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## Law Student Representation of Indigent Criminal Defendants in Illinois, 2 J. Marshall J. of Prac. & Proc. 364 (1969)

David W. Rosenberg

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LAW STUDENT REPRESENTATION  
OF INDIGENT CRIMINAL  
DEFENDANTS IN ILLINOIS

*Gideon v. Wainwright*<sup>1</sup> and *Douglas v. California*,<sup>2</sup> and their progeny,<sup>3</sup> have broadened the application of the sixth amendment right to assistance of counsel in a criminal case.<sup>4</sup> The Supreme Court decisions in *Gideon*, which made mandatory upon the states that trial counsel be provided to indigent felony defendants, and *Douglas*, which compelled the furnishing of counsel on appeal, increased the demand for legal counsel by an incalculable factor.<sup>5</sup>

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<sup>1</sup> 372 U.S. 335 (1963). The defendant was charged with breaking and entering a poolroom with intent to commit a misdemeanor, such offense being a felony under Florida law. The defendant appeared in court without a lawyer or the means to retain one and asked for court-appointed counsel. The court refused on the ground it could only provide counsel in capital cases. The defendant was therefore compelled to conduct his own defense.

<sup>2</sup> 372 U.S. 353 (1963). Two indigent defendants were convicted of thirteen felonies, including robbery, assault with a deadly weapon, and assault with intent to commit murder. Their request for counsel at the appellate level was denied.

<sup>3</sup> *Mempa v. Rhay*, 389 U.S. 128 (1967). The petitioner was convicted of "joyriding" and was placed on probation after pleading guilty on the advice of his court-appointed counsel. Subsequently, the prosecution moved to have his probation revoked on the ground he became involved in a burglary. At the revocation proceeding, the seventeen-year-old petitioner was not afforded counsel and was sentenced to ten years in jail. The court stated that *Gideon* compels the conclusion that "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." *Id.* at 134. See also *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); and *Stovall v. Denno*, 388 U.S. 293 (1967), which hold that since the police lineup procedure is considered a "critical stage" in the criminal process, the accused must be afforded counsel as a matter of right at such time, absent an intelligent waiver.

<sup>4</sup> The sixth amendment of the United States Constitution provides that: "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. See also *Powell v. Alabama*, 287 U.S. 45 (1932), wherein it is stated that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." *Id.* at 68-69.

<sup>5</sup> For an extensive study of the effect of *Gideon* see Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445 (1965) and Anderson, *Gideon: A Challenging Opportunity for School and Bar*, 9 VILL. L. REV. 619 (1964). See also Brief for American Civil Liberties Union as Amicus Curiae at 33, *Gideon v. Wainwright*, 372 U.S. 335 (1963), wherein it is stated that: [W]hatever cost is to be placed upon the state courts, local communities, and the bar must be borne as a result of the clear constitutional requirement that all indigent defendants in state criminal cases have a right to be furnished with counsel.

See also Brief for State Government as Amicus Curiae at 23, *Gideon v. Wainwright*, 372 U.S. 335 (1963), which stated that:

The effect of obligatory representation in felony cases will concededly impose a difficult but not insurmountable burden on the bar. The Legislatures in many states will have to act to set up an office of the public defender or its equivalent . . . .

The State, City and County Bar Associations in many instances will have to bestir themselves. A vast expansion of the services of

Some measure of this great need is evident from the situation in Illinois. In 1964 there were approximately 190,000 defendants charged with serious crimes in the City of Chicago alone<sup>6</sup>, of which fully one-half were unable to retain their own counsel.<sup>7</sup> The Illinois Constitution complements this need by providing that "[i]n all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel. . . ."<sup>8</sup>

Similarly, legislative enactments promote a greater demand for counsel in a number of proceedings. For example, the Illinois Code of Criminal Procedure allows all persons arrested or restrained of their liberty the right to consult with counsel.<sup>9</sup> Furthermore, the Code provides for counsel in all felonies before the defendant has to plead his case, and that any indigent desiring representation is entitled to appointed counsel.<sup>10</sup> The right to counsel also exists in mental health proceedings<sup>11</sup> and juvenile

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charitable organizations such as Legal Aid seems plainly indicated. *Law schools of the nation can prove of immense help.* The interstices will have to be taken up by voluntary assignment and court appointment. (emphasis added).

<sup>6</sup> CHICAGO POLICE DEPARTMENT REPORT TO THE F.B.I., ANNUAL RETURN OF OFFENSES KNOWN TO THE POLICE (1964). These crimes were classified by the Chicago Police as "Class I" crimes and included murder, manslaughter, forcible rape, robbery, aggravated assault, burglary, and larceny. This listing excluded some felonies such as narcotics violations and sex offenses other than rape which are classified as "Class II" crimes. See also D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT (1968).

<sup>7</sup> For a complete discussion of the rate of indigency see D. OAKS & W. LEHMAN, A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT 82 (1968). Nationwide, Mr. Lee Silverstein has estimated that approximately 300,000 persons are charged with felonies in the various states each year and over one-half of these defendants cannot afford an attorney to defend them, L. SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 8 (1965).

<sup>8</sup> ILL. CONST. art. II, §9 (1870).

<sup>9</sup> ILL. REV. STAT. ch. 38, §§103-3, 103-4 (1967). Section 103-3(a) provides that "[p]ersons who are arrested shall have the right to communicate with an attorney. . . ."; while section 103-4 provides that:

Any person committed, imprisoned or restrained of his liberty for any cause whatever and whether or not such person is charged with an offense shall, except in cases of imminent danger of escape, be allowed to consult with any *licensed attorney* at law of this State. . . . (emphasis added).

The effect of the licensing requirement on the adoption of a law student program will be discussed subsequently. See text at note 55 *infra*.

<sup>10</sup> ILL. REV. STAT. ch. 38, §113-3 (1967), which provides that:

(a) Every person charged with an offense shall be allowed counsel before pleading to charge. . . .

(b) In all cases, except where the penalty is a fine only, if the court determines that the defendant is indigent and desires counsel, the Public Defender shall be appointed as counsel. . . . [T]he court may appoint as counsel a licensed attorney at law of this State. . . .

<sup>11</sup> ILL. REV. STAT. ch. 91½, §9-4 (1967), which provides that:

At any hearing under this Act, the court shall inform the person asserted to be mentally retarded or to be in need of mental treatment of his right to counsel and ask if he desires counsel of his choice to be summoned or counsel to be appointed by the court. . . .

1. If the court determines that the person asserted to be mentally

cases,<sup>12</sup> while in post-conviction hearings the right depends upon the defendant's choice.<sup>13</sup>

Referring to this expressed public policy, the Illinois Supreme Court recently stated that "[i]t has long been a major goal of our entire judicial system to see that all persons charged with a crime 'stand on an equality before the bar of justice. . . .'"<sup>14</sup> Thus, the legislators and the courts have contributed to the great demand for legal representation that weighs heavily upon available counsel.

One method of solving the quantitative demand that all felony defendants obtain competent counsel would be the establishment of a program utilizing law school students from the seven law schools in Illinois<sup>15</sup> to represent indigent defendants. In addition to furnishing effective representation, such a program would provide invaluable professional training to Illinois law students.<sup>16</sup>

Before a judgment can be made as to whether Illinois should adopt a law student program to represent indigent criminal defendants, several questions must first be answered: What is the nature and extent of student representation in existing programs? Do law students have the competency to represent indigents in court? Can such a program satisfy constitutional provisions for safeguarding the accused's rights? Would such a program constitute the unauthorized practice of law; and, if so, how can this problem be obviated? Finally, must a student participation program be effectuated by specific legislation or can the Illinois Supreme Court use the rule-making power to establish such a program?

retarded or to be in need of mental treatment is indigent, the court shall appoint as counsel the Public Defender, if available.

2. If the Public Defender is not available, the court shall appoint as counsel an attorney at law licensed by this State.

<sup>12</sup> ILL. REV. STAT. ch. 37, §701-20 (1967), which provides that: [T]he minor who is the subject of the proceeding . . . although proceedings under this Act are not intended to be adversary in character, [has] the right to be represented by counsel. At the request of any party financially unable to employ counsel, the court shall appoint counsel.

<sup>13</sup> ILL. REV. STAT. ch. 38, §122-4 (1967), which provides that: If the petitioner is without counsel and alleges that he is without means to procure counsel, he shall state whether or not he wishes counsel to be appointed to represent him. If appointment of counsel is so requested, the court shall appoint counsel if satisfied that the petitioner has no means to procure counsel.

<sup>14</sup> *People v. Watson*, 36 Ill.2d 228, 232, 221 N.E.2d 645, 648 (1966).

<sup>15</sup> Chicago-Kent College of Law, DePaul University College of Law, John Marshall Law School, Loyola University School of Law, Northwestern University School of Law, University of Chicago Law School, and the University of Illinois College of Law.

<sup>16</sup> See, e.g., *Anderson, Gideon: A Challenging Opportunity for School and Bar*, 9 VILL. L. REV. 619 (1964); See also Brief in Support of the Adoption of Legal Aid Clinic Rule at Part III, Mich. Gen. Ct. Rule 921 (1965).

## PROGRAMS IN EFFECT

With regard to the initial inquiry, there are two types of programs involving law student representation of indigent defendants, distinguishable by the nature of the law student's participation. The first provides for the student's appearance in court, while the second type calls for out-of-court assistance to defense counsel. In Illinois, several programs of the latter variety are in operation and will be discussed after a consideration of in-court representation programs of other states.

Currently, there are several states which permit law students to appear in court to aid indigents in some capacity.<sup>17</sup> Minnesota, by adoption of a Supreme Court Rule on June 27, 1967, was one of the more recent states to institute a program that provides for representation by senior law students as follows:

Any senior law student in a law school in this state accredited by The American Bar Association, may, with the written approval of the Supreme Court of Minnesota, interview, advise, negotiate, and appear in any municipal or trial court on behalf of any indigent person accused of crime, or on behalf of the prosecution, or may represent any indigent person in a civil action; provided, however, that the conduct of the case is under the supervision of a member of the State Bar of Minnesota.

Before any student shall be eligible to appear in court for or on behalf of any indigent person accused of crime, or on behalf of the prosecution, or represent any indigent person in a civil action, the Dean of the accredited law school of which he is a student shall file with the Supreme Court a list of names of the enrolled students who have been selected by the faculty to participate in the program. Upon written approval by the Supreme Court of a student so certified, and the filing of such written approval, or a certified copy thereof, with the district court wherein the law school is located, such approved student shall be, and is hereby, authorized to appear in any court of the State of Minnesota when under the supervision of a member of the State Bar of Minnesota on behalf of such indigent persons accused of crime, or on behalf of the prosecution, or to represent indigent persons in any civil action as may be assigned to them. The expression 'supervision' shall be construed to require the personal attendance of the supervising member of the bar during any trial, plea and sentence, or any other critical stage of any proceeding in or out

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<sup>17</sup> COLO. REV. STAT. §12-1-19 (1963); CONN. PRAC. BK. ch. 45, §894 (1963); FLA. STAT. ANN., RULES CRIM. PROC. rule 1.860 (1968); MASS. JUD. CT. R. 11 (1958); MICH. STAT. ANN., SUP. CT. R. 921 (Cum. Supp. 1968); MINN. STAT. ANN., CT. RULES Vol. 27A (Cum. Supp. 1959-1967); MONT. REV. CODE §93-6704 (1947); RULES GOVERNING NEW JERSEY COURTS, SUP. CT. R. 1:12-8A (1968); NEW MEX. STAT. ANN., §18-1-26 (Supp. 1967); N.Y. CON. LAWS §478 (McKinney 1968); Order Authorizing Limited License to Practice Law to Certain Qualified Law School Applicants and Adopting Rules Governing the Granting of Limited License to Practice Law to Qualified Law School Applicants, 38 OKLA. B.A.J. 1242 (1967); PENN. RULES OF COURT rule 12½ (1969); TENN. CODE ANN., SUP. CT. R. 37, §21 (1956); WYO. STAT. ANN., RULES FOR BAR ASSOC. rule 18 (1957).

of the court room. In all events representation afforded pursuant to this rule must comply with minimal standards required by the State and Federal Constitutions.

The written approval of each student by the Supreme Court of Minnesota shall remain in force and effect for a period of twelve months from the date of filing unless withdrawn earlier.<sup>18</sup> Essentially, after selection by the law school and upon approval of the supreme court, the senior law student participates in court proceedings under the supervision of an attorney. The defendant's rights are protected by the requirement that representation under that rule shall comply with constitutional due process.

Similar to the Minnesota practice, Florida's senior law students are permitted to represent indigents by court rule.<sup>19</sup> This provision has been construed in *Dixon v. State*,<sup>20</sup> where a public defender's request that two law students be allowed to participate in arguing defendant's motion for a new trial was refused by the trial court. The appellate court held there was no error in declining to allow the students to assist in arguing the motion because they had not participated during the trial.<sup>21</sup> The court implicitly recognized the status of law students as counsel in stating that "it was within the trial Court's discretion to have heard . . . [the students'] argument on the new trial motion . . . ." <sup>22</sup>

Tennessee's court rule permits senior law students from accredited Tennessee law schools to represent indigents with the significant exception that the physical presence of a supervising attorney is not required,<sup>23</sup> contrary to the established practice in Florida and Minnesota. Whether the supervising attorney's presence is required appears to be the difference amongst the various state rules and acts which allow students to represent indigents in court. Most states follow the Tennessee rule which does not require in-court supervision of the law student.<sup>24</sup>

The second type of program exists in Illinois, where law students render out-of-court assistance to attorneys representing indigent defendants. The largest program of this nature is the Federal Defender Program for the Northern District of Illinois, which is derived from the Criminal Justice Act of

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<sup>18</sup> MINN. STAT. ANN., CT. RULES Vol. 27A (Cum. Supp. 1959-1967).

<sup>19</sup> FLA. STAT. ANN., RULES CRIM. PROC. rule 1.860 (1968).

<sup>20</sup> 191 So.2d 94 (Fla. Ct. App. 1966).

<sup>21</sup> *Id.* at 96.

<sup>22</sup> *Id.* at 97.

<sup>23</sup> TENN. CODE ANN., Sup. Ct. R. 37, §21 (1956), stating that "[i]mmediate supervision as used in this ORDER does not necessarily mean physical presence of the supervising attorney but shall always mean under the direction of such licensed attorney."

<sup>24</sup> For a comparison of the programs in the various states see Appendix I *infra*.

1964.<sup>25</sup> The six law schools in Chicago have formed a student training and assistance program in which two-man student teams report to the federal court and work under the supervision of a private attorney.<sup>26</sup> A similar program on the state level is the State Law Student Internship Program of the Circuit Court of Cook County. This recent program utilizes law students chosen from the six Chicago law schools to work under the direction of a judge in various divisions of the Circuit Court. The student assists the court with research and is present as an observer during judge-lawyer conferences. This program is under the direction of the Chief Judge and is administered by his Chief Administrative Assistant.<sup>27</sup> Students also serve at the Chicago Legal Aid Bureau in various out-of-court activities and in several local school programs.<sup>28</sup>

Once the program is established, the next question to be determined is whether law students have the capability of rendering effective assistance to indigents.

#### DO STUDENTS HAVE THE NECESSARY TRAINING AND ABILITY?

In 1953, Professor Harno of the University of Illinois favorably characterized the state of legal education in the United States, stating:

Progress in legal education . . . has been brought about

<sup>25</sup> 18 U.S.C. §3006A (1964), which provides:

(a) *Choice of plan.* — Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies or misdemeanors . . . who are financially unable to obtain an adequate defense. . . .

<sup>26</sup> O'Brien, *Implementing Justice: The National Defender Project*, 1 VAL. UNIV. L. R. 320, 337 (1967). For a complete discussion of the Federal Defender Program for the Northern District of Illinois, see MacCarthy, "Interns at Law" *Chicago's Novel Contribution to Legal Education*, 49 CHI. BAR REC. 46 (1967).

<sup>27</sup> The information on this Law Student Internship Program was obtained from Mr. Robert G. Johnston, a faculty member of The John Marshall Law School who is in charge of the program at this school. The program is currently under the direction of Chief Judge John S. Boyle and is administered by Benjamin S. Mackoff, Chief Administrative Assistant.

<sup>28</sup> Information was obtained by correspondence with the various law schools in Illinois with regard to the programs available in these schools permitting student participation. Dean John Ritchie of the Northwestern University School of Law stated that his students work at the Chicago Legal Aid Bureau, the Neighborhood Law Office on the Near North Side, in the Law Student Civil Rights Research Committee's undertakings, and in the office of the Public Defender of Chicago. Mr. Phillip H. Ginsberg, Director of the Mandel Legal Aid Clinic, said that about sixty students at the University of Chicago Law School constitute the Mandel Legal Aid Association, where they are involved in criminal trials and appeals, landlord-tenant relationships, consumer credit, and economic development for the indigent. Professor Robert W. Brown of the University of Illinois College of Law stated that the students work in conjunction with the local county public defender as his investigatory branch, provide research assistance for the local public defender, and handle some post-conviction appeal research. The University of Illinois students also work for the local OEO Legal Services Agency. These letters are on file in the office of *The John Marshall Journal of Practice and Procedure*.

through the establishment of certain quantitative standards — through setting up requirements involving specified periods of prelaw and law study, minimum physical facilities for law schools, the number of books in law school libraries, the minimum number of teachers on law-school staffs. . . .<sup>29</sup>

Another commentator recently stated that American law schools emphasize the practical considerations of legal advocacy rather than the historical or philosophical aspects of the law.<sup>30</sup> Many of today's law schools are vocationally oriented,<sup>31</sup> thereby enabling the student to obtain a working knowledge of the various fields of law, as well as learning the numerous skills an attorney must possess to understand the ubiquitous complexities in the present legal environment.

For example, the use of "practice courts" in law schools allows the prospective lawyer some insight into the actual

<sup>29</sup> A. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 164 (1953).

<sup>30</sup> Samad, *Reappraising American Legal Education Through a Comparative Study*, 13 CLEV.-MAR. L. REV. 375 (1964), where, in discussing American legal education, the author stated that the following are commonly found in American law schools:

[A] law degree is prerequisite to taking the bar examination, the control exercised by legal accrediting agencies, the stress in the curriculum on bar examination subjects, the stress of learning law in the context of litigation through the case method, rather than upon the study of law historically and institutionally through the lecture method, and the fact that the law school curriculum comprises mainly legal as opposed to cultural subject matter.

*Id.* at 379.

<sup>31</sup> The factors which compose this vocational characterization have been stated as follows:

The curricula of the American law schools is [*sic*] vocationally oriented, so that the student gains information in the basic substantive and adjective principles of the law; develops insights into legal institutions, legal method, and professional responsibility; develops dialectical skills in fact discrimination, case and issue analysis, legal synthesis, and issue disposition; gains technical skill in legal research and writing, advocacy and draftsmanship; and learns integration of skills in terms of legal planning, legal counselling, and representation of legal interests in legislative, negotiatory, and adjudicative proceedings.

*Id.* at 385-86. See also Brief in Support of the Adoption of Legal Clinic Rule at Appendix A, Mich. Gen. Ct. Rule 921 (1965), wherein A. H. Wheeler, Dr.Ph., Chairman of the Washtenaw County Citizens Committee for Economic Opportunity, gave the following reasons for permitting law students to represent indigents:

- a) our personal knowledge of their dedication and enthusiasm to the concept and purposes of the Clinic
- b) their superior preparation, qualifications and access to relevant information compared to the efforts of those of us, without any legal training, who now counsel and assist
- c) the likelihood that much of their work will be to counsel, to refer people to proper resources in the community and to conduct a variety of the negotiations that may secure satisfactory solutions without the necessity of going into Court
- d) the enthusiastic support that the legal community has given to similar clinics in other parts of the nation
- e) the anticipated creation of an Advisory Board composed in large measure of the people to be served and representatives of organizations that now assist them. . . .

See also LEAA Dissemination Document (Grant 085) — *Harvard Student District Attorney Project — A Clinical Experience in Prosecution of Minor Criminal Cases by Senior Law Students*, which illustrates the ability of students in prosecuting minor criminal cases.



handling of a case. Practical experience is gained by affording the student an opportunity to correlate his knowledge of procedural and substantive courses while acting as counsel in a hypothetical case, from the initiation of a suit through post-judgment proceedings. By interviewing witnesses, filing pleadings, and appearing in a trial setting, the student develops necessary skills which would enable him to render effective assistance to the indigent accused.<sup>32</sup>

Furthermore, in many law schools, a student develops legal research skills through required courses and assigned research projects.<sup>33</sup> Similarly, those students who receive the opportunity to participate with law school journals are well versed in the techniques of legal research and writing. Thus, the students' knowledge of the techniques of research further complements their capability for representing indigents.

Justice Tom C. Clark has acknowledged the law student's capability by stating that "[t]oday, the average graduate's knowledge of substantive law is really amazing and a goodly per cent reach brilliance."<sup>34</sup> Confidence in the ability of law students to represent indigents was expressed by way of argument in *Gideon*, with such statements as:

A voluntary defender system may use salaried investigators or it may be aided by volunteers from private law offices or local law schools. Such a system is typical of the large urban centers in

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<sup>32</sup> Stevens, *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, 40 A.B.A.J. 211 (1954), where the author acknowledges that:

A few law schools operate a practice court, using actual live controversies presided over by local judges. Thus the students get practical experience and training in dealing with real issues, contacting and conferring with real parties and witnesses, preparing and filing actual pleadings, and examining and cross-examining persons with personal knowledge of the actual events which are the subject matter of the trial. 'Practice Court serves the function of a legal laboratory where, under expert supervision and in a highly realistic setting, the students are given an opportunity to put into practice the knowledge which they have acquired during the course.'

*Id.* at 213. See also Brief in Support of the Adoption of Legal Aid Clinic Rule at Part III, at 7, Mich. Gen. Ct. Rule 921 (1965), stating that a two year program would give the student the necessary knowledge and experience:

[T]he clinic will be established as a two year operation so that a student will normally have to participate in his second year to be permitted to engage in the clinic as a third year law student. Under these circumstances he will have an opportunity to sit in court as a critical observer; he will have an opportunity to observe a number of negotiations and to observe the interviewing and advising of clients. He will, therefore, have some substantial experience in the limited area in which the legal aid clinic will operate.

<sup>33</sup> *Legal Education for Practice: What the Law Schools Can Do and Are Doing*, *supra* note 33, at 213.

<sup>34</sup> Clark, *Some Thoughts on Legal Education*, 12 AM. UNIV. L. REV. 125, 128 (1963), where the author emphasized that there is a need for some practical experience for the law student which may be satisfied by allowing law student participation in trial courts, under the supervision of an experienced attorney.

the East. Its cost to the community and the bar is minimal.<sup>35</sup>

The State, City and County Bar Associations in many instances will have to bestir themselves. A vast expansion of the services of charitable organizations such as Legal Aid seems plainly indicated. *Law schools of the nation can prove of immense help. . .*<sup>36</sup>

Programs already adopted in other jurisdictions have demonstrated that students possess the capacity to be responsible representatives.<sup>37</sup> In arguing for the adoption of a student representative program in Michigan, one law school dean has said:

[A] properly supervised law student can prepare and present a defense which will far exceed the minimum standards of competence which have been established and applied in the federal and state courts.<sup>38</sup>

As a result of the above confidence attributed to the ability of law students, the American Bar Association is presently considering the adoption of a model rule to permit law student representation of indigents in both civil and criminal cases, as well as before administrative tribunals.<sup>39</sup>

Thus, it is clear that senior law students possess the qualifications necessary for providing indigents with adequate and effective counsel due to their exposure to a broader procedural and substantive curricula in today's law schools and the practical experience gained in "practice courts." However, the students' ability as an advocate must be justified with regard to the requirements of constitutional due process.

#### CONSTITUTIONAL REQUIREMENTS

The United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."<sup>40</sup> Thirty years ago, in *Johnson v. Zerbst*,<sup>41</sup> the Court held that the sixth amendment imposed a duty upon the federal government to provide legal representation where the defendants appeared without counsel because of indigency.<sup>42</sup> This principle has

<sup>35</sup> Brief for American Civil Liberties Union as Amicus Curiae at 35, *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>36</sup> Brief for State Government as Amicus Curiae at 24, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (emphasis added).

<sup>37</sup> See Brief in Support of the Adoption of Legal Aid Clinic Rule at Part II, Mich. Gen. Ct. Rule 921 (1965).

<sup>38</sup> *Id.* at Part IV, at 16. See also *Chicago Sun-Times*, May 3, 1968, at 66, col. 1, where Illinois Supreme Court Justice Walter V. Schaeffer, a proponent for allowing third-year law students to represent indigents in minor criminal and civil cases, was quoted as saying that "the average law student is better prepared today than when he went to school."

<sup>39</sup> AM. BAR NEWS, Vol. 13, No. 12, at 6 (December, 1968).

<sup>40</sup> U.S. CONST. amend. VI.

<sup>41</sup> 304 U.S. 458 (1938).

<sup>42</sup> The *Zerbst* Court established that the denial of legal representation

become obligatory upon the states through *Gideon*.<sup>43</sup>

In considering indigents' convictions, the federal and state courts have been ardent in their pronouncement that the right to counsel is a fundamental requisite of procedural due process rather than a vacuous formality. For example, in *Brubaker v. Dickson*,<sup>44</sup> an indigent's conviction of first-degree murder was reversed because his court-assigned counsel failed to conduct an investigation or to present available evidence to show that the accused did not possess the specific intent to commit the crime. The court of appeals commented upon the quality of counsel demanded by constitutional safeguards, stating that:

[T]he due process clause 'prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right.'

. . . [However] . . . the constitutional requirement . . . is one of substance, not of form. . . .

. . . Due process does not require 'errorless counsel, . . . but counsel reasonably likely to render *and rendering* reasonably effective assistance.'<sup>45</sup>

Similarly, in *Powell v. Alabama*,<sup>46</sup> in which several Negroes were indicted and tried for rape without assistance of counsel, the United States Supreme Court stated that:

[I]n a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.<sup>47</sup>

Thus, the Court established that the duty to provide for the assistance of counsel means effective counsel and not necessarily experienced counsel.<sup>48</sup>

In *People v. Cox*,<sup>49</sup> the Illinois Supreme Court extensively considered the meaning of assistance of counsel in reviewing a fourteen-year-old boy's murder conviction. The defendant contended that he was deprived of the assistance of counsel because

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would constitute grounds for habeas corpus relief, stating that:

If the accused . . . is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty.

*Id.* at 468.

<sup>43</sup> 372 U.S. 335 (1963). See text at note 1 *supra*.

<sup>44</sup> 310 F.2d 30 (9th Cir. 1962).

<sup>45</sup> *Id.* at 37 (emphasis added). See also *Constitutional Law — Due Process — Denial of Effective Aid of Counsel Violates Fourteenth Amendment — Brubaker v. Dickson* (United States Circuit Court of Appeals, 9th Cir., 1962), 27 ALBANY L. REV. 291 (1963).

<sup>46</sup> 287 U.S. 45 (1932).

<sup>47</sup> *Id.* at 71.

<sup>48</sup> *Id.*

<sup>49</sup> 12 Ill.2d 265, 146 N.E.2d 19 (1957).

his "attorney" had not been licensed to practice law in Illinois. Despite the fact that the "attorney's" lack of qualifications was discovered five years after conviction, the Illinois Supreme Court stated:

A violation of due process does not result . . . from the single circumstance, unaided by other facts, that the counsel of a defendant's choice is later proved to be unlicensed to practice law before the court in which the trial occurred.<sup>50</sup>

The Illinois Supreme Court then discussed the defendant's constitutional right to counsel as measured by the attorney's ability to render effective assistance, stating:

[T]he right to counsel is not a mere formality, but contemplates that only *qualified* persons will be permitted to defend in a court of justice the life or liberty of a person charged with a crime.

This does not mean . . . that an accused who has been represented by one other than a licensed attorney may claim, *ipso facto*, that he has been deprived of his constitutional rights.<sup>51</sup>

The Illinois Supreme Court then concluded that:

[T]he test of due process is not whether the defendant had an attorney, licensed or unlicensed, but whether under all the circumstances of the case, his conviction was obtained in such a manner as to be offensive to the common and fundamental ideas of what is fair and what is right.<sup>52</sup>

In light of the above, the constitutional issue regarding the adequacy of student representation evolves into whether a senior law student would be capable of rendering reasonably effective assistance of counsel? The Constitution has been interpreted as requiring that a defense attorney's qualifications and advocacy comport with common ideas of fairness, rightness, and justice. A senior law student would satisfy these due process requirements, particularly if the student has proven his capabilities in law school and remains subject to an experienced practitioner's supervision. Thus, it is demonstrable that senior law students can satisfy the constitutional safeguards for the effective repre-

<sup>50</sup> *Id.* at 272, 146 N.E.2d at 23.

<sup>51</sup> *Id.* at 269-70, 146 N.E.2d at 22 (emphasis added).

<sup>52</sup> *Id.* at 271, 146 N.E.2d at 23. See also *State v. Johnson*, 64 S.D. 162, 265 N.W. 599 (1936), where the Supreme Court of South Dakota stated that the fact that defendant's attorney had been disbarred prior to the date of trial and had never been reinstated "would not [alone] entitle defendant to a new trial, unless it appeared that his rights had been prejudiced in some manner by the deception of his counsel." *Id.* at 165, 265 N.W. at 600. Further, in discussing the test of due process, it has been stated in *Annot.*, 68 A.L.R. 2d 1141, 1146 (1959) that:

It has been expressly recognized by courts in several jurisdictions that the mere fact that counsel representing the accused may have been unlicensed, or not a member of the bar of the state where the trial was held, is insufficient to show that the accused was denied due process of law; in addition, the accused must demonstrate that the trial was unfair because he was prejudiced by the actual representation accorded him by the unlicensed counsel, or that the general combination of circumstances was such that he was denied a fair trial.

sentation of criminal defendants.<sup>53</sup> It remains to be considered whether representation by law students would constitute the improper practice of law.

#### UNAUTHORIZED PRACTICE OF LAW

Apart from the questions of the capability of representation by senior law students and the constitutional adequacy of such representation, the problem remains as to whether such representation would constitute the unauthorized practice of law according to the present Illinois statute,<sup>54</sup> rules of court,<sup>55</sup> and decided cases.<sup>56</sup>

The Illinois Attorney and Counselors Act provides that "[n]o person shall be permitted to practice as an attorney or counselor at law within this State without having previously obtained a license for that purpose from the Supreme Court of this State."<sup>57</sup> The underlying purpose of this license requirement

<sup>53</sup> See Brief in Support of the Adoption of Legal Aid Clinic Rule at 14, Mich. Gen. Ct. Rule 921 (1965), wherein it is stated that:

Were the United States Supreme Court . . . called upon to determine the constitutional validity of law student representation, . . . [it] would recognize that the defendant had received *some counsel* and would focus upon the question of competence: *Was that counsel sufficiently competent to meet the constitutional requirement?*

<sup>54</sup> ILL. REV. STAT. ch. 13, §1 (1967). By virtue of this statute, only those persons licensed as attorneys may practice in Illinois. See also ILL. REV. STAT. ch. 38, §32-5 (1967), which provides that:

A person who falsely represents himself to be an attorney authorized to practice law . . . shall be fined . . . or imprisoned in a penal institution other than the penitentiary . . . or both.

<sup>55</sup> ILL. REV. STAT. ch. 110A, §701 (1967), which states that only qualified licensed attorneys may practice law in Illinois.

<sup>56</sup> See, e.g., *People v. Alexander*, 53 Ill. App. 2d 299, 202 N.E.2d 841 (1964), which held that the appearance of law clerks before the bar would constitute, under certain circumstances, the unauthorized practice of law.

With regard to the practice of law by law clerks, their activities have been regulated and limited to:

[W]ork of a preparatory nature, such as research, investigation of details, assemblage of data, and like work that will enable the attorney-employer to carry a given matter to a conclusion through his own examination, approval, or additional effort. The activities of a law clerk do not constitute the practice of law so long as they are thus limited. However, the law clerk does engage in law practice when he handles uncontested probate matters, gives oral opinions on abstracts of title, or prepares wills, leases, mortgages, bills of sale, or contracts without supervision from his employer.

7 AM. JUR. 2d *Attorneys at Law* §88 (1963).

See also *People v. Munson*, 319 Ill. 596, 150 N.E. 280 (1926), in which the State's Attorney who conducted the examination of witnesses before a grand jury indictment was not a licensed attorney, the court stated:

The statute prohibiting the practice of law by one not licensed is to be observed in fact as well as in theory, and the fact that there may be associated in the trial of the case other persons actually licensed to practice law in nowise validates the participation of one not so authorized.

*Id.* at 605, 150 N.E. at 283.

<sup>57</sup> ILL. REV. STAT. ch. 13, §1 (1967). Furthermore, all states have established, by means of statute and/or court rule, that no person, other than a licensed attorney, may practice law. See, e.g., 7 C.J.S. *Attorney and Client* §§5, 16 (1937).

is twofold: to protect the integrity of the legal profession<sup>58</sup> and to provide the public with reasonably effective assistance of counsel. The Illinois Supreme Court has considered the latter purpose as the primary reason for regulating the legal profession:

A license granted by this court to practice is a guarantee that, so far as this court is advised, the person holding such license is a fit and proper person to assume the responsibilities, to enjoy and safe-keep the confidence of others, and to aid and assist them in the care and management of their legal business and affairs.<sup>59</sup>

Concomitantly, the Illinois Supreme Court has expressed the following definition of the practice of law:

The courts are in accord on the proposition that where one appears in a court representing one of the parties to the litigation, counsels and advises with such party in reference to his rights in the suit, selects the kind of pleading and drafts it, and assumes general control of the action in the court, he is engaged in the practice of law. . . . [A]s to what constitutes practicing of law [it] is not limited to practice in courts of record but may include the giving of advice, counseling, drafting of legal documents and the participation in transactions which are outside the scope of the actual litigation of a cause in the courts.<sup>60</sup>

The above judicial attitude has been applied to only one case dealing with the practice of law by a law student. In *People v. Alexander*,<sup>61</sup> the law student defendant was found guilty of contempt of court for the unauthorized practice of law. The defendant had collaborated with an attorney in preparing and presenting a motion that the court enter an order spreading

<sup>58</sup> The "integrity" aspect for the requirement of the licensing of attorneys is based on economy and as an aid to the courts. See, e.g., *Heiskell v. Mozie*, 82 F.2d 861 (D.C. Cir. 1936), commenting that the rule allowing only licensed attorneys to practice law:

[A]rises out of the necessity, in the proper administration of justice, of having legal proceedings carried on according to the rules of law and the practice of courts and by those charged with the responsibility of legal knowledge and professional duty.

*Id.* at 863. See also 7 C.J.S. *Attorney and Client* §7 (1937).

<sup>59</sup> *People v. Czarnecki*, 268 Ill. 278, 294, 109 N.E. 14, 20 (1915). See also *In re Baker*, 8 N.J. 321, 85 A.2d 505 (1951), where the same intention was stated:

[T]he underlying purpose of regulating the practice of law is not so much to protect the public from having to pay fees to unqualified legal advisors as it is to protect the public against the often drastic and far-reaching consequences of their inexpert legal advice.

*Id.* at 339, 85 A.2d at 514.

<sup>60</sup> *People ex rel. Chicago Bar Ass'n v. Tinkoff*, 399 Ill. 282, 288, 77 N.E.2d 693, 696, cert. denied, 334 U.S. 833 (1948). See also *People ex rel. Chicago Bar Ass'n v. Goodman*, 366 Ill. 346, 8 N.E.2d 941 (1937), which denoted the practice of law with regard to the nature of the activity, stating that:

It is immaterial whether the acts which constitute the practice of law are done in an office, before a court or before an administrative body. The character of the act done, and not the place where it is committed, is the factor which is decisive of whether it constitutes the practice of law.

*Id.* at 357, 8 N.E.2d at 947. See generally 7 AM. JUR. 2d *Attorneys at Law* §73 (1963).

<sup>61</sup> 53 Ill. App. 2d 299, 202 N.E.2d 841 (1964).

mistrial of record,<sup>62</sup> pursuant to the judge's request. Significantly, with regard to the aspect of the practice of law by the student clerk, the Illinois court said:

[C]lerks should not be permitted to make motions or participate in other proceedings which can be considered as 'managing' the litigation [but] clerks may make such motions . . . without being guilty of the unauthorized practice of law.<sup>63</sup>

The court thus recognized that the student's personal appearance in a courtroom was not a per se violation.<sup>64</sup>

The Illinois Supreme Court has been emphatic in characterizing the admission to practice law as a judicial prerogative, rather than a matter for the legislature. In *People ex rel. Chicago Bar Association v. Goodman*,<sup>65</sup> the Illinois Supreme Court asserted its right to determine the qualifications for admission to the practice of law, stating, "[t]he power is inherent in this court to prescribe regulations for the study of law and the admission of applicants for the practice of that profession."<sup>66</sup> Thus, the court views itself as the sole authority for granting admission to the bar.<sup>67</sup>

Hence, the statute prescribes that only licensed attorneys be allowed to represent clients, but the underlying purpose of that statute and the definition given to the practice of law is expressed in terms of the degree of effective assistance which may be rendered. Due to the license requirement, the appearance of third-year law students as representatives of indigents, even under the supervision of a licensed attorney, would be the unauthorized practice of law.<sup>68</sup> However, if senior law students have demonstrated their ability to render effective representation, then the purpose of the licensing provision would be satisfied. Therefore, since the court regulates the practice of law, the problem of unauthorized practice by law students would be solved by judicial exception to allow third-year law students to represent indigents.<sup>69</sup>

<sup>62</sup> The court stated that an order spreading mistrial of record is "[a]n order of court reciting the verdict of a jury or setting out its failure to agree on a verdict . . ." *Id.* at 301, 202 N.E.2d at 842.

<sup>63</sup> *Id.* at 303, 202 N.E.2d at 843. See also Annot., 13 A.L.R. 3d 1137 (1967) for a discussion of the activities of law clerks with regard to the illegal practice of law.

<sup>64</sup> See also *Dixon v. State*, 191 So.2d 94 (Fla. Ct. App. 1966).

<sup>65</sup> 366 Ill. 346, 8 N.E.2d 941 (1937), *cert. denied*, 302 U.S. 728.

<sup>66</sup> *Id.* at 349-50, 8 N.E.2d at 944. The court further stated that "[t]he power to regulate and define the practice of law is a prerogative of the judicial department as one of the three divisions of the government created by article 3 of our constitution." *Id.* at 349, 8 N.E.2d at 944.

<sup>67</sup> See also *In re Day*, 181 Ill. 73, 82-83, 92, 54 N.E. 646, 648, 651 (1899).

<sup>68</sup> See Nolan, *Special Statement of the Committee on Character and Fitness of the Chicago Bar Association*, 48 CHI. BAR REC. 55 (1967).

<sup>69</sup> See text at note 17 *supra* for a discussion of such programs in effect in other jurisdictions.

In addition, an analogy can be drawn to the practice employed by medical schools. Third and fourth-year medical students spend a significant portion of their time in hospital clinics under the supervision of a licensed

## CONCLUSION

It is suggested that the adoption of a rule allowing law student participation under licensed supervision will alleviate the urgent, demonstrated need for in-court representation of indigent defendants. In theory, law students have the necessary training and ability to provide indigent defendants with effective assistance of counsel as is required under the sixth and fourteenth amendments of the Constitution. As previously demonstrated, the only practical barrier is the licensing requirement, which would be satisfied under a judicial exception for qualified law students because the judiciary would control those students who would participate in court by approval of the recommended students from the various law schools. Thus, such a judicial exception should be granted. It is urged, therefore, that the Illinois Supreme Court adopt the rule proposed by the Chicago Bar Association<sup>70</sup> permitting senior law students to represent criminal indigents in Illinois courts.\*

*David W. Rosenberg*

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physician, and this practice has not been challenged as the unauthorized practice of medicine, even though the Illinois statute provides that only licensed physicians may practice medicine (ILL. REV. STAT. ch. 91, §2 (1967)). This is, in fact, where the future doctor gains his practical experience. Furthermore, senior medical students at the Chicago Maternity Center assist in delivering babies in the homes of those who cannot afford hospital facilities. Normally, there are only two medical students and one nurse comprising a team. Additional assistance is requested only when the need arises. Medical students, therefore, in hospitals and clinics are performing a valuable function to society. Thus, since medical students are being permitted to work in clinics while under the supervision of licensed physicians, this would be an analogous situation with regard to permitting law students to represent indigents while under the supervision of a licensed attorney.

<sup>70</sup> See Appendix II *infra*.

\*Editor's Note: During the preparation of this article for publication the Illinois Supreme Court adopted Rule 711, entitled Representation by Supervised Senior Law Students, effective as of May 27, 1969. This rule deals with many of the problems discussed in the foregoing comment. However, the beneficial effect of this enactment is limited since the senior law student's participation can be accomplished only through employment in approved programs or state legal departments, i.e., the Public Defender. It is submitted that the indigent defendant's need for counsel requires more extensive participation than that provided by Rule 711. Thus, senior law students should be allowed to represent clients while employed in private law firms with the same supervision as required in all criminal proceedings. This conclusion follows from the fact that the need for representation necessitates involvement of all segments of the Bar.



APPENDIX I  
COMPARISON OF THE VARIOUS STATE PROGRAMS

STATE	How Established		Provision for Allowing Student Practice		REQUIREMENTS			
	Statute	Rule	General	Special	Seniors Only	General Supervision Out-of-Court	Supervisory Presence in Criminal Cases	Part of Formalized Program
ILLINOIS (Proposed)		✓		✓	Yes	Yes	Yes	Yes
COLORADO	✓			✓	No	No	No	No
CONNECTICUT		✓	✓		No	No	No	No
FLORIDA		✓		✓	Yes	Yes	Yes	Yes
MASSACHUSETTS		✓		✓	Yes	Yes	No	No
MICHIGAN		✓		✓	No	Yes	Yes	No
MINNESOTA		✓		✓	Yes	Yes	Yes	Yes
MONTANA	✓		✓		No	No	No	No
NEW JERSEY		✓		✓	Yes	No	No	Yes
NEW MEXICO	✓		✓		No	No	No	No
NEW YORK	✓			✓	Yes	No	No	Yes
OKLAHOMA		✓		✓	Yes	Yes	Yes	Yes
PENNSYLVANIA		✓		✓	Yes	No	No	Yes
TENNESSEE		✓		✓	Yes	Yes	Yes	Yes
WYOMING		✓		✓	Yes	Yes	No	No

APPENDIX II  
SUPREME COURT OF ILLINOIS  
RULE

REPRESENTATION BY SUPERVISED LAW STUDENTS

1. *Purpose:*

It is the responsibility of a judicial system to provide adequate legal services for all persons, regardless of their ability to pay. The discharge of this obligation and the training of law students may be promoted by the efforts of qualified law students acting under adequate supervision by members of the Bar.

2. *Eligibility:*

The activities by law students authorized by this rule may be undertaken only by law students who satisfy all of the requirements set forth below. For the purposes stated herein, an "approved law school" shall mean a law school approved by the Board of Law Examiners pursuant to Rule 58 of the Supreme Court of Illinois. Law students to be eligible:

- A. Shall have received credit, from an approved law school, for work representing at least two-thirds of the total hourly credits required for graduation.
- B. Shall be certified to the Supreme Court of Illinois by the Deans of their respective law schools as having satisfied to the Supreme Court of Illinois the foregoing credit requirement, as being students in good academic standing, and as being eligible under the school's criteria to undertake the activities authorized herein.
- C. Shall undertake the activities authorized herein only in the course of their work for one of the following organizations or programs:
  - (i) A legal aid bureau, organization or clinic chartered by the State of Illinois or established by an approved law school located in Illinois.
  - (ii) An office of the public defender; or
  - (iii) A program (a) to provide representation for indigent parties in courts of review and (b) approved by the Chief Justice of the Illinois Supreme Court, which approval has not been withdrawn.
  - (iv) A program (a) to provide representation to indigent parties in the trial courts and (b) approved by the Chief Judge of the Circuit Court in which such representation is to be provided, which approval has not been withdrawn.

3. *Activities and Practice:*

An eligible student shall be licensed to engage, under the general supervision of a duly enrolled member of the Bar of Illinois, in the following activities, subject to the limitations herein expressed:

- A. To interview and counsel with clients.
- B. To negotiate generally in the settlement of claims and to engage in the preparation and drafting of legal instruments.
- C. To appear in the trial courts of this State in criminal and civil matters.
  - (i) In all civil cases, appearances and pleadings shall be signed by the supervising member of the Bar, but his presence while the case is being presented in court shall not be required.
  - (ii) In all criminal cases involving a charge of an offense where the penalty is a fine only, eligible students may prepare all documents to be filed in such cases, but such documents shall be signed by the supervising member of the Bar, and eligible students may conduct all pre-trial, trial and post-trial proceedings.
  - (iii) In all criminal cases involving a charge of an offense subject to the penalty of imprisonment, all documents filed may be prepared by eligible students but shall be signed by the supervising member of the Bar. Eligible students may participate in pretrial, trial and post-trial proceedings in such cases only in the presence of the supervising member of the Bar. The restrictions set forth in this subparagraph (3 (C) (iii) shall extend to a post-conviction proceeding challenging a sentence of imprisonment and to a proceeding, such as an action for contempt, which may be designated as a "civil case," for some purposes, but which may result in a sentence of imprisonment.
  - (iv) Documents filed in the trial courts may set forth the names of

eligible students who have participated in the preparation of such documents.

- D. To prepare briefs, abstracts and other documents filed in courts of review of the State and to present oral arguments to such courts.
  - (i) All documents filed shall be signed by, and filed in the name of, the supervising member of the Bar and may also set forth the names of eligible students participating in their preparation.
  - (ii) Oral arguments may be presented by eligible students only in the presence of the supervising member of the Bar.

4. *Proviso:*

Nothing herein contained shall limit or affect research, investigation or related activities by law students or other persons who are not members of the Illinois Bar but who, independently of this rule, could properly engage in such activities.