

## *People v. Perez* — An Initial Look At The Sixth Amendment Status Of Student Practice Rules

Despite the advent of the limited practice of law by law students as early as 1957,<sup>1</sup> a California Court of Appeals<sup>2</sup> in 1978 became the first court to examine the sixth amendment status<sup>3</sup> of student representation in state criminal prosecutions. In *People v. Perez*,<sup>4</sup> a California appellate court concluded that a lawyer-supervised law student, certified<sup>5</sup> for limited practice by

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1. See, e.g., MASS. SUP. JUD. CT. R. 3:11 (1957), reprinted in F. KLEIN, S. LELEIKO, & J. MAVITY, BAR ADMISSION RULES AND STUDENT PRACTICE RULES 1064-65 (1978) [hereinafter cited as STUDENT PRACTICE RULES]; WYO. BAR R. 18 (1957), reprinted in STUDENT PRACTICE RULES, *supra*, at 1155-57. Currently 47 states, the District of Columbia, 24 United States District Courts, and four United States Courts of Appeals have student practice rules. See generally STUDENT PRACTICE RULES, *supra*, at 913-77.

For a thorough history of student practice and its pedagogic underpinnings, see *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. 363 (1973) [hereinafter cited as *Empirical Study*].

2. Court of Appeals, Fourth District, Division 1. Interestingly, prior to *Perez*, the Fourth District was the only California Court of Appeals disallowing student practice before its courts. Under the STATE BAR OF CALIFORNIA RULES GOVERNING THE PRACTICAL TRAINING OF LAW STUDENTS (adopted 1970) [hereinafter cited as CAL. STATE BAR RS.], reprinted in STUDENT PRACTICE RULES, *supra* note 1, at 1008-13, individual judges have absolute discretion to permit or prohibit law student participation in proceedings before them. CAL. STATE BAR RS., *supra*, at VI.A.(3).

3. The sixth amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. CONST. amend. VI. The United States Supreme Court has applied the sixth amendment right to counsel to state prosecutions through the due process clause of the fourteenth amendment. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Gideon v. Wainwright*, 372 U.S. 335 (1963). *Accord*, *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973).

Two state courts have dealt with appeal issues collateral to the sixth amendment status of the participating law students. In *State v. Daniels*, 346 So. 2d 672 (La. 1977), the Louisiana Supreme Court held that the defendant had fully consented to student participation in his defense and no reversible error resulted from the substitution of a second supervising attorney for the initial supervising attorney who was called out of town. In *People v. Masonis*, 58 Mich. App. 615, 228 N.W.2d 489 (1975), the court held that defense counsel's explicit announcement at the beginning of the trial that he was a certified law student satisfied the Michigan student practice rules and that the trial court had no duty to advise defendant personally that his appointed counsel was a law student.

One commentator suggests student practice does not pose any threat to sixth amendment rights; rather, carefully constructed programs for student representation contribute meaningfully to the substantive right to counsel. See Monaghan, *Gideon's Army: Student Soldiers*, 45 B.U.L. REV. 445 (1965).

4. 147 Cal. Rptr. 34 (1978) (hearing granted by the California Supreme Court, Aug. 16, 1978) (no official citation exists for the *Perez* case because the supreme court's decision to hear the *Perez* appeal vacated the appellate court decision, rendering it a nonopinion unpublished in the official reporter).

5. Throughout this note, "certified law student" will mean a law student who has been authorized for limited practice within a jurisdiction by complying with the require-

the California Student Practice Rules,<sup>6</sup> is *per se* ineffective counsel in felony trials.<sup>7</sup> Ostensibly to protect the defendant's right to effective counsel,<sup>8</sup> *Perez* struck down the student practice rules without considering the proper function of certification in sixth amendment analysis.<sup>9</sup> Moreover, the court misapplied sixth amendment principles in concluding that the Constitution does not allow student representation in felony trials, irrespective of the presence of a supervising attorney at trial.

In *Perez*, although a licensed supervising attorney maintained full responsibility for the conduct of the case, the student represented the defendant at trial. Prior to *Perez's* trial for second-degree burglary, the court appointed as *Perez's* counsel a deputy public defender, who then obtained the assistance of a law student<sup>10</sup> certified for limited practice by the California State

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ments established by the authorizing body of the jurisdiction, generally the judiciary in its rule-making capacity. For a tabloid survey of student practice rules throughout the country, see STUDENT PRACTICE RULES, *supra* note 1, at 960-77.

6. The California State Bar Association promulgated the student practice rules to provide practical training in lawyering skills neglected by traditional legal education. Memorandum of the State Bar of California at 21, *In re* of the Approval of the State Bar of California Rules Governing the Practical Training of Law Students (submitted Sept. 5, 1978) (memorandum sought California Supreme Court approval *nunc pro tunc* of the student practice rules) [hereinafter cited as Memorandum].

Although the California Supreme Court received copies of the California student practice rules immediately after the State Bar adopted them, the court never officially approved the rules. The *Perez* court concluded the rules authorized a species of admission to practice unapproved by the supreme court. 147 Cal. Rptr. at 43. Thus the law student's representation of *Perez* was the unlawful practice of law. *Id.* This conclusion prompted the California Bar to submit the memorandum to the state supreme court. Supreme court approval of the rules, however, does not resolve the constitutional issue the appellate court raised *sua sponte* regarding the effectiveness of the student's representation. See 147 Cal. Rptr. at 36, 43 n.3.

7. The court distinguished student representation in felony trials from student representation in misdemeanor trials, concluding the sixth amendment permitted the latter but prohibited the former. See 147 Cal. Rptr. at 39-41. The United States Supreme Court decision in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), implicitly rejects this distinction for purposes of substantive right to counsel analysis. See S. KRANTZ, C. SMITH, D. ROSSMAN, P. FROYD, & J. HOFFMAN, RIGHT TO COUNSEL IN CRIMINAL CASES: THE MANDATE OF ARGERSINGER V. HAMLIN 3-177 (1976) [hereinafter cited as S. KRANTZ & C. SMITH]; notes 26, 29, & 35 *infra*.

8. For general examinations of the sixth amendment right to effective counsel, see Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1 (1973); Brown, *The Trumpet Sounds—Gideon—A First Call to the Law School*, 43 TEX. L. REV. 312 (1965); Monaghan, *supra* note 3; Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U.L. REV. 289 (1964); Comment, *A Standard for the Effective Assistance of Counsel*, 14 WAKE FOREST L. REV. 175 (1978).

9. See text accompanying notes 37-48 *infra*.

10. The student was actually a law school graduate awaiting the results of the bar examination.

Bar. With Perez's signed consent,<sup>11</sup> the student appeared on behalf of Perez at trial, conducting the defense under the deputy defender's direct supervision.<sup>12</sup> As the attorney supervised in silence,<sup>13</sup> the student examined witnesses, made objections and motions, and presented the closing argument to the jury, who ultimately convicted Perez on the felony charge.<sup>14</sup> Perez appealed, contending that despite the presence of an attorney of record, his representation by a law student violated his sixth amendment right to assistance of counsel.<sup>15</sup>

In reviewing Perez's sixth amendment claim, the appellate court treated the supervising attorney and the certified student as individuals with separate duties rather than as a team with a shared duty to render effective assistance. The court first reviewed the supervising attorney's role, holding his silent supervision amounted to pro forma representation lacking constitution-

11. CAL. STATE BAR RS., *supra* note 2, at VI.A., requires the client's signed consent as a condition to the student's appearance on the client's behalf at trial. The written consent is evidence that the attorney of record fully informed the client about the law student's role. The consent is not a waiver of the right to counsel because at all times a licensed attorney is responsible for the student's work and must be personally present in the courtroom.

12. *Id.* Rule VI.A. requires the personal and direct supervision of the attorney of record whenever the certified student appears on the client's behalf in court. This provision protects the criminal defendant's sixth amendment right to "counsel," traditionally defined as licensed counsel. See, e.g., *Huckleberry v. State*, 337 So. 2d 400 (Fla. Dist. Ct. App. 1976); *People v. Washington*, 87 Misc. 2d 103, 384 N.Y.S.2d 691 (Sup. Ct. 1976). *But see* Monaghan, *supra* note 3, who argues that "[t]he question [under the sixth amendment] is not whether the accused has been represented by a member of the bar, but whether he has had the 'Assistance of Counsel.'" *Id.* at 458. Neither membership in the bar nor its absence should be decisive. See generally note 40 *infra* and accompanying text. See also CAL. STATE BAR RS., *supra* note 2, at VII, outlining the activities in which a certified student may engage under the general, rather than direct, supervision of the licensed attorney.

13. The trial court record did not contain evidence of any official statements by the deputy defender and did not reflect the nature or extent of any private conversations between the attorney and the student. 147 Cal. Rptr. at 37. The attorney's silence implies several interpretations, not the least plausible of which is that the student performed his duties competently and did not require correction on the record. The *Perez* court, however, chose not to examine the reason for the attorney's silence and thus avoided the substantive scrutiny of the student's performance that may have explained the attorney's silence.

14. 147 Cal. Rptr. at 36-37.

15. Perez did not contend the law student's representation was incompetent, and the court did not review the student's actual performance. *Id.* at 43 n.3. Specifically, Perez argued that 1) his representation by a certified law student was a waiver of his sixth amendment right to counsel not knowingly and intelligently made; and 2) his representation by a law student, an unlicensed person, was a denial of his right to counsel. *Id.* at 36. The opinion suggests that Perez, who fully consented to the student's appearance, did not understand the student's role because Perez spoke only Spanish and required an interpreter throughout the trial. *Id.* at 40-41 & n.2.

ally required zeal<sup>16</sup> and disqualified him as effective counsel under sixth amendment principles.<sup>17</sup> Concerning the student's participation, the court held the student's in-court representation of Perez to be the unlawful practice of law by an unlicensed person, without statutory or judicial authorization.<sup>18</sup> The state argued authorization existed under California certification rules,<sup>19</sup> which permit a student, under a supervising attorney's immediate guidance, to represent felony defendants.<sup>20</sup> The court rejected this argument on two grounds.<sup>21</sup> First, the California Supreme Court had not officially approved the rules promulgated by the State Bar in 1970.<sup>22</sup> As the only body empowered to confer the right to practice law in California, the state supreme court's failure to adopt the rules rendered them an invalid exercise of licensing power by the State Bar.<sup>23</sup> Second, and more significant, the *Perez* court interpreted the sixth amendment to the Federal Constitution as proscribing supervised student representation in felony trials.<sup>24</sup>

The *Perez* court's rationale for the sixth amendment proscription of student felony representation has both a procedural and a substantive dimension. The procedural aspect of the decision inheres in the court's reliance on Justice Brennan's concurring opinion in *Argersinger v. Hamlin*.<sup>25</sup> In *Argersinger*, the United States Supreme Court extended the right to counsel to all criminal defendants facing possible imprisonment.<sup>26</sup> In his con-

16. "The Constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of active advocate in behalf of his client . . . ." *Id.* at 37 (citing from *Anders v. California*, 386 U.S. 738, 744 (1967)). See note 13 *supra*.

17. See 147 Cal. Rptr. at 36. Cf. Comment, *supra* note 8 (The author describes various conduct of defense counsel that does or does not qualify as effective assistance under the sixth amendment.). See generally S. KRANTZ & C. SMITH, *supra* note 7.

18. 147 Cal. Rptr. at 37. In the court's view, appearance before a judicial body on behalf of a client "is the highest point of the [attorney's] calling." *Id.* In defending Perez at a felony trial, the certified student engaged in an activity traditionally regarded as the practice of law.

19. CAL. STATE BAR RS., *supra* note 2.

20. *Id.* at VI.A.

21. 147 Cal. Rptr. at 37-39.

22. See note 6 *supra*.

23. 147 Cal. Rptr. at 38. The California State Bar is authorized to adopt regulations deemed necessary or advisable for effectuating the qualifications for admissions to the practice of law. CAL. BUS. & PROF. CODE § 6047 (West 1974).

24. See note 7 *supra*.

25. 407 U.S. 25, 40-41 (1972). For an extensive study of the *Argersinger* mandate, with ideas for implementing both its plain meaning and spirit, see S. KRANTZ & C. SMITH, *supra* note 7.

26. The Supreme Court held "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or

curing opinion Justice Brennan voiced an expectation that students could make a significant contribution to the representation of the poor in many cases, including those reached by the *Argersinger* decision.<sup>27</sup> Because *Argersinger* involved a misdemeanor charge, the *Perez* court interpreted Justice Brennan's concurrence procedurally as restricting student representation to misdemeanor cases.<sup>28</sup> The substantive aspect, which focuses on defense counsel's actual performance,<sup>29</sup> surfaces in the court's discussion of the professional capabilities of student counsel.<sup>30</sup> By contrasting in the abstract "the conceded premise of the incompleteness of the training of the law student with the competence requirement of the licensed attorney in the trial arena,"<sup>31</sup> the court concluded, without examining the student's individual performance, that law students, as a class, are inherently incompetent to handle felony representation.<sup>32</sup>

The *Perez* court's summary conclusion that the certified student was *per se* ineffective counsel failed to advance the substan-

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felony, unless he was represented by counsel at trial." 407 U.S. at 37. Cf. S. KRANTZ & C. SMITH, *supra* note 7, at 26 ("[T]he importance placed on loss of liberty in the *Argersinger* case will have reverberations in any due process analysis of whether right to counsel is required in areas such as civil commitment, civil contempt, and pre-trial diversion.").

27. 407 U.S. at 40 (1972) (Brennan, J., concurring).

28. 147 Cal. Rptr. at 39-40. "We conclude the *Argersinger* decision does not give constitutional aura to the activities of [the student] in this case." *Id.* at 40.

29. In contemporary sixth amendment analysis involving competency of counsel, the appellate review focuses on the quality of defense counsel's actual performance. This methodology necessarily requires scrutiny on a case-by-case basis because substantive right to counsel principles protect a defendant's right to have competent assistance in each and every case. A theoretical generality cannot resolve the issue of counsel's competence in a specific case. See Bazelon, *supra* note 8; Comment, *supra* note 8; Comment, 24 RUTGERS L. REV. 378 (1970).

30. 147 Cal. Rptr. at 42-43.

31. *Id.* at 42.

32. *Id.* at 43. The court derived its "conceded premise" from one commentary, which relied on another commentary dating back to 1958. The court said:

An experienced trial judge can only watch with horror as a neophyte destroys his own case by inept questioning. The immediate presence of the experienced lawyer cannot undo the harm done by a single disastrous question. . . . 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.

*Id.* at 42. No precedent supports the court's conclusion that the alleged inexperience of defense counsel, without more, renders his representation constitutionally infirm. See Waltz, *supra* note 8; Comment, 24 RUTGERS L. REV. 378 (1970). Inexperience and incompetence are not synonymous, and today, because of the pervasive use of clinical programs, inexperience is not necessarily coextensive with the status of student. See STUDENT PRACTICE RULES, *supra* note 1, at 913-41; Bird, *The Clinical Defense Seminar: A Methodology for Teaching Legal Process & Professional Responsibility*, 14 SANTA CLARA LAW. 246 (1974); *Empirical Study*, *supra* note 1; Gorman, *Clinical Legal Education: A Prospectus*, 44 S. CAL. L. REV. 537 (1971).

tive sixth amendment guarantee of representation by reasonably competent counsel.<sup>33</sup> Although the student's involvement at trial presented a novel sixth amendment appeal,<sup>34</sup> an analogue existed in challenges to counsel's effectiveness involving a licensed attorney. Under modern sixth amendment analysis,<sup>35</sup> the mere presence of the licensed attorney at trial is not decisive, but is only a consideration in determining whether defendant received reasonably effective assistance.<sup>36</sup> Membership in the bar serves as evidence that counsel is minimally qualified and thus reasonably likely to be effective. Bar membership alone, however, cannot answer whether counsel in fact rendered effective aid in any particular case.<sup>37</sup> Only by scrutinizing counsel's individual performance in a specific case, can a court truly determine whether counsel rendered constitutionally adequate assistance.

In *Perez*, the law student's compliance with the California student practice rules serves a function analogous to the licensed attorney's membership in the bar. Certification is evidence that the student is reasonably likely to be effective in performing the authorized activities. Certification requirements, like bar mem-

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33. See *McMann v. Richardson*, 397 U.S. 759 (1970); *Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973).

34. The court had not previously entertained an appeal challenging the validity of the student practice rules or contending a certified student rendered ineffective representation. See note 3 *supra*.

35. Prior to 1960, most jurisdictions regarded the right to counsel as a procedural rather than a substantive right and, consequently, granted post-conviction relief only when representation was so lacking in competence that it reduced the trial to a "mockery of justice." *Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir.), *cert. denied*, 325 U.S. 889 (1945). This stringent standard imposed upon defendant a heavy burden to show unfairness in the trial as a whole. Because defense counsel can render ineffective assistance without reducing the trial to a mockery of justice, substandard representation passed defendants' challenges. See *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974). *Accord*, *Bines, Remedying Ineffective Representation in Criminal Cases: Departures from Habeas Corpus*, 59 VA. L. REV. 927, 928-29 (1973):

It may be something of a puzzle to outsiders why lawyers, who demand so much of other professionals, ask so little of themselves. Doctors, after all, owe their patients much more than a mockery of medicine. But the mockery-of-justice standard does not really reflect the standard of performance which defense lawyers owe their clients.

In 1960, the Fifth Circuit adopted a substantive standard focusing specifically on defense counsel's performance rather than on the fairness of the trial as a whole. *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir.), *modified*, 289 F.2d 928 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961). See Comment, *supra* note 8.

36. See *Powell v. Alabama*, 287 U.S. 45 (1932). *Accord*, David, *Institutional or Private Counsel: A Judge's View of the Public Defender System*, 45 MINN. L. REV. 753, 760 (1961) ("The presumption that all persons licensed to practice are competent to handle all legal matters is refuted every day.").

37. Monaghan, *supra* note 3, at 458.

bership, assure minimum qualifications for the scope of practice involved. Once a student satisfies those requirements a court should presume the student's competence to render assistance within the scope of authorized activities. Rather than presuming the student's competence and inquiring whether the student in fact rendered reasonably effective assistance, the *Perez* court summarily found ineffective representation.

The *Perez per se* rule creates an absolute bar to felony representation by students identified by a licensing body as qualified to satisfy sixth amendment guarantees under specified conditions. In proposing the practice rules, the California State Bar determined that certified students under direct supervision are presumptively capable of furnishing constitutionally effective assistance to all defendants.<sup>38</sup> As the legislative and administrative branch of the California Supreme Court,<sup>39</sup> the only governmental body with the power to admit persons to the practice of law,<sup>40</sup> the State Bar acted pursuant to its statutory duty<sup>41</sup> in promulgating the rules. By authorizing supervised student participation in activities formerly restricted to licensed attorneys,<sup>42</sup> certification encourages students to develop the practical skills often neglected by traditional legal education.<sup>43</sup> The student does

38. See Memorandum, *supra* note 6, at 39. Although the student's compliance with certification requirements creates a presumption of the student's ability to be effective within the scope of authorized activities, the court, when reviewing defendant's challenge to counsel's competence, must determine whether the student in fact rendered constitutionally adequate assistance. See *MacKenna v. Ellis*, 280 F.2d 592 (5th Cir.), *modified*, 289 F.2d 928 (5th Cir. 1960), *cert. denied*, 368 U.S. 877 (1961).

39. See *Chronicle Publishing Co. v. Superior Court*, 54 Cal. 2d 548, 354 P.2d 637, 7 Cal. Rptr. 109 (1960); CAL. BUS. & PROF. CODE §§ 6047, 6060-6068 (West 1974).

40. 147 Cal. Rptr. at 38-39. See *Brotsky v. State Bar*, 57 Cal. 2d 287, 368 P.2d 697, 19 Cal. Rptr. 153 (1962). The United States Supreme Court has let the states define "counsel" and regulate the practice of law within their boundaries, limited only by federal constitutional protections. See *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967). In nearly every state the power resides with the judiciary, which, in its rule-making capacity, establishes minimum licensing requirements for the legal profession. See *State v. Cook*, 84 Wash. 2d 342, 525 P.2d 761 (1974); S. KRANTZ & C. SMITH, *supra* note 7, at 264-66.

41. See CAL. BUS. & PROF. CODE §§ 6031, 6047 (West 1974). The State Bar has express statutory authority to aid in the improvement of the administration of justice, which undoubtedly includes improving the training and educating of lawyers.

42. See, e.g., KY. SUP. CT. R. 2.540 (1978), *reprinted in* STUDENT PRACTICE RULES, *supra* note 1, at 1053-54; MASS. SUP. JUD. CT. R. 3:11 (1978), *reprinted in* STUDENT PRACTICE RULES, *supra* note 1, at 1064-65. All jurisdictions authorizing student practice permit trial work to varying degrees. *Id.* at 960-69.

43. As a general rule, law schools use the "case method" approach to legal education. The case method employs a questioning process to induce substantive analysis, but offers no training in client counseling, interviewing, negotiating, preparation of court docu-

not practice, however, at the expense of a defendant's constitutional rights because the rules require the student's academic preparedness,<sup>44</sup> the defendant's consent upon full disclosure of the student's role,<sup>45</sup> the supervising attorney's personal presence at the student's court appearance,<sup>46</sup> and the attorney's assumption of personal professional responsibility for the student's work.<sup>47</sup> The *Perez* court refused to defer to the State Bar's judgment that these requirements guarantee the student's minimum qualifications and provide basic protections to the client.<sup>48</sup> In its appellate capacity, the *Perez* court's responsibility was not to review the validity of certification rules the state judiciary promulgated under its rule-making authority,<sup>49</sup> but to determine if validly licensed or certified counsel actually rendered effective assistance.<sup>50</sup> The court failed in its appellate function by summarily

ments, or trial advocacy. See STUDENT PRACTICE RULES, *supra* note 1, at 913-41; Bird, *supra* note 32; *Empirical Study*, *supra* note 1; Gorman, *supra* note 32.

44. A participating student must have successfully completed at least three semesters of law school, CAL. STATE BAR RS., *supra* note 2, at III.B.(3)(a)-(b) (or two years of other law study, *id.* at III.B.(3)(c)-(d)), and the law school dean or specified alternates must certify the student's ability and character.

45. *Id.* at VI.A. See note 11 *supra*.

46. CAL. STATE BAR RS., *supra* note 2, at VI.A.(3).

For the protection of the client and public and to insure the validity of the experience from an educational standpoint, the personal presence of the supervising attorney is required in certain especially important instances . . . and in all criminal matters where the right to counsel is guaranteed by the Constitution or statute.

Memorandum, *supra* note 6, at 54 (quoting from *Annual Report of the Board of Governors*, 44 STATE BAR J. 616, 631 (1969)).

The *Perez* court incorrectly regarded defendant's signed consent as a waiver of the right to counsel, despite the trial court's appointment of a deputy defender as the attorney of record and the attorney's presence in court at trial. 147 Cal. Rptr. at 43. See note 11 *supra*. Cf. KY. SUP. CT. R. 2.540, reprinted in STUDENT PRACTICE RULES, *supra* note 1, at 1053-54 (Kentucky's student practice rules do not require the supervising attorney's personal presence in court in criminal cases involving fines of less than \$500 or imprisonment of less than 12 months.).

47. CAL. STATE BAR RS., *supra* note 2, at V.C. See notes 11 & 46 *supra*.

48. Although not inconceivable, a court's substantive scrutiny of licensing requirements for the legal profession is improbable, because the judiciary itself through the state supreme court generally determines who is qualified to practice law. See *State v. Cook*, 84 Wash. 2d 342, 525 P.2d 761 (1974); J. FISCHER & D. LACHMANN, AMERICAN BAR FOUNDATION, UNAUTHORIZED PRACTICE HANDBOOK (1972). A lower court sitting as adjudicator of a controversy is not free to review licensing requirements established by the highest court in the state through its legislative branch. The *Perez* court in its appellate role did not have the discretion to ignore, or the power to abrogate, the practice rules promulgated by the legislative branch of the California Supreme Court.

49. The State Bar formulated the rules pursuant to its statutory duty "to aid in all matters pertaining to the advancement of the science of jurisprudence or to the improvement of the administration of justice." CAL. BUS. & PROF. CODE § 6031 (West 1974).

50. See notes 6, 29, 35, & 48 *supra*.



proscribing student felony representation, rather than conducting a substantive review of the student's performance as counsel.<sup>51</sup>

The *Perez* court, moreover, misapprehended the import of *Argersinger v. Hamlin*.<sup>52</sup> In *Argersinger*, the United States Supreme Court extended the substantive sixth amendment right to effective counsel to all defendants facing possible imprisonment,<sup>53</sup> abrogating the felony/misdemeanor distinction that traditionally determined which defendants merited the assistance of counsel.<sup>54</sup> Because *Argersinger* establishes loss of liberty as the benchmark for the right to counsel, statutory labels of felony and misdemeanor should not affect the substance of the right.<sup>55</sup> Although in sixth amendment analysis, the minimum constitutional standard of effectiveness<sup>56</sup> is identical for misdemeanor and felony representation, a state, as a matter of policy, may provide felony defendants more protection than the constitutionally required minimum.<sup>57</sup> Thus, although a state *may* use the felony/nonfelony distinction to limit the scope of student practice within its jurisdiction to nonfelony cases, the distinction does not affect the constitutional scope of student practice; that is, a state, constitutionally may extend its student practice to felony cases.<sup>58</sup>

Notwithstanding *Argersinger*, the *Perez* court concluded the felony/nonfelony distinction persists under sixth amendment

51. See notes 13, & 29-32 *supra* and accompanying text.

52. 407 U.S. 25 (1972). See note 7 *supra*, and notes 25-28 *supra* and accompanying text.

53. See notes 7 & 26 *supra*.

54. The Court concluded imprisonment is no less onerous because it results from conviction of a misdemeanor rather than a felony. 407 U.S. at 37.

55. See *id.* at 37. *But cf.* S. KRANTZ & C. SMITH, *supra* note 7, at 168 (*Argersinger* did not address the question of what would constitute effective assistance in nonfelony cases and the nature of misdemeanor crimes requires a different emphasis in non-felony cases).

56. Because the United States Supreme Court has never clearly defined "effective assistance," no uniform standard of review exists. *McQueen v. Swenson*, 498 F.2d 207, 214 (8th Cir. 1974). For an extensive and thorough analysis of the variety of standards used by the states and federal circuits, see Comment, *supra* note 8.

57. Had the California State Bar decided as a policy matter to restrict supervised student representation to traditional misdemeanor cases, the *Perez* court would have been justified in concluding the law student exceeded his authority. Constitutional standards prescribe minimum protections and a state has the power to establish more protective standards. The *Perez* court, however, based its decision on constitutional principles rather than state policy. In concluding the right to counsel acknowledges a felony/nonfelony distinction, the court misinterpreted *Argersinger*. See S. KRANTZ & C. SMITH, *supra* note 7, at 168.

58. See note 66 *infra* and accompanying text.

analysis.<sup>59</sup> Despite the State Bar's provision of the same minimum constitutional protections for all misdemeanor and felony defendants with respect to the right to counsel,<sup>60</sup> the *Perez* court concluded a felony defendant deserved greater constitutional protection.<sup>61</sup> In citing Justice Brennan's *Argersinger* concurrence as authority for prohibiting student representation in felony trials,<sup>62</sup> the *Perez* court ignored an alternative interpretation of the Brennan concurrence. Justice Brennan, joined by Justices Douglas and Stewart, acknowledged with approval that in 1972 approximately thirty-eight states had certification rules permitting law students to make supervised court appearances as defense counsel.<sup>63</sup> The Justices expressly stated that law students could contribute significantly to the representation of the poor, including those who have a constitutional right to counsel.<sup>64</sup> Because the statutory felony/misdemeanor distinction has no role in right to counsel analysis,<sup>65</sup> Justice Brennan's concurring opinion reasonably is read not only to approve, but to encourage supervised student representation in all cases involving the right to counsel.<sup>66</sup> In restricting the constitutional scope of student practice to misdemeanor trials, the *Perez* court misapplied the sixth amendment right to counsel principles established in *Argersinger*.

At a time when innovative educators, jurists, and practitioners are expanding, through limited practice programs, the lawyering experiences available to law students, *Perez* marks an un-

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59. 147 Cal. Rptr. at 39.

60. CAL. STATE BAR RS., *supra* note 2, at VI.A.

61. 147 Cal. Rptr. at 40-41.

62. *Id.* at 39, citing 407 U.S. 25, 40 (1972) (Brennan, J., concurring). See notes 25-28 *supra* and accompanying text.

63. 407 U.S. at 40-41.

64. *Id.*

65. See *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

66. Justice Brennan wrote his short concurring opinion simply to add an observation about the majority's discussion of legal resources available to meet the demand for counsel created by *Argersinger*: "Law students as well as practicing attorneys may provide an important source of legal representation for the indigent." 407 U.S. at 40. Cf. *Johnson v. Avery*, 393 U.S. 483 (1969) (The Court invalidated a regulation prohibiting prisoners from assisting one another with habeas corpus applications and other legal matters as violative of prisoners' constitutional right of access to the courts. The Court acknowledged with approval a proposed law school clinical program targeted to assist prisoners with habeas applications.); *Procunier v. Martinez*, 416 U.S. 396 (1974) (The Court invalidated California regulations barring law students employed by lawyers representing prisoners from interviewing inmate clients.); *Bounds v. Smith*, 430 U.S. 817 (1977) (The use of law students either as volunteers or in formal clinical programs is a means by which a state can meet its constitutional duty to assure prisoners meaningful access to the courts.).

healthy retreat. Law students can contribute both qualitatively and quantitatively to the representation of the poor if the legal community furnishes encouragement and guidance. Student practice rules not only enable students to assist the legal profession in its duty to provide quality legal services to all, but also allow students to develop the lawyering skills essential to professional competence. The more expansive the practice rules made available to students, the better prepared students will be to respond competently and sensitively to the diverse and inevitable challenges of practice.\*

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\* **Editor's note:** On April 26, 1979, the California Supreme Court upheld Perez's conviction of second degree burglary in concluding that a defendant "who has received reasonably competent representation pursuant to a program replete with safeguards designed to ensure the competency of representation has not been denied his constitutional right to assistance of counsel merely because one of the two persons who appeared on his behalf was not yet a member of the bar." *People v. Perez*, \_\_\_ Cal. 3d \_\_\_, \_\_\_, 594 P.2d \_\_\_, \_\_\_, 155 Cal. Rptr. 176, 182 (1979).