel must have given reasonably effective assistance, Hudson v. Alabama, 493 F.2d 171 (5th Cir. 1974); defendant must have had conscientious and meaningful representation, State v. Desroches, 110 R.I. 497, 293 A.2d 913 (1972); defendant must have had a fair trial, Thomas v. State, 516 S.W.2d 761 (Mo. App. 1974); or counsel must have had a reasonable basis for his actions, Commonwealth *ex rel.* Washington v. Masoney, 427 Pa. 599, 235 A.2d 549 (1967). *See also* Miller v. McCarthy, 607 F.2d 854, 857 (9th Cir. 1979); Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979) (en banc); Moran v. Morris, 478 F. Supp. 145 (C.D. Cal. 1979); State v. Schrum, 226 Kan. 125, 126-27, 595 P.2d 1127, 1129 (1979); Sanchez v. State, 589 S.W.2d 422, 424 (Tex. Crim. App. 1979).

In People v. Pope, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979), the California Supreme Court departed from the "farce or sham" standard previously enunciated in People v. Ibarra, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963), and held that in order for a defendant to prove inadequate assistance, he must show that "trial counsel failed to act in a manner to be expected of reasonably competent *attorneys* acting as diligent advocates" and that "counsel's acts or omissions resulted in the withdrawal of a potentially meritorious defense." 23 Cal. 3d at 425, 590 P.2d at 866, 152 Cal. Rptr. at 739 (emphasis supplied). The *Perez* court applied this standard and refused to overturn defendant's conviction on the basis of lack of effective representation. *But see* note 36 *supra*.

In applying any one of these standards, however, it is important to note that the appellate court is restricted to reviewing the trial record, and ineffective representation may not always be apparent therefrom. *See* State v. King, 24 Wash. App. 495, 601 P.2d 982 (1979) (record did not disclose whether attorney had prevented defendant from testifying on his own behalf). For example, if counsel was ineffective, he may have failed to call a necessary witness, but the record would neither show this oversight nor the extent to which defendant was prejudiced. KRANTZ, *supra* note 6, at 174; *cf.* Dickey v. Florida, 398 U.S. 30, 53 (1970) (Brennan, J., concurring) ("concrete evidence of prejudice is often not at hand").

44. 24 Cal. 3d at 136, 594 P.2d at 4, 155 Cal. Rptr. at 179.

45. *See* note 26 *supra*.

admission to the bar, however, are not mere formalities when the right to counsel is involved. These requirements indicate that certain minimum standards of competency, needed to ensure that the defense attorney can protect his client's interests, have been met.[46] In addition to assuring that the defendant will have a competent defense, a license connotes training in the procedural area to guarantee smooth operation of the complex judicial process.[47] Licensing also means that an attorney has the character and moral demeanor required for the fiduciary attorney-client relationship.[48] The attorney's licensing qualifications are stringent, and for good reason: the attorney bears a heavy responsibility to his clients.[49]

The law student assumes the same responsibilities in representing a criminal defendant at trial, but his proven qualifications and achievements fall far short of the standard for licensure. The only requirements for participation in the student program are the completion of three semesters of legal education and approval of the law school dean.[50] There may be areas of study to which he has not been exposed[51] or defects in

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46. The threshold qualification contained in the Sixth Amendment contemplates that whoever represents the defendant will be specifically qualified in law. Viewed in the historical context of the legal profession in both this country and in England, that threshold requirement is met by admission to the bar. Special qualifications have been placed on those who sought to represent defendants before criminal courts at least since the time of Henry IV. [footnote omitted] Thus, admission to the bar is taken as assurance that the attorney meets the minimum competence set out in the requirement of "counsel" in the Sixth Amendment. [footnote omitted]

KRANTZ, *supra* note 6, at 269.

47. Faretta v. California, 422 U.S. 806, 845 (1974) (Burger, C.J., dissenting) (contending that efficiency of judicial system is promoted by licensed, experienced counsel).

48. In State v. Murrell, 74 So. 2d 221 (Fla. 1954), the court expounded upon the relationship between moral character and the attorney's role in society:

> There is in fact, no vocation in life where moral character counts for so much or where it is subjected to more crucial tests by citizen and the public than is that of members of the bar. His client's life, liberty, property, reputation, the future of his family, in fact all that is closest to him are often in his lawyer's keeping. The fidelity and candor with which he performs his trust, point up reasons that distinguish the legal profession from other businesses.

Id. at 224.

49. *Id.*

50. RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS (1970), *reprinted in* COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, STATE RULES PERMITTING THE STUDENT PRACTICE OF LAW: COMPARISONS AND COMMENTS (1971).

51. Because all areas of the law are interrelated, it is impossible to properly advise a client concerning a particular problem without at least some understanding of other aspects of the law which might properly be focused

character which would prevent his admission to the bar.[52] The main point, however, is simply that he is a law *student*.

The *Perez* court attempted to overcome this problem by stressing that adequate counsel had been provided because a licensed attorney had at all times been present in the courtroom.[53] Case law concerning representation by both licensed and unlicensed counsel, however, indicates that the mere presence of a licensed attorney may not be enough; rather, such representation is considered sufficient only if the participation of the licensed attorney is of a "controlling"[54] or a "continuing and substantial"[55] nature. In the instant case, although the supervising public defender was present, it is questionable whether his participation through supervision of the law student was "continuing and substantial." His contribution, according to the trial record, amounted to a mere thirty-six words.[56] During the course of a three-day trial, the utterance of thirty-six words does not amount to "substantial" participation.[57] Moreover, while it

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on the client's problem. Comment, *Unauthorized Practice by Law Students: Some Legal Advice about Legal Advice*, 36 TEX. L. REV. 346, 348 (1958).

52. *See* note 42 *supra*.

53. 24 Cal. 3d at 140, 594 P.2d at 8, 155 Cal. Rptr. at 183.

54. In State v. Riggs, 135 N.E.2d 247 (Ind. 1956), where the chief defense counsel was incompetent and not an attorney-at-law, his co-counsel had only secondary control over the defense proceedings "and was not in a position to insist upon his advice being followed" the court granted a new trial. While the public defender in *Perez* was theoretically in control of the law student, he could not realistically dictate every word spoken by the student. Thus, the student could have made a statement damaging to Perez' defense, and the public defender would have been powerless to remedy its effect.

55. People v. Cox, 12 Ill. 2d 265, 146 N.E.2d 19 (1957). In *Cox*, the Illinois Supreme Court rejected the state's argument that defendant's representation by licensed as well as unlicensed counsel cured any defect in the representation by unlicensed counsel. The court held that the shortcomings of the unlicensed person would be remedied only if the representation by licensed counsel had been of a "continuing and substantial nature." The court examined the trial record and determined that the licensed attorney had not taken a continuing and substantial role at trial. *See* State v. Deruy, 143 Kan. 590, 56 P.2d 57 (1936) (local counsel assisted attorney not licensed to practice in state); Higgins v. Parker, 354 Mo. 888, 191 S.W.2d 668 (1945) (layman masquerading as defense attorney was assisted by licensed counsel); State v. Johnson, 64 S.D. 162, 265 N.W. 599 (1936) (qualified attorney assisted one who had been disbarred).

56. 24 Cal. 3d at 141, 594 P.2d at 9, 155 Cal. Rptr. at 184. In addition to the public defender's limited participation evidenced by the trial record, he failed to object to the prosecution's testimony that after his arrest, Perez was advised of his right to remain silent and exercised that right. A prosecutor's comment on a defendant's exercise of his constitutional right to silence is thought to be so prejudicial that it mandates reversal of any conviction if a timely objection has been made. *See* Doyle v. Ohio, 426 U.S. 610 (1976); Griffin v. California, 380 U.S. 609 (1965); People v. Wollenberg, 37 Ill. 2d 480, 229 N.E.2d 490 (1967). *See also* People v. Stock, 56 Ill. 2d 461, 309 N.E.2d 19 (1974).

57. Despite the *Perez* court's eagerness to characterize defendant's rep-

is not possible to glean from the record the extent to which the public defender controlled the student's words and actions, the assumption by the *Perez* court that such control existed is of questionable validity.[58] Thus, the public defender's mere presence at the counsel table does not cure the constitutional defect of representation by unlicensed counsel.[59]

Public Policy Considerations

The court further attempted to justify law student representation on the basis of public policy considerations. The court noted that a reversal of defendant's conviction would seriously undermine the student practice programs it staunchly supports.[60] The court expressed concern for the risks posed by the law student's inexperience, yet found it preferable for the future defense lawyer to acquire experience under supervised student practice programs rather than later on his own.[61] But in its eagerness to endorse the student practice program, the court gave only fleeting consideration to the accused's right to constitutionally adequate counsel for his defense.[62] While criminal trial ex-

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resentation as licensed counsel assisted by a law student, it is apparent from the transcript that it was the licensed attorney who was the assistant. 24 Cal. 3d at 141, 594 P.2d at 9, 155 Cal. Rptr. at 184 (Mosk, J., dissenting).

58. Even assuming that the public defender exercised control over the law student, the appellate court and supreme court dissent pointed out that once a statement is made or a question is asked in court, it cannot be withdrawn:

> [The supervising attorney] 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.

Id. at 144, 594 P.2d at 12, 155 Cal. Rptr. at 187 (Mosk, J., dissenting) (quoting 82 Cal. App. 3d 45, 52, 147 Cal. Rptr. 34, 40 (1978)).

59. *See* note 30 *supra*.

60. The *Perez* court purported to rely on the view of its Chief Justice, Rose E. Bird, as support for courtroom training of law students. The court's reliance is misplaced, however. The Chief Justice offered no opinion on the use of law students in felony trials. Rather, in discussing one program of student participation, she noted that "the most experienced students try *misdemeanor* cases." Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process and Professional Responsibility*, 14 SANTA CLARA LAW. 246, 270 (1974) (emphasis supplied). *But see* notes 2 & 31 *supra*.

61. 24 Cal. 3d at 138, 594 P.2d at 6, 155 Cal. Rptr. at 181.

62. In *Argersinger*, the Court stated that "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defense." Argersinger v. Hamlin, 407 U.S. 25, 32 (1972). This statement supported the proposition that lawyers are necessary to enable each defendant to stand equal before the law; attorneys cannot be considered luxuries. It may be questioned then whether this goal of equality is advanced by assigning a law student to indigent defendants

perience benefits the student, the goal of preparing future defense attorneys should not supersede the primary objective of providing each *present* defendant with representation comparable to that which a paying defendant could command.[63] The trial of an indigent criminal defendant should not be reduced to a student exercise, especially when a defendant's liberty is at stake.[64]

WAIVER OR CONSENT TO LAW STUDENT REPRESENTATION

If, as the *Perez* court held, law student representation fulfills constitutional requirements, then no issue of consent or waiver would be involved. A law student and a licensed attorney could be appointed by the court, and the defendant would have no voice in the matter because an indigent defendant generally does not have the right to choose a particular attorney to represent him.[65] If, however, representation by a supervised student amounts to something less than the constitutional guarantee of counsel, the constitutional right may be waived, but only through a knowing and intelligent consent.[66]

Although the *Perez* court stated that no waiver was required since defendant had been represented by both the law student *and* a licensed attorney, it nonetheless found that Perez had made an effective "waiver" because the procedural requirements of the student practice rules had been met.[67] The court's reasoning, in addition to being inconsistent, ignored a number of Perez' rights and the manner in which those rights could be relinquished. Perez had the right to be represented by a licensed

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when it is inconceivable that a paying defendant would accept such representation.

63. The need for adequate representation is not being met if it is necessary to use law students to represent the indigent accused. . . . Regardless of the ability and desire of the law student, no stage in the defense of a person accused of crime can be completely entrusted to one inexperienced in the law and procedure of criminal defense.

Mancuso, *Law Students and Defender Offices*, 24 LEGAL AID BRIEFCASE 242 (1966).

64. The *Perez* dissent stated that a felony trial goes beyond the limits of the professional services that students should be permitted to provide. 24 Cal. 3d at 145, 594 P.2d at 13, 155 Cal. Rptr. at 188 (Mosk, J., dissenting).

65. United States v. Laura, 607 F.2d 52, 56 (3d Cir. 1979); United States v. Vargas-Martinez, 569 F.2d 1102, 1104 (9th Cir. 1978); United States v. Poulack, 556 F.2d 83, 86 (1st Cir.), *cert. denied*, 434 U.S. 986 (1977); United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir. 1976), *cert. denied*, 429 U.S. 1104 (1977); Reiff v. United States, 299 F.2d 366 (9th Cir.), *cert. denied*, 372 U.S. 937 (1962); Tibbett v. Hand, 294 F.2d 68 (10th Cir. 1961); Raullerson v. Patterson, 272 F. Supp. 495 (D. Colo. 1967).

66. Faretta v. California, 422 U.S. 806 (1975); Johnson v. Zerbst, 304 U.S. 458 (1938).

67. 24 Cal. 3d at 140, 594 P.2d at 8, 155 Cal. Rptr. at 183.

staff member of the public defender's office.[68] He also had the right to waive his right to counsel and represent himself,[69] or, in the alternative, partially waive his right in the sense that he would be represented but not by a licensed attorney.[70] An agreement that a law student, supervised by a licensed attorney, could perform some or all of counsel's duties would constitute such a partial waiver.[71] However, both situations require that the waiver be knowingly and intelligently made.[72]

In determining whether a waiver has been knowingly and intelligently made, a fundamental requirement is that the waived right had in fact been made known to the person.[73] In the instant case, there was no indication that Perez knew that he could have had a licensed attorney conduct his entire defense.[74]

The *Perez* court rejected defendant's argument that his consent to student representation was not knowingly made. In reaching this decision, the court relied solely on the signed con-

68. *See* note 38 *supra*.

69. Faretta v. California, 422 U.S. 806 (1975).

70. People v. Miller, 89 Cal. App. 3d 17, 152 Cal. Rptr. 707 (1979).

71. *Id.* at 19, 152 Cal. Rptr. at 709. In *Miller*, the defendant was represented by a law student at trial and later appealed his conviction, claiming he had not been aware of his representative's status. In discussing defendant's rights under the sixth amendment and the waiver of such rights, the court stated that "[a]n agreement that a legal intern under the direct supervision of counsel could discharge some or all of counsel's duty, would constitute a partial waiver [of defendant's sixth amendment rights]."

72. Waiver is defined as the "intelligent relinquishment or abandonment of a known right. . . ." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

73. The record of Perez' trial indicated only that the consent form had been filed with the court. 24 Cal. 3d at 140, 594 P.2d at 8, 155 Cal. Rptr. at 183. Such a procedure, however, provided "little insight into either the nature of, or the circumstances surrounding," the signing of the consent form to determine whether there was "an intentional relinquishment or waiver" of the right to be represented by an attorney. Molignaro v. Dutton, 373 F.2d 729 (5th Cir. 1967). *See* note 21 *supra*.

74. In distinguishing the imposter cases from *Perez*, the court stressed that an important consideration in those cases was that the defendant *did not know* the imposter status of his representative. It is perhaps ironic, then, that the court gave such minimal treatment to Perez' claim that he did not know he was being represented by a law student. It is not difficult to visualize Perez' confusion and stress while on trial. This situation was compounded by the fact that the trial was conducted in a language foreign to him—English. Under such conditions, it seems unlikely that he would have had the temerity to question the consent form when it was presented to him. Furthermore, because Perez was indigent, it seems reasonable to assume that he did not possess a high degree of sophistication concerning the intricacies of the criminal justice system. It would not be unreasonable to conclude, therefore, that Perez was not aware of the *difference* between an attorney and a law student. *See* note 26 *supra*. Moreover, there was no indication that the choice between representation by a licensed attorney or a supervised law student was ever explained to Perez.

sent form.[75] The court went on to state that since no constitutional rights were involved, the presumption that official duties had been performed was sufficient to shift to defendant the burden of showing that his consent was invalid.[76]

The court's reasoning is fraught with problems. Its reliance on the written consent overlooks the fact that such forms often carefully refrain from indicating that the defendant has a choice of representation by licensed counsel instead of a law student. The hapless defendant, under the pressure of arrest and impending trial, cannot be expected to "read between the lines" to discover whether this option exists.[77] Thus, the court's reliance on the validity of the consent form appears to be no more than a feeble attempt to justify its overall decision.

Furthermore, despite the fact that defendant had signed a consent form, when a waiver of rights is involved, it is well established that the trial court has a duty to safeguard defendant's rights. There should be a dialogue between the court and the defendant so it can be ascertained whether the accused understands the consequences of his action.[78] In making this determination, courts in previous decisions have considered all the circumstances of the case including such objective criteria as the defendant's age,[79] his level of education,[80] and his prior involvement, if any, in legal proceedings.[81] After considering all relevant factors the court should indulge in every reasonable presumption against waiver.[82] In the instant case, there was no evidence that the trial court employed any of these precautions; yet the California Supreme Court ignored this omission and de-

75. 24 Cal. 3d at 139, 594 P.2d at 7, 155 Cal. Rptr. at 182.

76. 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. . . . [A]ny argument based on the defendant's "consent" is a makeweight.

Gideon's Army, supra note 14, at 462.

77. *Id.*

78. When a waiver of constitutional rights is involved, whether the waiver was made knowingly and intelligently should be clearly determined by the trial court, the findings appearing on the record. Glasser v. United States, 315 U.S. 60, 70 (1942); *see* Mixon v. United States, 608 F.2d 588, 590 n.1 (5th Cir. 1979); United States v. Woods, 544 F.2d 242 (6th Cir. 1976); United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir. 1973); United States *ex rel.* Singleton v. Woods, 440 F.2d 835 (7th Cir. 1971).

79. LaPlante v. Wolff, 505 F.2d 780 (8th Cir. 1974).

80. United States v. Harrison, 451 F.2d 1013 (2d Cir. 1971).

81. United States v. Trapnell, 512 F.2d 10 (9th Cir. 1975).

82. Brookhart v. Janis, 384 U.S. 1, 4 (1966).

parted from extensive precedent designed to safeguard the right to counsel.

It seems basic to the protection of the right to counsel that before a defendant consents to student representation, all options should be clearly explained on the consent form *and* in a dialogue between the defendant and the trial judge. The defendant should be informed that he has a right to representation by licensed counsel, but that if he consents, it is the law student who will conduct his defense.[83] When this information is provided, it is doubtful that a defendant facing a serious criminal charge would choose to be represented by a mere student.[84]

CONCLUSION

The goal of constitutional protections is to provide rich and poor, as nearly as possible, with the same benefits under the law. The right to representation of counsel in a criminal trial is invaluable since it is often the means by which all other rights are enforced. For the indigent defendant, however, the right too often means perfunctory, apathetic representation by an overworked public defender or an opportunistic assigned defense attorney. Representation of indigents by a supervised law student may improve this situation by providing enthusiastic advocacy for the indigent defendant. But the defendant may also find himself being *used* as a test case in which the student is allowed to make his first mistakes to the detriment of those least likely to protest—the poor.[85]

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83. People v. Miller, 89 Cal. App. 3d 14, 152 Cal. Rptr. 707 (1979). In order to ensure knowing and intelligent consent to student representation, both the consent form and the dialogue with the court should advise defendant that "he has the right to have a competent licensed attorney personally and actively conduct his defense at every stage of the proceeding and that he has the right to terminate the student's participation at any time, in favor of the licensed attorney." *Id.* at 16, 152 Cal. Rptr. at 709.

84. *Cf.* Irving, *Argersinger and Beyond (Introduction: The Right to Counsel)*, 12 AM. CRIM. L. REV. 591, 621 (1975) (Where the trial court applies objective criteria to determine whether a waiver is being made intelligently and knowingly, a waiver in fact rarely results. Efforts to waive counsel are usually based on ignorance or false beliefs on the part of defendant). It seems likely that consent to representation by a law student, when defendant has a right to licensed counsel, may similarly be based on the defendant's ignorance or false beliefs. When defendant clearly understands his choice, his decision in favor of the licensed attorney seems compelling.

85. [T]he majority of the cases handled by [law students involve] indigents with non-fee generating problems—cases which the private bar does not want either because the case is not economically profitable or because it is too oppressive. If anything perpetuates the sense by the poor that they are receiving less than quality legal services, it is this requirement that third-year law students can only represent indigent clients. . . . The suggestion is very clear that law students will be al-

There is, however, a middle ground between allowing a law student to conduct the entire trial defense of an accused person and total exclusion from the criminal defense process. Criminal defense work involves a great deal of pre-trial preparation, including investigation of the case, pre-trying of witnesses, motions, and other details, all of which are vitally important to the proper conduct of the courtroom defense.[86] Assisting the trial attorney in these matters would provide the student with invaluable experience. Furthermore, such activities would have the advantage of being subject to advance approval so that the defendant would not be prejudiced by the student's inexperience. There would probably be few objections to student participation in these aspects of criminal defense and a limited role in the trial itself. But the student should be an assistant to the attorney of record, rather than vice versa.

In the final analysis, the issue of whether student representation abridges the defendant's constitutional rights may require determination by the United States Supreme Court. But as long as a defendant must give his consent to student representation because it is not the equivalent of assistance by licensed counsel, it is fundamental that such consent must be knowingly and intelligently given. Defendant's rights should be clearly explained to him; he should *know* that if he signs the consent form he will be represented by a *law student*. This basic safeguard was ignored by the California Supreme Court. Instead of advancing toward the goal of providing rich and poor

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lowed to make their mistakes on the poor—the group least able to object.

Wolf, *The Delivery of Legal Services: Some Ethical Considerations in the Use of Law Students, reprinted in* CLINICAL LEGAL EDUCATION: WORKING PAPERS 245 (1973). While California does not restrict law students to defense of indigents, it is naive to think a paying client would tolerate such inexperienced representation. *Cf.* CTS Corp. v. Electro Materials Corp. of Am., 476 F. Supp. 144, 145 (S.D.N.Y. 1979) (law students not entitled to "attorneys' fees" for their services). A defendant's right to a fair trial should not depend on his ability to pay. When an indigent is, for all practical purposes, relegated to reliance on a law student, "[h]is plight is an indictment of our system of criminal justice, which promises 'Equal Justice Under Law,' but delivers only 'Justice for Those Who Can Afford It.'" United States v. Decoster, No. 72-1283, slip op. at 1 (D.C. Cir. July 10, 1979), (en banc) (Bazelon, J., dissenting), *cert. denied*, 100 S. Ct. 302 (1979). *See generally* Erickson, *Standards of Competency for Defense Counsel in a Criminal Case*, 17 AM. CRIM. L. REV. 233 (1979).

86. *See* Cleary, *Law Students in Criminal Law Practice*, 16 DE PAUL L. REV. 1 (1966), contending that a criminal trial can be compared to the tip of an iceberg, in that what is apparent is only a small part of the whole. A case is based on underlying factual and legal research not apparent on the surface. Pretrial and post-trial procedures are essential to any litigation and must be mastered by the law student. *Id.* at 7.

with comparable assistance of counsel, *People v. Perez* was a step backward.

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