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William A. Roberts

Greg F. Janson

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People v. Perez

Misapplication of the Right to Counsel

I. INTRODUCTION

People v. Perez represents the strongest attack against the use of law students in the judicial process since the inception of Clinical Law in 1957.¹ If this decision is given its fullest interpretation, it will demote California law students to passive onlookers in their respective clinical law programs. In its most diluted form, it will effectively prohibit any law student from participation in criminal defense.

The case, in terms of actual analysis, may be viewed as a balancing between a criminal defendant's right to the effective assistance of counsel and the interest of society in having an educated and well-trained bar. Alternatively, the case may be viewed as an instance where a court applied an improper standard and stretched the facts to fit that erroneous rule.

This note will demonstrate how this decision has departed from both well-considered public policy and a long line of case precedents. Initially, however, a discussion of the facts and an analysis of the *Perez* decision will be made, along with a general exploration of the right to counsel.

II. FACTUAL BACKGROUND

Carlos Perez was convicted of second-degree burglary,² a felony, by a jury in a superior court of the State of California. Police officers, after hearing the sound of breaking glass, drove one block in the direction of the disturbance and saw the defendant standing across the street from the shattered front door of Durago's Men's Store in Calexico. Defendant was the only person observed in the area and was walking briskly away from the scene of the

1. A formally recognized clinical law program began in Colorado in 1957. Such programs proved to be so successful that within twenty years, forty-seven states were involved in active law student participation in the courtroom. (Nevada, Vermont and Rhode Island, having no law schools within their borders, are the exceptions). COUNCIL ON LEGAL EDUCATION FOR PROFESSIONAL RESPONSIBILITY, INC., SURVEY AND DIRECTORY OF CLINICAL LEGAL EDUCATION (1977-78).

2. CAL. PENAL CODE § 459 (West Supp. 1977).

crime. The officers stopped Mr. Perez and searched bags found in his possession. Inside of both bags were several articles of clothing with price tags still affixed from Durago's Men's Store. Additionally, the officers observed several fresh scratches and glass particles on Mr. Perez's forearms and hands.³ Mr. Perez testified that the bags were not in his arms and that he had discovered them on the sidewalk only moments before his apprehension.⁴ To quote the court of appeal: "The evidence of Perez's guilt, conservatively speaking, is overwhelming."⁵

Mr. Edward Zinter, Deputy Public Defender, was appointed counsel for Mr. Perez. Mr. Jack Loo, University of California, Los Angeles, Law School graduate, then awaiting his Bar results, joined Mr. Zinter in the defense as a certified law student.⁶ Mr. Perez signed a consent form acknowledging Mr. Loo as part of his defense team under the supervision of Mr. Zinter.⁷

After the jury had returned the guilty verdict, the trial judge stated:

[A]nd in particular, in front of the jury, I would like to compliment Mr. Loo, even though the defendant was convicted. Mr. Loo did what I consider for a law student an outstanding job, and I thought it was a better job than some I've seen with, you know, people who are full-fledged lawyers.⁸

The case was successfully appealed by Ernest Bordunda, court appointed counsel for Mr. Perez. The case attracted an *amicus curiae* brief, from Loyola Law Clinics and McGeorge School of Law along with the state's July 19, 1978 petition for rehearing⁹ following the court of appeal's reversal that was originally announced on June 23, 1978.

The denial for rehearing precipitated a deluge of activity focusing on the California Supreme Court. The court responded by vacating the court of appeal's judgment and granted a hearing¹⁰ and,

3. *People v. Perez*, 82 Cal. App. 3d 952, 955, 147 Cal. Rptr. 34, 36 (1978), *hearing granted*, No. 78-121 (Cal. Sup. Ct. Aug. 16, 1978). On December 18, 1978, the California Supreme Court gave provisional approval to the State Bar request for approval of *Rules Governing the Practical Training of Law Students* and invited comments on those rules until Feb. 1, 1979, shortly after which the court will take final action. The authors' reasons are given as a probable indication of the court's reasons for granting the request and also to point out other inconsistencies in the court of appeal opinion.

4. *Id.*

5. *Id.* at 955, 147 Cal. Rptr. at 36.

6. Since 1970, the State Bar has certified law students from ABA-approved schools who have finished a minimum of one-half of the prerequisite number of hours for graduation. Such law students may then receive practical training under a supervising attorney. *Infra* note 83.

7. *Supra* note 5.

8. *People v. Perez*, 4 Crim. No. 8753, Record at 177, lines 15-17.

9. *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 40 (1978).

10. Hearing granted August 16, 1978.

at the same time, invited *amicus curiae* from interested parties.¹¹

III. REASONING OF THE COURT OF APPEALS

An analysis of the court of appeal decision indicates that the conviction was overturned on the ground that there was a denial of the right to counsel, compounded by a subsidiary, but important, issue of the unauthorized practice of law. In order to arrive at the finding of a sixth amendment violation, it is necessary to lay the predicate that, first, Mr. Loo's participation was illegal and that, second, Mr. Loo's activities precluded Mr. Zinter's representation in Mr. Perez's defense. It then becomes incumbent to examine the court of appeal's handling of the unauthorized practice of law sub-issue, before dealing with the sixth amendment's guarantee of right to effective representation by counsel.

The court first determined that Mr. Loo's actions constituted the practice of law.¹² The court arrived at this conclusion by adhering to the language in *Smallberg v. State Bar*,¹³ which held that the representation of another before a tribunal is the very heart of the practice of law. The court noted that comparatively, Mr. Loo's activities were much closer to the practice of law than were the activities of others who had been convicted under California law.¹⁴ The court further indicated that no case or other authority existed to support the contention that the use of a certified law student, under the supervision of an attorney, was a procedure permissible in California.¹⁵

The court then dismissed the state's contention that the "Rules Governing the Practical Training of Law Students" adopted by the State Bar were sufficient justification for Mr. Loo's activities

11. The Deans of the fifteen ABA-approved law schools retained the firm of Beardsley, Hufstедler, and Kemple to draft and submit their *amicus curiae*. Loyola Law Clinics, headed by Thomas Scully in conjunction with McGeorge School of Law Clinic headed by Glendale Garfield also plan to submit an *amicus curiae* brief.

12. 82 Cal. App. 3d at 962, 147 Cal. Rptr. at 36.

13. 212 Cal. 113, 297 P. 96 (1931). *People v. Merchant Protection Corp.*, 189 Cal. 531, 209 P. 363 (1922); *In re Steven C.*, 9 Cal. App. 3d 255, 88 Cal. Rptr. 97 (1970).

14. *Crawford v. State Bar*, 54 Cal. 2d 659, 355 P.2d 490, 7 Cal. Rptr. 746 (1960) (aiding disbarred attorney to conduct interview by practicing attorney, unlawful); *Farnham v. State Bar*, 17 Cal. 3d 605, 552 P.2d 445, 131 Cal. Rptr. 661 (1976) (practicing law while suspended); *Bluestein v. State Bar*, 13 Cal. 3d 162, 529 P.2d 599, 118 Cal. Rptr. 175 (1974) (aiding an unlicensed person in threatening to use criminal process to collect alimony); CAL. BUS. & PROF. CODE § 6126 (West 1939).

15. 82 Cal. App. 3d at 957, 147 Cal. Rptr. at 37 (1978). *See also Supra* note 95.

in the courtroom.¹⁶

The court held that it is inherently a judicial function to determine who is, or is not, admitted to the practice of law.¹⁷ It was determined that while the legislature may properly empower the State Bar to draft rules of conduct for the practicing attorney, it had in this area exceeded the limits of its control and invaded the province of the judiciary by promulgating authority allowing the State Bar to authorize practice by certified law students.¹⁸ The court viewed the legislature's entry into the realm of the judiciary as a violation of the separation of powers doctrine¹⁹ and, thus, found the trespass unconstitutional.²⁰ The court found that Mr. Loo's activities constituted the practice of law²¹ and that the authority under which these activities took place had been unconstitutionally extended to the State Bar by the legislature. Therefore, Mr. Loo was without authority to practice law and was involved in the unauthorized practice of law.²²

The preceding provided an outline of the sub-issue involving the court's determination on unauthorized practice of law. Attention must now be shifted to the reversible error violation of the sixth amendment right to effective counsel.

IV. RIGHT TO COUNSEL

The right to counsel may be best understood after an examination of the development of that right. An overview of the history and scope of that right will provide the basis for a clear understanding of the court of appeal opinion and of the state's opposition to the court's rationale.

V. DEVELOPMENT OF THE RIGHT TO COUNSEL IN FEDERAL CRIMINAL PROCEEDING

A. The Right to Counsel in English and Early American Law

The right to counsel in early England was nonsensical, illogical and injurious.²³ Those prosecuted for lesser offenses had a very

16. The *Rules* were first issued in 1970 and were later amended on May 15, 1976. The *Rules* are currently before the California Supreme Court. Upon request by the State Bar of California that their "*Rules Governing the Practical Training of Law Students*" be approved, Bar Misc. No. 4089. As of the date of this article, they have been provisionally approved. *Supra* note 95.

17. In re Lavine, 2 Cal. 2d 324, 41 P.2d 161 (1935); Brotsky v. State Bar, 57 Cal. 2d 287, 19 Cal. Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310 (1962).

18. *Supra* note 9, at 960, 147 Cal. Rptr. at 37.

19. *Id.* at 960, 962, 147 Cal. Rptr. at 37, 39.

20. *Id.* at 962, 147 Cal. Rptr. at 39.

21. *Id.* at 957, 147 Cal. Rptr. at 36.

22. Brydonjack v. State Bar, 208 Cal. 439, 443, 281 P. 1018, 1022 (1929).

23. For an excellent examination of the right to counsel in England and colo-

broad right to representation by counsel.²⁴ On the other hand, those accused of felonies were not permitted to retain counsel.²⁵ It was not until 1936²⁶ that those charged with felonies were given virtually the same rights as those charged with misdemeanors.

nial America, *see* BEANEY, *THE RIGHT TO COUNSEL IN AMERICAN COURTS* 8-24 (1955); and 1 F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883).

24. In minor cases such as libel, perjury, battery, and conspiracy, the accused was allowed the right to retain counsel and to be defended by him. BEANEY, *supra* note 23, at 8; and STEPHEN, *supra* note 23, at 397-399.

25. Before 1695, one accused of robbery, larceny, or treason, had no right to be represented even by retained counsel. BEANEY, *supra* note 23, at 9. In that year, Parliament carved out an exception for treason or misprision thereof, requiring the court to appoint counsel, not to exceed two, upon the request of the defendant. 7 and 8 W. 3, C.3, s.1 (1695). This statute, however, left other accused felons without protection. Blackstone was critical of a system which protected those who were accused of lesser offenses and did not generally protect those accused of more grievous offenses, when he questions: "[U]pon what face of reason can that assistance . . . be denied to save the life of a man, which is yet allowed him in prosecutions for every petty trespass?" He then observed that the judges themselves had been aware of this apparent irony, since they had permitted counsel to argue both factual and legal issues. 4 BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND* 355 (1795).

26. For an analysis of events leading up to the recognition of an absolute right of counsel in all criminal cases in England, *see* RADZINOWICZ, *A HISTORY OF THE ENGLISH CRIMINAL LAW*, 399-601.

In 1903, Parliament passed the Poor Prisoners Defense Act, 3 Edw. 7, c. 38, s.1 (1903), which empowered the judges "to appoint a solicitor and a counsel in all indictments when the defendant's means were insufficient to enable him to obtain counsel, and when it appeared from the nature of the defense, as disclosed in evidence given or statements made before the committing magistrates, that justice required such an appointment." *See* HALISBURY, *LAW OF ENGLAND* Pt. v, Par. 684 (1909).

Because this act required the defendant to disclose his evidence, and made it virtually discretionary with the magistrate to appoint counsel, the defendant's rights were not well protected. *See* ORFIELD, *CRIMINAL PROCEDURE FROM ARREST TO APPEAL* 363-64 (1947). Parliament partially responded to this problem with the adoption of the Poor Prisoner's Defense Act, 20 and 21 Geo. 5, c. 32 (1930), which required that a defendant charged with murder be defended by appointed counsel, and permitted discretionary appointment of counsel in the case of other felonies, when "by reason of the gravity of the charge or of exceptional circumstances, justice requires such an appointment." *Id.* s. 2; later repealed by 12 and 13 Geo. 6, Pt. II, s. 18 (2)(a) (1949). *See* JACKSON, *THE MACHINERY OF JUSTICE IN ENGLAND* 123-125, and 253 (1940), for a discussion of the unsatisfactory results under the 1930 act.

In 1949, Parliament modified only slightly the Poor Prisoner's Defense Act when it passed the Legal Aid and Advice Act of 1949, which required that any doubts about whether justice required the appointment of counsel under the 1930 Act be resolved in favor of the defendant, and provided for pre-arraignment application for appointed counsel by the defendant. 12 and 13 Geo. 6, c. 51 (1949). *See also* Smith, *The English Legal Assistance Plan*, 35 A.B.A.J. 453 (1949), which examines the primarily civil nature of this act.

The right to counsel varied in Colonial America.²⁷ Pennsylvania, Delaware and South Carolina, recognized this right to the extent that it was available, upon request, to one accused of a capital offense.²⁸ Connecticut went even further.²⁹ Virginia and Rhode Island merely had a statutory privilege, based upon judicial discretion.³⁰ In the remainder of the Colonies, it appears that the English procedure prevailed.³¹ During the post-revolutionary period, most states statutorily provided for the right to coun-

27. There are two views as to the influence of the English Common Law, relative to Colonial American Law.

The first group limits its effect to the post-revolutionary period. See GOEBEL and NAUGHTON, *LAW ENFORCEMENT IN COLONIAL NEW YORK*, (1944). The thesis of this group is that the frontier character of early America caused it to develop a body of law much different than that found in England.

The second group holds that there was a deliberate and conscious effort to transplant the English law into the colonies. *Id.*

28. BEANEY, *supra* note 23, at 16-17. Pennsylvania's Frame of Government of 1683 stated: "[A]ll persons of all persuasions may . . . personally plead their own cause themselves, or if unable, by their friend. . . ." *Id.* Par. VI. In the Charter of Privilege of 1701, it was guaranteed that "all criminals shall have the same privileges of Witnesses and Counsel as their Prosecutors." *Id.* Para. V (1701).

Later, a 1718 statute in effect provided for assigned counsel, stating that "upon all trials of the said capital crimes, lawful challenges shall be allowed, and learned counsel assigned to the prisoners." 3 Stat. 199 (1718).

Delaware, in its 1701 charter provided that "all criminals shall have the same Privileges of Witnesses and Counsel as their Prosecutors." Art. 1 § 5. Also, a statute of 1709 provided for the appointment of counsel in cases of capital offenses. I *LAWS OF DELAWARE, 1700-1797* at 66 (1797).

South Carolina, in 1731, gave one accused of a capital offense the "right to make his and their full defense, by council learned in the law . . . [I]n case any person shall desire counsel, the court is required . . . to assign counsel. . . ." XIII *LAWS OF THE PROVINCE OF SOUTH CAROLINA* at 518-519 (1736).

29. *Id.* at 16. 1818 marked the first statutory provision for the right to counsel in Connecticut. As of 1750 there had existed a very broad, judicially imposed right to counsel when the accused asked for it, after being first informed of his right to ask. Counsel was also appointed, even in the absence of request, when the accused was handicapped in some manner. 2 SWIFT, *A SYSTEM OF THE LAWS OF CONNECTICUT* 392 (1795).

30. *Id.* at 17. In Virginia, an act passed in 1734 permitted the accused in all capital cases to defend by counsel upon request to the court. The courts, however, interpreted it to mean little more than did the English practice, which permitted counsel to argue points of law. SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* at 76-80 (1930).

A Rhode Island Act of March 11, 1660, expressed the right of counsel as follows: "Whereas it doth appears that any person . . . may on good grounds, or through malice and envy be indicted and [accused] may be innocent, and yet, may not be accomplished with so much wisdom and knowledge of the law as to plead his own innocency. Be it therefore inacted . . . that it shall be accounted and owned from henceforth . . . the lawful privilege of any man that is indicted, to procure an attorney to plead any point of law that may make for the clearing of his innocency." II *RHODE ISLAND COLONIAL RECORDS 1664-77* at 239 (Bartless, 1857).

31. *Id.* at 14. Exhaustive studies of colonial New York and Virginia indicate that the right to counsel in those states was no greater in actual practice than in England. GOEBEL and NAUGHTON, *LAW ENFORCEMENTS IN COLONIAL NEW YORK* at 574 (1944). See also Scott, *supra* note 30 at 76-80.

sel.³²

There was little discussion on either the state or the federal

32. *Id.* 18-20. Georgia had no provisions in its 1776 Constitution concerning counsel; however, English procedure had been followed since at least 1754. 1 GRICE, THE GEORGIA BENCH AND BAR 40 (1931).

The recognition of the right to defend by counsel was stated in the Constitution of 1798: "No person shall be detained from advocating or defending his cause before any court or tribunal, either by himself or counsel or both." GA. CONST. art. III, § 8.

Virginia had no provisions in the Constitution of 1776, and has failed to include any in its later constitutions. The Bill of Rights of the Constitution of 1776, however, does state, in effect, that prosecutions should be in accordance with the "law of the land." However, in 1786 Virginia enacted a statute which allowed the accused to retain counsel to assist him at the trial. XII STATUTES AT LARGE OF VIRGINIA 343 (Hening, 1823).

South Carolina, in its Constitution of 1778, Par. XLI, required that criminal proceedings be in accordance with the "[l]aw of the land."

North Carolina had no constitutional clause regarding counsel until 1868. An act of 1777, however, declared that "[e]very person accused of any crime or misdemeanor whatsoever, shall be entitled to counsel, in all matters which may be necessary for his defense as well as the facts as to law." XCIV LAWS OF NORTH CAROLINA 317 (Iredell, 1791).

The Delaware Constitution of 1716 stated that all acts and statutes in force were to continue. DEL. CONST. art. 24, (1776). This maintained the previously established right to retain counsel in all felonies less than capital, and the right to have counsel appointed in capital cases. The Constitution of 1792 provided: "In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel." DEL. CONST. art. I, § 7, (1972).

In the Pennsylvania Constitution of 1776, the right previously enjoyed, continued. PENN. CONST. DEC. OF RIGHTS IX (1776).

The New York Constitution of 1777, Par. XXXIV, simply stated: "in every trial or impeachment for crimes or misdemeanors, the party impeached or indicted shall be allowed counsel, as in civil actions."

New Jersey, which had previously had no statutory provision, extended a guarantee that "all criminals shall be admitted to the same privileges of witnesses and counsel, as their prosecutors are, or shall be entitled to." Par. XVI. Apparently this was not deemed sufficient and, later, an act of 1795 required the courts in all cases of indictment "to assign to such person, if not of ability to procure counsel, such counsel, not exceeding two, as he or she shall desire." ACTS OF THE GENERAL ASSEMBLY, 1791-96, p. 1012.

The Massachusetts Constitution of 1780 guaranteed that "every subject shall have a right to . . . be fully heard in his defense by himself or his counsel, at his election." MASS. CONST. pt. I, art. XII.

The Maryland Constitution of 1776 held that "In all criminal prosecutions, every man hath a right . . . to be allowed counsel. . . ." MD. CONST. DECLARATION OF RIGHTS, XIX. (1780).

The New Hampshire Constitution of 1784 stated that "every subject shall have a right . . . to be fully heard in his defense by himself, and counsel." NH. CONST., pt. I, art. XV, (1784). An act of 1791 provided that one indicted for crimes punishable by death "shall at this request have counsel learned in the law assigned him by the court, not exceeding two, and . . . shall have liberty to make his full defense by counsel and by himself. . . ." LAWS OF NEW HAMPSHIRE 247 (1972).

The Independent Republic of Vermont in its Constitution of 1777 declared sim-

level regarding the inclusion of a right to counsel in the national Constitution,³³ even though there had been considerable debate on several other of the proposed amendments. Apparently, the states were satisfied with existing procedures in this area and assumed that criminal prosecution would remain, primarily, a state function.³⁴ Because of the absence of discussion surrounding the adoption of the sixth amendment "right to counsel", the courts were left with the responsibility to define the scope of this right.³⁵

B. The Right of Counsel from 1789 to 1938

Even though the scope of right to counsel under the sixth amendment was ultimately left to judicial pronouncements, it cannot be said that Congress was silent on the subject. Two acts were passed during the early part of this period which were relevant to the right of counsel in certain situations. The first, the Judiciary Act of 1789,³⁶ was signed by President Washington the day before the sixth amendment was proposed in both Houses of Congress.³⁷ This act stated in relevant part:

[I]n all the courts of the United States, the parties may plead and man-

ply that "in all prosecutions for criminal offenses, a man hath a right to be heard, by himself and his counsel. . . ." VT. CONST., Chap. I, para. X (1777).

33. The only two states to propose, at their ratification conventions, a right to counsel were Virginia and North Carolina. Virginia proposed that: "In all criminal and capital prosecutions, a man hath a right to . . . be allowed counsel in his favor. . . ." 3 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 658 (1901). North Carolina copied the proposal of Virginia. *Id.*, v.6, at 243.

Madison introduced, in the first session of Congress on July 2, 1789, a series of amendments, one of which provided that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense" as part of article I, Sec. 9. 1 ANNALS OF CONG. 440 (Gales & Seaton ads. 1789).

There was extensive debate on such proposals as the basis of representation, religious freedom, freedom of speech and press, election of representatives, and the right to bear arms, yet there was virtually no discussion surrounding the right to counsel proposals. *Id.*, at 747-96.

34. This lack of comment could best be attributed to the thinking at the time that the criminal process would remain primarily a state responsibility. CUMMINGS and MCFARLAND, FEDERAL JUSTICE 464-75 (1937).

35. See BEANEY, *supra* note 23, at 24, where it was observed, "it is extremely difficult, if not impossible with the available material to reach any positive conclusion concerning the intention of Congress in proposing the clause of the interpretations given it by the states at the time of ratification. Lack of discussion usually means that there is general agreement, but in view of the varying statutory and judicial practices in the states, the question may well be asked, to what did the states agree? Each state could accept the proposal as guaranteeing a right similar to that which the citizen already possessed against this own state government. But whether an individual would be allowed to interpret it to mean more than the right to retain counsel would depend on the state in which he resided. It was left to the courts to decide the scope of the clause, with a minimum of guidance from the events and the comments accompanying its adoption."

36. 1 STAT. 73 § 35 (1789).

37. The Judiciary Act of 1789 was signed by Washington on Sept. 25. BEANEY, *supra* note 23.

age their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of said court . . . shall be permitted to manage and conduct causes therein.³⁸

The second statute, passed on April 30, 1790,³⁹ seven months prior to the ratification of the sixth amendment stated,

Every person who is indicted of treason or other capital crime, shall be allowed to make his full defense by counsel learned in the law; and the court before he is tried, or some judge thereof, shall immediately, upon his request, assign to him such counsel not exceeding two, as he may desire, and they shall have access to him at all reasonable hours.⁴⁰

The sixth amendment and the two acts of 1789 and 1790, represented the extent of legislative and judicial pronouncement on the right to counsel until 1938.⁴¹ During the period prior to 1938 several cases had touched upon the problem, yet were decided on other grounds. *Anderson v. Treat*,⁴² for example, dealt with a situation in which the trial judge severed the co-defendants, due to a conflict of interest, and appointed separate counsel for Treat. Treat, however, desired representation by the one counsel retained by all co-defendants. The judge's action was upheld on the technical grounds that habeas corpus could not be used to attach the judgment and, even if it could, petitioner had not timely objected to the appointment of counsel.⁴³

38. 1 STAT. 73 § 35 (1789).

39. 1 STAT. 73 § 35 (1790).

40. *Id.* Apparently, this statute placed the right to counsel in federal courts on the same basis as Delaware, Pennsylvania and South Carolina, where the constitution merely gave the right "to be heard by counsel."

The ratification of the sixth amendment was not followed by statutory changes, and the acts of 1789 and 1790 remained as the sole guides to the meaning of the sixth amendment until 1938.

41. Federal courts developed a practice of appointing counsel in non-capital cases, pursuant to their inherent power over court procedures and officers. Holtzoff, *Right to Counsel under the Sixth Amendment*, 20 N.Y.U.L. REV. 1 (1944).

42. 172 U.S. 24 (1898). On his own motion, the trial judge had severed the defense of co-defendants upon discovering a conflict of interests and had appointed counsel for Treat, who wished to be defended by the one counsel retained by all defendants. The Supreme Court upheld this appointment on the ground that *habeas corpus* could not be used to attack the judgment, but implied that on the merits of the case it would have rejected the petitioner's claim, because no timely objection to the appointment of counsel was shown. *Id.* at 30-31.

43. Other pre-1938 cases dealt with equally peripheral aspects of the right to counsel issue: *United States v. Philadelphia and Reading Ry. Co.*, 268 F. 697 (E.D. Pa. 1916) (filing fee for appearance by counsel held not violative of right to counsel); *Paschen v. United States*, 70 F.2d 491 (7th Cir. 1934) (practice of Federal Judges to personally conduct *voir dire* examination of jury not contra right to counsel); *Urban v. United States*, 46 F.2d 291 (10th Cir. 1931) (counsel absent during empaneling of jury, not violative of right to counsel whereas counsel accepted panel upon his return); *Hogan v. United States*, 9 F.2d 562 (8th Cir. 1925) (withdrawal of one of several counsel immediately before motion for new trial, in-

The Supreme Court, in the 1938 case of *Johnson v. Zerbst*,⁴⁴ issued its first opinion wherein the right to counsel guarantee of the sixth amendment was articulated and defined. Two marines on leave had been arrested, convicted and sentenced to four and one-half years in prison for counterfeiting. They petitioned for a writ of habeas corpus and a hearing was held before a Georgia federal district court. The basis for the Marines' petition was the failure of the trial court to offer counsel or to advise them of their right to have court appointed counsel. The United States Supreme Court held: "The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."⁴⁵

VI. DEVELOPMENT OF THE RIGHT TO COUNSEL IN STATE CRIMINAL PROCEEDINGS⁴⁶

A. *Powell v. Alabama*⁴⁷

The United States Supreme Court, in *Powell*, faced the ques-

violative of right to counsel where remaining counsel saved an exception to the court's ruling); *see also* *Smith v. United States*, 288 F. 259 (D.C. Cir. 1923) (counsel appointed by court in order to avoid further delay after numerous postponements); *In re Ades*, 6 F. Supp. 467 (D. Md. 1934) (counsel injected himself into a criminal proceeding); and *Dillingham v. United States*, 76 F.2d 36 (5th Cir. 1935) (counsel who voluntarily aided indigent must have rendered sufficient assistance to afford defendant a fair trial).

44. 304 U.S. 458 (1938).

45. *Id.* at 463. The precedents for *Johnson* were as follows: *Frank v. Mangum*, 237 U.S. 309, 345-50 (1915) (Holmes, J., dissenting), stated that Supreme Court must look beneath the record where judge and jury had been intimidated. *Moore v. Dempsey*, 261 U.S. 86 (1923), where due process was held to have been violated when the trial was reduced to a sham, due to the obviously passion-induced conviction. *Downer v. Dunaway*, 53 F.2d 586 (5th Cir. 1931). Fear induced by a series of mob attacks caused the defense attorney to fail to move for continuance, change of venue, motion for new trial after judgment; therefore, *habeas corpus* could issue. *Powell v. Alabama*, 287 U.S. 45 (1932). Counsel must be assigned when defendant is unable to employ counsel, is incapable of self-defense due to ignorance, feeble-mindedness, illiteracy, etc. pursuant to due-process. *Patton v. United States*, 281 U.S. 276 (1930). Waiver of jury trial required to be express and intelligent.

In 1931 the American Law Institute submitted to its members and to the legal profession a code which placed upon the judge the duty of appointment of counsel at arraignments for accuseds of felonies who needed counsel and were without it. However, any defendant might and should procure his own counsel, if possible. A.L.I. *Code of Criminal Procedure* (Official Draft) (1930) § 209.

46. 304 U.S. 458 (1938).

47. Sutherland observed that, in contrast to the ideas espoused by Coke, the judge cannot adequately represent the interests of the accused:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligation of counsel for the accused? He can and should see to it that in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.

tion of whether a federally guaranteed right of counsel existed in state criminal proceedings. In setting aside the criminal convictions of eight youths sentenced to death, because of the absence of appointed counsel, the Court held that due process under the fourteenth amendment had been violated.

The due process right of counsel, enunciated by *Powell*, was much narrower than the sixth amendment right of counsel later articulated in *Johnson*. The due process standard was based on the presence of "special circumstances" requiring appointed counsel:

[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 necessity of due process of law. . . .⁴⁸

The factors triggering this due process right of counsel were summarized as follows:

[T]he ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility, the imprisonment and close surveillance of the defendants by the military forces, the fact that their friends and families were all in other states and communication with them necessarily difficult, the above all that they stood in deadly peril of their lives.⁴⁹

287 U.S. at 61. Sutherland recognized the defendant could not represent his own interests adequately because "even the intelligent and educated layman has small and sometimes no skill in the science of law." *Id.* at 68-69. Moreover, said Sutherland, the defendant

lacks both the skill and knowledge adequate to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though, he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. *Id.* at 69.

48. 287 U.S. 45 at 71. Due process, Justice Sutherland further stated that due process always required the observance of certain fundamental personal rights associated with a hearing and "the right to the aid of counsel is of this fundamental character." This statement referred to the right to retain counsel of one's choice and at one's expense. *Id.* 68-69.

49. *Id.* at 71. The courts were first to abandon the "special circumstances" test in capital cases. *Hamilton v. Alabama*, 368 U.S. 52 (1961) held that right to counsel is a constitutional mandate in such cases. The erosion of the special circumstances test in non-capital cases was completed in *Gideon v. Wainwright*, 372 U.S. 335 (1963).

For earlier cases utilizing the "special circumstances" test see: *Williams v. Kaiser*, 323 U.S. 471 (1945); *Tompkins v. Missouri*, 323 U.S. 485 (1945); *Hawk v. Olson*, 326 U.S. 271 (1945); *De Meerleer v. Michigan*, 329 U.S. 663 (1947); *Marino v. Ragen*, 332 U.S. 561 (1947); *Haley v. Ohio*, 332 U.S. 596 (1948).

Prevalent prejudicial factors enunciated by the courts have been:

1. *Youth*. *Moore v. Michigan*, 355 U.S. 155 (1957); *Pennsylvania ex rel Herman v. Claudy*, 350 U.S. 116 (1956); *Uveges v. Pennsylvania*, 335 U.S. 437 (1948); *Wade v. Mayo*, 334 U.S. 672 (1948); *Marino v. Ragen*, 332 U.S. 561 (1947); *De Meerleer v. Michigan*, 329 U.S. 663 (1947).

B. *Betts v. Brady*⁵⁰

Betts raised the question of whether or not the broad meaning of the right to counsel as provided in the sixth amendment applied to the states through fourteenth amendment due process. The Court answered in the negative. It stated that the right of counsel provided in the due process clause of the fourteenth amendment “formulate a concept less rigid and more fluid”⁵¹ than that mandated by the sixth amendment.

The standard adopted in *Betts* was not unlike that adopted in *Powell*. The Court reasoned that a state denial of the right of counsel “might in certain circumstances”⁵² be a denial of the due process right to counsel when “the resulting conviction was so lacking in ‘fundamental fairness’” as to necessitate the imposition of a constitutional restriction upon a state prosecution.⁵³

C. *Gideon v. Wainwright*⁵⁴

Gideon, by a unanimous Court, overruled *Betts* and held that one who is “hailed into Court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁵⁵ Justice Black, speaking for the majority, stated that the right of counsel in felony trials was “fundamental” and, therefore, constitutionally mandated in state courts by the due process clause of the fourteenth amendment.⁵⁶

2. *Inexperience*. Moore, *supra*; Uveges, *supra*.

3. *Mental Deficiency*. Massey v. Moore, 348 U.S. 105 (1954); Palmer v. Ashe, 342 U.S. 134 (1951).

4. *Overreaching by Court or Prosecutor*. Gibbs v. Burke, 337 U.S. 773 (1949); Townsend v. Burke, 334 U.S. 736 (1948); Palmer v. Ashe, *supra*; White v. Ragen, 324 U.S. 760 (1945).

5. *Prejudicial Trial Events*. Cash v. Culver, 358 U.S. 633 (1959); Gibbs v. Burke, *supra*; Hudson v. North Carolina, 363 U.S. 697 (1960); Chewing v. Cunningham, 368 U.S. 443 (1962).

6. *Prejudicial Sentencing Occurrences*. Townsend v. Burke, *supra*.

50. 316 U.S. 455 (1942), *rev'd*. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

51. *Id.* at 461-462.

52. *Id.* at 462.

53. *Id.* at 471-473. Justice Black, in dissent, argued that the fourteenth amendment made the sixth applicable to the states and, therefore, required the appointment of counsel. *Id.* at 474 (joined by Justices Douglas and Murphy).

54. 372 U.S. 335 (1963).

55. *Id.* at 344.

56. *Id.* at 342-343, 344. Justice Black personally believed that the fourteenth amendment made applicable against the states all provisions of the Bill of Rights. See *Adamson v. California*, 332 U.S. 46, 71 (1947) (Black, J., dissenting), *rev'd*. *Malloy v. Hogan* 378 U.S. 1, 6 (1964).

D. *Argersinger v. Hamlin*⁵⁷

The Supreme Court, in *Argersinger*, held as irrelevant the designation of an offense as either misdemeanor or felony when determining whether a defendant is entitled to court appointed counsel. The Florida Supreme Court had held that the right to appointed counsel extended only to trials "for non-petty offenses punishable by more than six months imprisonment."⁵⁸ The Supreme Court reversed and, per Justice Douglas, stated: "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel."⁵⁹ The Court rejected the argument that there were too few attorneys to provide representation in misdemeanor cases where imprisonment was threatened.⁶⁰ Justice Brennan, in his concurring

57. 407 U.S. 25 (1972) (the right to be represented by designated counsel in a misdemeanor case where imprisonment might occur). See discussion *infra*.

The right of juveniles to designate counsel was recognized in *In re Gault*, 387 U.S. 1 (1967). See also *Specht v. Patterson*, 386 U.S. 604 (1967).

58. The Florida Supreme Court, following the precedent established by *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968) held the right to court-appointed counsel extends only to trials "for non-petty offenses punishable by more than six months state imprisonment." See *ex rel. Argersinger v. Hamlin*, 236 So. 2d 442, 443 (Fla. 1970), *rev'd sub nom., Argersinger v. Hamlin*, 407 U.S. 25 (1972). See also Note, *Right to Counsel: The Impact of Gideon v. Wainwright in the Fifty States*, 3 CREIGHTON L. REV. 103 (1970).

Twelve states provided counsel for indigents accused of "serious crimes" in the misdemeanor category. *Id.* at 119-124. Nineteen states provided for the appointment of counsel in most misdemeanor cases. *Id.* at 124-133. One of those is Oregon, whose Supreme Court said: "If our objective is to insure a fair trial in every criminal prosecution the need for counsel is not determined by the seriousness of the crime. The assistance of counsel will best avoid conviction of the innocent—an objective as important in the municipal court as in a court of general jurisdiction." *Stevenson v. Holtzman*, 254 Ore. 94, 100-101, 458 P.2d 414, 418 (1969). The California requirement extends to traffic violations. *Blake v. Municipal Court*, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966).

Overall, 31 states have now extended the right to defendants charged with crimes less serious than felonies. *Id.* at 134.

59. 407 U.S. 25, 37 (1972). Compare A.B.A. *Project on Standards for Criminal Justice, Providing Defense Services I* (Approved Draft 1968). The A.B.A. observed that "Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise." *Id.* § 4.1 pp. 37-38.

60. 407 U.S. at 37. The opinion stated:

We do not share Mr. Justice Powell's doubt that the Nation's legal resources are insufficient to implement the rule we announce today. It has been estimated that between 1,575 and 2,300 full-time counsel would be required to represent *all* indigent misdemeanors, excluding traffic offenders. Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 Iowa L. Rev. 1249, 1260-1261 (1970). These figures are relatively insignificant when com-

opinion, stated that law students could serve a role in defending these cases: "I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision."⁶¹

VII. SCOPE OF RIGHT TO COUNSEL

A. Generally

Culminating in *Argersinger*,⁶² the right of counsel has become an absolute in all criminal prosecution where imprisonment is a potential punishment, whether state or local. The scope of this right is now very broad, and extends to such nontrial proceedings as appeals and lineups. These proceedings are said to be "critical stages" since substantive rights of the defendants may be affected therein.⁶³

pared to the estimated 355,200 attorneys in the United States (Statistical Abstract of the United States, 153 (1971)), a number of which is projected to double by the year 1985.

See Ruud, *That Burgeoning Law School Enrollment*, 58 A.B.A.J. 146, 147. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the "estimated 14,500 average annual openings." *Id.* at 148.

61. 407 U.S. at 41.

62. *Supra* note 59.

63. Among the "critical stages" encountered by the courts are:

1. *Pre-trial Proceedings*: *Hamilton v. Alabama*, 368 U.S. 52 (1961) *supra* note 49 (arraignment where defense of insanity must have been asserted or lost); *White v. Maryland*, 373 U.S. 59 (1963) (guilty plea entered at preliminary hearing); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (making both *White*, and *Hamilton*, *supra*, retroactive) and *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing wherein only issue was probable cause);

2. *Custodial Questioning*:

a. Post Indictment. *Spano v. New York*, 360 U.S. 315 (1959) (although the opinion of the court reasoned that a confession was involuntary, four justices reasoned that the confession abridged the defendant's right to counsel because it was obtained in the absence of counsel); *Massiah v. United States*, 377 U.S. 201 (1964) (post-indictment statements of defendant, absent counsel and overheard by police using secret broadcasting unit held violative of right to counsel).

b. Pre Indictment. *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Compare Miranda v. Arizona*, 384 U.S. 436 (1966) which placed the right to counsel at this stage on the fifth amendment's self-incrimination clause.

For right to counsel cases dealing with custodial proceedings which followed the "special circumstances" test of *Powell*, see *Crooker v. California*, 375 U.S. 433 (1958); and *Cicenia v. Lagay*, 357 U.S. 504 (1958), *rev'd Escobedo*, *supra* at 491-492.

3. *Identification Procedures*: *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) (in-court identification of defendants based on out-of-court lineups absent counsel held inadmissible). *Compare Stovall v. Denno*, 388 U.S. 293 (1967) (unnecessarily suggestive lineups held violative of due process); and *Kirby v. Illinois*, 406 U.S. 682 (1972) (no right to counsel attaches to pre-indictment lineups because no adversary criminal proceedings).

4. *Post Conviction*: *Townsend v. Burke*, 334 U.S. 736 (1948) (counsel

Although the scope of the right of counsel is broad, the concept of counsel itself is not so broad. The right of counsel under either the sixth or fourteenth amendments is less than all-encompassing and yet more than mere appointment of an attorney.

In *Powell*, the United States Supreme Court stated that inadequate representation may be equivalent to none at all. The right to counsel was said to implicitly require that the legal assistance be effective.⁶⁴ *Powell* and its progeny, however, failed to define a standard by which the effectiveness of counsel was to be measured, leaving this determination to state and federal courts. As a result, a number of standards have been formulated.

B. *The Mockery of Justice Test*

The decision in *Diggs v. Welch*⁶⁵ was overwhelmingly considered to embody the proper standard of effective representation in both state and federal prosecutions until the mid-1960's. The court in that case, held that a criminal conviction could be overturned if the incompetency of counsel resulted in a trial which "shocked the conscience of the court and made the proceedings a

mandated at sentencing); *Mempa v. Rhay*, 389 U.S. 128 (1967) (hearing on revocation of probation required presence of counsel). Due process and equal protection, however, have been the primary vehicles by which the right to counsel has been expanded beyond matters affecting sentencing. *Griffin v. Illinois*, 351 U.S. 12 (1956) (due process and equal protection prevented state criminal procedure from favoring wealthy defendants); *Douglas v. California*, 372 U.S. 353 (1963) (indigent defendant must have counsel appointed on appeal when more affluent defendants are allowed retained counsel); *Gunsolus v. Gagnon*, 454 F.2d 416 (7th Cir. 1971) (due process mandated appointed counsel at parole revocation hearing); and *Johnson v. Avery*, 393 U.S. 483 (1969) (so-called "jail-house lawyers" could not be prohibited from preparing writs of *habeas corpus* for fellow prisoners).

5. *Non-Criminal Proceedings*: Due process requires counsel in such cases. *Specht v. Patterson*, 386 U.S. 605 (1967) (commitment proceedings). *Compare* *In re Groban*, 352 U.S. 330 (1957) (fire marshal investigation); and *Anonymous v. Baker*, 360 U.S. 287 (1959) (contempt of court of private detectives who refused to testify).

64. Under *Powell*, due process in capital cases requires "effective representation." *Id.* at 71. *See also* *Avery v. Alabama*, 308 U.S. 444 (1940) wherein Justice Black wrote for the majority:

"[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment." *Id.* at 453.

65. 148 F.2d 667 (D.C. Cir.) *cert. denied*, 325 U.S. 889 (1945).

farce and mockery of justice.”⁶⁶ Currently, four circuits⁶⁷ and nearly one-half of the states⁶⁸ still adhere to this test.

C. *The Reasonable Competency Standard*⁶⁹

In *McMann v. Richardson*, the United States Supreme Court held that a guilty plea was “voluntarily and intelligently given” only if it was based on “reasonably competent”⁷⁰ legal advice. Reasonable competence was objectively defined as advice within the “range of competence demanded of attorneys in criminal cases.”⁷¹ *McMann*, although it dealt with the subject of guilty pleas, set in motion an objective alternative to the subjective “mockery of justice” standard.⁷² However, some courts, including

66. *Id.* at 670. In *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967), the court said: “These words are not to be taken literally, but rather as a vivid description of the principle that the accused has a heavy burden in showing the requisite unfairness.” *Id.* at 116.

67. See *Dunker v. Vinzant*, 505 F.2d 503 (1st Cir. 1974); *United States v. Yanishefsky*, 500 F.2d 1327 (2nd Cir. 1974); *United States ex rel. Little v. Twomey*, 447 F.2d 767 (7th Cir.) cert. denied, 490 U.S. 1078 (1972); *Johnson v. United States*, 380 F.2d 810 (10th Cir. 1967).

The eighth circuit purports to use this standard but, in fact, actually applies the “reasonable competency test.” *Supra* note 51.

The District of Columbia circuit repudiated this standard in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973).

68. *State v. Phillips*, 16 Ariz. App. 174, 492 P.2d 423 (1972); *Haynie v. State*, 257 Ark. 542, 518 S.W.2d 492 (1975); *Palmer v. Adams*, 162 Conn. 316, 294 A.2d 297 (1972); *Parker v. State*, 295 So. 2d 312 (Fla. Dist. Ct. App. 1974); *State v. Wozniak*, 94 Idaho 312, 486 P.2d 1025 (1971); *People v. Austin*, 23 Ill. App. 3d 520, 319 N.E.2d 306 (1974); *Greer v. State*, 321 N.E.2d 842 (Ind. 1975); *Winter v. State*, 210 Kan. 597, 502 P.2d 733 (1972); *State v. Flanagan*, 254 La. 100, 222 So. 2d 872 (1969); *State v. LeBlanc*, 290 A.2d 193 (Me. 1972); *People v. Green*, 42 Mich. App. 154, 201 N.W.2d 664 (1972); *State v. O'Neill*, 299 Minn. 60, 216 N.W.2d 882 (1974); *Parham v. State*, 229 So. 2d 582 (Miss. 1969); *State v. Noller*, 142 Mont. 35, 381 P.2d 293 (1963); *Warden v. Lischko*, 90 Nev. 221, 523 P.2d 6 (1974); *State v. Gillihan*, 85 N.M. 514, P.2d 33 (1973); *State v. Sneed*, 284 N.C. 606, 201 S.E.2d 867 (1974); *State v. Peoples*, 28 Ohio App. 2d 162, 162 N.E.2d 463 (1971); *State v. Lewis*, 255 S.C. 466, 179 S.E.2d 616 (1971); and *Bonsal v. State*, 502 S.W.2d 813 (Tex. 1973).

69. 397 U.S. 759 (1970).

70. *Id.* at 770.

71. *Id.* at 770-71.

72. This standard has been articulated in various ways:

1. “Reasonably effective assistance.” See *Hudson v. Alabama*, 493 F.2d 171, 173 (5th Cir. 1974); *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974). See also *Baxter v. Rose*, 523 S.W.2d 930 (Tenn. 1975).

2. “Reasonably competent assistance.” See *United States v. DeCoster*, 487 F.2d 1197, 1202 (D.C. Cir. 1973).

3. “Genuine and effective assistance.” See *Harris v. State*, 293 A.2d 291 (Del. 1972) (genuine and effective legal assistance); *Green v. Warden*, 3 Md. App. 266, 238 A.2d 920 (1968) (genuine and effective legal assistance); *State v. Goode*, 84 S.D. 369, 171 N.W.2d 733 (1969) (adequate and effective assistance).

4. “Conscientious and meaningful representation.” See *State v. Desroches*, 110 R.I. 497, 293 A.2d 913 (1972).

5. “A fair trial.” See *Thomas v. State*, 516 S.W.2d 761, 765 (Mo. Ct. App. 1974); accord, *In re Bousley*, 130 Vt. 296, 292 A.2d 249 (1972) (fair and im-

California's, have retained the "mockery of justice" standard though they apply it more strictly.⁷³

VIII. THE COURT OF APPEAL USE OF RIGHT TO COUNSEL

The court of appeal, applying the constitutional mandate as set forth in *Powell, Gideon*, and *Argersinger*, declared that representation by a certified law student, in a felony prosecution, is unconstitutional. The court's decision contained the exact wording found in *Argersinger*: "Absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless represented by counsel at his trial."⁷⁴ Since the record was silent as to whether or not the form signed by Mr. Perez was knowingly and

partial trial); *State v. Robinson*, 75 Wash. 2d 230, 233, 450 P.2d 180, 181-83 (1969); *State v. Thomas*, 71 Wash. 2d 470, 429 P.2d 231 (1967) (fair and impartial trial).

6. "Any reasonable basis" for counsel's actions. See *Commonwealth ex rel. Washington v. Maroney*, 427 Pa. 599, 235 A.2d 349 (1967) (some reasonable basis). See also *Taylor v. State*, 291 Ala. 756, 287 So. 2d 901 (1973); *Rook v. Cupp*, 17 Ore. App. 205, 526 P.2d 605 (1974).

73. California courts hold that a trial is a sham and farce whenever counsel's incompetence affects a vital issue. *People v. Ibarra*, 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863 (1963). See also *People v. Thomas*, 43 Cal. App. 3d 862, 118 Cal. Rptr. 226 (1974).

The Eighth Circuit modified the "farce and mockery" test. *Cardarella v. United States*, 375 F.2d 222 (8th Cir. 1967). In *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974) the court stated: "Stringent as the 'mockery of justice' standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit." *Id.* at 214. See also *Johnson v. United States*, 506 F.2d 640 (8th Cir. 1974), cert. denied, 420 U.S. 973 (1975). The Eighth Circuit recently affirmed the "farce and mockery" test in *Sheril v. Wyrick*, 524 F.2d 186 (8th Cir. 1975).

The courts are split over who has the burden of proof in a competency challenge, but most place it on the defendant. See, e.g., *Hussick v. State*, 19 Ore. App. 915, 529 P.2d 938 (1974); *In re Bousley*, 130 Vt. 296, 292 A.2d, 249 (1972); *State v. Thomas*, 203 S.E.2d 445 (W. Va. 1974). Some jurisdictions presume that members of the bar are competent. See *Lunce v. Overlade*, 244 F.2d 108 (7th Cir. 1957); *Kindle v. State*, 262 Ind. App. 199, 313 N.E.2d 721 (1974).

Other courts shift the burden to the state once defendant makes out a *prima facie* case of incompetence. See *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973). See also *Coles v. Peyton*, 389 F.2d 224 (4th Cir. 1968). Other jurisdictions require that the state prove competency beyond a reasonable doubt once the defendant makes a *prima facie* case. See, e.g., *Risher v. State*, 523 P.2d 241 (Alas. 1974).

Almost every jurisdiction requires the incompetence to be prejudicial. See, e.g., *McQueen v. Swenson*, 498 F.2d 207 (8th Cir. 1974); *Risher v. State*, *supra*. This position accords with the "harmless constitutional error rule." See *Chapman v. California*, 386 U.S. 18, 20-21 (1967); and *Fahy v. Connecticut*, 375 U.S. 85, 92 (1963).

74. *Supra* note 9, at 960.

intelligently made, the presumption⁷⁵ must be made that it was not an intelligent waiver.⁷⁶ Since there was not an intelligent waiver and the court had already decided that Mr. Loo could not be considered to be counsel,⁷⁷ there remained only the question of whether Mr. Zinter's presence would satisfy the constitutional requirements. The court found that Mr. Zinter's participation did not meet the constitutional requirements.⁷⁸ The court emphasized that right to counsel means more than the mere presence of counsel. It entails that counsel act in a real, not perfunctory, sense. "Zealous and active counsel . . . in a substantial sense . . . not *pro forma*" are the constitutional requirements that must be met.⁷⁹ The court of appeal decided that Mr. Zinter's participation did not meet this level.⁸⁰ Consequently, neither Mr. Loo nor Mr. Zinter provided effective representation.⁸¹ In the absence of a knowing and intelligent waiver, this constitutes reversible error *per se*.⁸² The Supreme Court of the State of California vacated the ruling of the court of appeal and granted a hearing on August

75. "This court may not presume from the silent record a voluntary and intelligent waiver," *supra* note 9, at 963, 147 Cal. Rptr. at 41. See also *Boykin v. Alabama*, 395 U.S. 238 (1969); *Blake v. Municipal Court*, 242 Cal. App. 2d 731, 51 Cal. Rptr. 771 (1966).

76. "Some rights will never be deemed waived unless the defendant is first expressly advised of their existence," *Michigan v. Mosley*, 423 U.S. 96, 108, (1975) (White, J., concurring). The right of assistance of counsel is such a right; *Boykin v. Alabama*, 395 U.S. 238 (1969); *Carnley v. Cochran*, 369 U.S. 506 (1962); *Walton v. Arkansas*, 371 U.S. 27 (1962).

77. The court makes a further argument. The federal constitutional right to counsel is controlling; therefore the State of California legislature and/or judiciary cannot fashion the practice of law to abrogate that or those rights: *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963); *Sperry v. Florida*, *ex rel Florida Bar*, 373 U.S. 379 (1963); *Johnson v. Avery*, 393 U.S. 483 (1969).

78. *Supra* note 9, at 965, 147 Cal. Rptr. at 43-44.

79. *Powell v. Alabama*, 287 U.S. 45, 57-58 (1932). See also *Anders v. California*, 386 U.S. 738 (1967).

80. *Supra* note 9, at 967, 147 Cal. Rptr. at 44.

81. The court also briefly mentioned the question of moral standards since this had been part of the basis for reversible error in *Huckelberry v. State*, 337 So. 2d 400 (Fla. 1967), stating that while a member of the Bar has been scrutinized and accepted, a law student's "working knowledge of professional ethics is largely unknown." *Supra* note 9, at 966, 147 Cal. Rptr. at 43. The court of appeal erred on this point. Not only had Mr. Loo already passed the Professional Responsibility exam at the time, but the *Huckelberry* case is distinguishable on its facts. In *Huckelberry*, there had been direct fraud by a law school graduate who had not passed the Bar and who had held himself out as a member of the Bar. The *Huckelberry* case is further distinguishable in that a law school graduate posing as an attorney had the defendant agree to a plea bargain on a murder charge. In *Perez*, Mr. Loo had the assistance of practicing counsel, there was no fraud, and there was a vigorous defense and cross-examination in the three day jury trial.

82. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *United States v. Dougherty*, 473 F.2d 1113, 1127-1129 (D.C. Cir. 1972); *People v. Ruiz*, 263 Cal. App. 2d 216, 69 Cal. Rptr. 473 (1968).

16, 1978.⁸³ On December 18, 1978 the court gave provisional approval to the State Bar rules governing the training of law students.

IX. ARGUMENTS OF THE STATE FOR REVERSAL

The arguments on behalf of the state can be separated into two components. First, there was no unauthorized practice of law. Second, there was no sixth amendment violation of assistance of effective counsel.

A. No Unauthorized Practice of Law

The state first contended that the State Bar "Rules Governing Practical Training of Law Students" did not allow any authorized practice of law.⁸⁴ The test for what is the practice of law is not where the action takes place, but rather whether advice and counsel were given by one retaining independent judgment in the affairs of the client.⁸⁵

83. The hearing was granted on the following two issues: first, whether as a matter of law a certified law student's representation, under the supervision of an attorney, of a criminal defendant, impairs sixth amendment rights and, second, whether the *State Bar of California's Rules Governing Practical Training of Law Students* sanctions the unauthorized practice of law. Note that the California Supreme Court has given provisional approval to these rules as of Dec. 18, 1978. *Infra* note 95.

84. *Rules Governing the Practical Training of Law Students*, first adopted in January, 1970, and amended most recently in May, 1976, provide as follows: "Rule VI: Activities requiring direct supervision. (A) A student may engage in the following activities only if the client on whose behalf he acts shall approve in writing the performance of such acts by such students or generally by any student and then only with the approval, under the direct and immediate supervision and in personal presence of the supervising lawyer. . . . (3) Appearing on behalf of the client in any public trial, hearing or proceeding pertaining thereto in a court, or tribunal or before any public agency, referee, commissioner, or hearing officer, State or Federal, to the extent approved by such court, public agency, referee, commissioner, or hearing officer. . . . (B) In all instances when, under these Rules, a student is permitted to appear in any trial, hearing or proceeding, the student shall, as a condition of appearance, first file with the court, tribunal, public agency, referee, commissioner or hearing officer, a copy of the written approval of the client required by Paragraph (A) of this Rule VI.

"Rule III. . . . (B) (4) A student's eligibility to participate in activities under these rules may be terminated by the Supreme Court or by the State Bar at any time without a hearing and without any showing of cause." Provisionally approved Dec. 18, 1978 *infra* note 95.

85. *People v. Merchant Protective Corp.*, 189 Cal. 531, 209 P. 363 (1922); *Crawford v. State Bar*, 54 Cal. 2d 659, 7 Cal. Rptr. 746 (1960); *People v. Strawder*, 34 Cal. App. 3d 330, 108 Cal. Rptr. 901 (1973); *Farnham v. State Bar*, 17 Cal. 3d 605, 552 P.2d 445, 131 Cal. Rptr. 661 (1976).

The law student, under the State Bar Rules, is never without the supervision of a lawyer, and that attorney retains control and responsibility for the case.⁸⁶ The judge or the attorney can excuse the law student at any time.⁸⁷ Because of these limitations on the certified law student, the state contended that it could not be said that the student is dispensing or using independent legal advice or judgment.

The specific facts of *Perez* lend themselves to a showing that there was no unauthorized practice of law. The consent form signed by Mr. Perez, Mr. Loo and Mr. Zinter was submitted to the court.⁸⁸ Mr. Zinter was present throughout the trial,⁸⁹ and was actively involved in the defense.⁹⁰ In short, the requirements of the State Bar Rules were met.⁹¹

The question at this point, however, was whether or not the State Bar Rules themselves were constitutional. The court of appeal maintains that it is up to the judiciary to admit persons into the practice of law, and that the legislature, via the State Bar, had unconstitutionally invaded an area of judicial prerogative.⁹² The Supreme Court of California by way of its provisional approval of the rules, has shown its disagreement with the reasoning of the court of appeal on this point. While the issue might have had merit eight years ago, the state and the *amicus* hold that it is now a moot point. Over 11,788 students have had clinical experience under the State Bar "Rules Governing the Practical Training of Law Students."⁹³ In the last year alone, over 2,675 students have been involved in clinical law.⁹⁴ Certified law students have, under supervision, performed trial work at all levels, including appearances by certified law students before the California Supreme Court.⁹⁵ While the Supreme Court has not formally accepted the

86. *Supra* note 83, Rule V(C).

87. *Supra* note 83, Rule III (B)(4).

88. *Supra* note 9, at 956, 147 Cal. Rptr. 36-37.

89. *Id.*

90. *Id.*

91. Indeed, Mr. Zinter never relinquished control of the affairs of Mr. Perez. Since he was the attorney of record, he had an ethical obligation to Mr. Perez to see to it that the defense team represented Mr. Perez to the fullest extent of their capabilities (*see, e.g.*, ABA PROFESSIONAL CODE OF RESPONSIBILITY, E.C. 7 & D.R. 7-101). Since there have been no allegations by Mr. Perez or findings by the court that Mr. Zinter did not live up to those ethical obligations, it must be assumed that Mr. Zinter acted in an ethical manner at the trial. Since part of those ethical obligations included the highest degree of endeavor for the client, it may be assumed that Mr. Perez was represented by counsel.

92. *Supra* note 9, at 959, 147 Cal. Rptr. at 39.

93. *Infra* note 118, at 58.

94. *Id.*

95. *Infra* notes 117, 118, since representation by a certified law student has never been an issue prior to *Perez*, "the record" is devoid of references to the status of law students during court appearances.

State Bar "Rules Governing the Practical Training of Law Students,"⁹⁶ it has acquiesced to them since 1970 and has provisionally accepted them on Dec. 18, 1978, and is now being asked by the state to give its assent to a *nunc pro tunc*⁹⁷ order.⁹⁸

The state contended that Mr. Loo was not acting as an attorney, as he did not exercise independent judgment or independently give advice or counsel, but was acting within the scope of the State Bar Rules. The Rules set forth by the California Bar are well accepted, needed,⁹⁹ and await only formal verification.

B. *Question of Effective Assistance of Counsel*

While the question of the unconstitutionality of the State Bar Rules can be dealt with by a closer examination of the facts, the sixth amendment question raised by court of appeal requires a more in-depth analysis.

The basic error of the court of appeal was in the emphasis it placed on form over substance, status over actions. The court seized upon the fact that Mr. Loo was a law student¹⁰⁰ and rode it into the constitutional graveyard. The question is not who was counsel, but what did counsel do?¹⁰¹ However, before delineating the exact scope of the sixth amendment right to counsel standard, and determining whether that standard was met, it is important to note that law students have traditionally been viewed in a much different light in connection with the courts than have laymen. In *Hachin v. Arizona*,¹⁰² it was stated that a "law student becomes a member of the Bar upon entry." In *Argersinger v. Hamlin*,¹⁰³ Justice Brennan's concurring opinion, joined by Jus-

96. The court provisionally accepted the *Rules Governing the Practical Training of Law Students* on 18 Dec. 1978. The Daily Journal, Dec. 18, 1978 at 1, Cal. 4.

97. "Now for then." This phrase is applied to acts allowed to be done subsequent to the time when they should be done, with retroactive effect. BLACK'S LAW DICTIONARY 1218 (*rev'd* 4th ed. 1968).

98. For an indication of how the court might decide this question, see Bird, *Clinical Defense Seminar*, 14 SANTA CLARA LAWYER 243 (1974).

99. See policy discussion that follows, *infra* notes 115 to 133 and accompanying text.

100. Mr. Loo was at the time a graduate of University of California, Los Angeles, School of Law, had already taken the Bar, and was awaiting the exam results. He is now a practicing attorney. Source: Telephone interview with Ellen Mayer, Assistant Records Officer, UCLA School of Law, Jan. 11, 1979.

101. *People v. Felder*, 402 N.Y.S.2d 411, 413 (1978); *Achtien v. Dowd* 117 F.2d 989, 992 (7th Cir. 1941).

102. 389 U.S. 143, 147 (1967).

103. 407 U.S. 25, 40 (1972).

tices Douglas and Stewart, specifically called for the help of law students in the representation of indigents in the court room.¹⁰⁴ Justices Powell and Rehnquist, concurring in result, supported the concept, though they indicated some reservations as to its actual viability and as to the extent of its impact outside of locales with law schools.¹⁰⁵ The court has also cited with approval the in-prison legal services by law students in *Johnson v. Avery*.¹⁰⁶

As can be seen, the law student has explicitly been given a place, albeit limited, in trial work. However, as stated earlier, the question is not so much who is doing the representation, but rather what level of representation is being given. The standard in California¹⁰⁷ is the same as in the federal courts: that of *effective* counsel.¹⁰⁸ Mr. Perez had not claimed that his counsel was ineffective.¹⁰⁹ The trial judge had nothing but praise for Mr. Loo at the termination of the trial.¹¹⁰ Additionally, it must be remembered that Mr. Loo comprised only one-half of the defense team. The leading half of the team, Mr. Zinter, participated actively throughout the proceeding. He interjected himself thirteen times on the record,¹¹¹ handled the sentencing alone,¹¹² and provided a guiding hand for Mr. Loo.

104. *Id.* "Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. . . . Like the American Bar Association's *Model Student Practice Rules* (1969), most of these regulations permit students to make supervised court appearances as defense counsel in criminal cases. . . . I think it plain that law students can be expected to make a significant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including the case reached by today's decision." *Id.*

105. *Id.* at 57, note 21.

106. 393 U.S. 483, 495-496 (1969).

107. In re Saunders, 2 Cal. 3d 1033, 1041, 472 P.2d 921, 926, 83 Cal. Rptr. 633, 638 (1970).

108. Pinedo v. United States, 347 F.2d 142 (9th Cir.) *cert. denied*, 382 U.S. 976 (1965); Tahl v. O'Connel, 336 F. Supp. 576 (S.D. Ca. 1971), *aff.* 460 F.2d 1068 (9th Cir. 1972), *cert. denied*, 409 U.S. 1042 (1971); Barber v. Nelson, 451 F.2d 1017 (9th Cir. 1971). In re Saunders, 2 Cal. 3d 1033, 472 P.2d 921, 88 Cal. Rptr. 633 (1970); People v. Brown, 26 Cal. App. 3d 825, 102 Cal. Rptr. 518 (1972); People v. Pinedo, 30 Cal. App. 3d 860, 106 Cal. Rptr. 743 (1973).

109. *Supra* note 9.

110. *Supra* note 8; pertinent parts: "Mr. Loo did what I consider . . . an outstanding job and I thought a better job than some . . . full-fledged lawyers." It might also be pointed out that Mr. Loo had won acquittals in his five previous outings.

111. *Id.* Mr. Zinter's participation breaks down as follows: entered himself as attorney of record (RT 2), was alone at sentencing (RT 180-192), voir dire (RT 5), stipulated as to evidence (RT 26, 61, 113, 147, 168), objected to evidence (RT 50, 59), initiated and joined in discussions at the bench (RT 145, a, b, 161), trial strategy (RT 145 b), to rest (RT 148), not to poll the jury (RT 172). All cites to transcript pages of Superior Court, Imperial County 4 Crim. No. 8753. It is of some interest to note that in the court of appeal's first opinion (June 23, 1978), the court stated that Mr. Zinter took no active part in the proceedings, and when the error was pointed out, the court replaced the original phrase with "uttered a total of 36 words." *Id.*

112. *Id.* at 180-192.

The state contended that Mr. Perez was represented by counsel and that counsel was effective in its representation. The fact that half of Mr. Perez's defense team was not yet a lawyer, but rather part of that special niche in the legal profession created for law students, goes to the form of defense and not to its substance.

C. The Court Erred in not Applying the Prejudicial Standard on the Question of Effective Counsel

The court of appeal was mistaken in not requiring Perez to prove that he was prejudiced by his representation. Mr. Perez has never alleged that he suffered from ineffective representation.¹¹³ This, combined with the comments of the trial judge, would seem to indicate that Mr. Perez's defense was within bar standards.¹¹⁴ The court blurred the distinction between being denied counsel of any kind and being denied "effective" counsel. The former is reversible *per se*, whereas the latter is reversible only upon a showing of prejudice.¹¹⁵ The *Perez* court seemed anxious to promulgate new law, even at the cost of muddled interpretations and selective application.

X. POLICY CONSIDERATIONS

This discussion would not be complete without some mention of the important social considerations which are brought forward by *People v. Perez*.

A. The Court of Appeal's Decision Disrupts the Judiciary's Long and Continuing Drive to Extend Legal Protection to All

For many years, the Supreme Courts of the United States and of California have been pioneers in extending legal representation to the accused, to the indigent, and to others who traditionally have not had adequate access to the courtroom.¹¹⁶ The court

113. *Supra* note 9.

114. *Supra* note 8.

115. *Supra* note 72.

116. While there are many cases to illustrate this point, reference here will be limited to a few of the more well-known cases: *Powell v. Alabama*, 287 U.S. 45 (1932), (right to counsel in capital cases); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (denial of counsel at critical stage reversible error *per se*); *Argersinger v. Hamlin*, 407 U.S. 25 (1972), (right to counsel when liberty may be taken); *Johnson v. Avery*, 393 U.S. 483 (1969) (right to counsel or legal material in prison); *Faretta v. California*, 422 U.S. 806 (1975) (overruled California's Supreme Court in stating that defendant must have counsel and could not appear *pro se*).

has specifically recognized and welcomed the use of law students to help meet the needs caused by this extension of court appointed legal representation.¹¹⁷ The trend and intent of the courts are obvious.

"[I]f the judgment is made final, the long arm of the court of appeal's opinion will effectively cripple the status of clinical legal education in California."¹¹⁸ The clinical law programs in California that are affected by the court of appeal's decision are far-reaching. Over 2,675 students were active in the program in 1978, 11,788 since 1970.¹¹⁹ To remove so many active participants from the state judicial process can result in nothing but a reversal of the positive trend established by the courts in extending legal representation to all.

While the *Perez* court limits its decision on sixth amendment grounds to student participation in representation of felony trials only,¹²⁰ it would be constitutional error to be so misled.¹²¹ The court of appeal, holding that the State Bar Rules are invalid because unconstitutionally extended,¹²² would leave every law student involved not only in actual trial work, but also in landlord-tenant disputes, employee disability cases, child custody cases, juvenile hearings, and all other areas of law where law students have made and are making significant contributions, open to a charge of unauthorized practice of law.¹²³ Furthermore, attorneys endeavoring to help a law student in his or her practical training would expose themselves to charges of malpractice and possibly even to review by the State Bar's disciplinary committee.¹²⁴ Fortunately, the Supreme Court's provisional acceptance of the State Bar "Rules Governing the Practical Training of Law Students" will alleviate these damages to a significant extent, with the possible exception of the area of criminal defense, where the issue remains unresolved. The court of appeal's decision not only flies

117. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Johnson v. Avery*, 393 U.S. 483, 496 (1969); *People v. Municipal Court*, *supra*, note 94.

118. *Amicus curiae* brief for appellee, *People v. Perez*, 82 Cal. App. 3d 952, 147 Cal. Rptr. 40 (1978), to court of appeal for rehearing from Loyola Law Clinics by Thomas Scully and McGeorge School of Law Clinics by Glendale Garfield.

119. Memorandum of the State Bar of California in Support of Request that the State Bar of California *Rules Governing the Practical Training of Law Students* be approved, Bar Misc. No. 4089, P. 58. Request provisionally granted Dec. 18, 1975, *supra* note 95.

120. *Supra* note 9, at 63, 147 Cal. Rptr. at 41.

121. *Argersinger v. Hamlin*, 407 U.S. 25 (1972), would extend such a ruling at least to misdemeanors.

122. *Supra* note 9, at 960, 147 Cal. Rptr. at 41.

123. This is a misdemeanor which, because of its nature, could seriously affect the student's chance of ever entering the profession, CAL. BUS. & PROF. CODE §§ 6030, 6044(d) (West 1961).

124. State Bar of California RULES OF PROFESSIONAL CONDUCT Rule 3-101.

into the face of a long pursued judicial goal but also has had and will have a chilling effect on the relationship between the professional and law students.

B. The Effects of this Decision Will Severely Curtail Legal Education in California and as a Result the People of California Will Suffer

Since 1870, when the case method of learning was introduced at Harvard,¹²⁵ one of the chief criticisms of legal education has been the almost total exclusion of practical training.¹²⁶ Into this void, the clinical law program sprang successfully,¹²⁷ with many an accolade from the profession.¹²⁸

The court of appeal's decision would significantly accentuate the problem of the incompetent attorney in court. The question has recently received widespread public attention, much of it from within the profession itself.¹²⁹ By denying the only "real world" experience available to the California law student, the court's opinion would seem to insure a more unfamiliar and therefore a more incompetent neophyte attorney than previously.¹³⁰ As more would-be attorneys pass the Bar,¹³¹ and these new attorneys are without practical experience, the foreseeable result is even a lower level of representation for that segment of society that cannot withstand having their counsel err. Also, a

125. This method was introduced by Christopher Columbus Langdell.

126. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COL. L. REV. 651 (1935); Frank, *Why Not a Clinical Lawyer School?* 81 U. PA. L. REV. 907 (1933).

127. Ninety percent (90%) of ABA-approved schools have clinical law programs, *Survey of Clinical Legal Ed. 1977-78*, CLERP REPORTER.

128. Bellow & Johnson, *Reflections on the USC Clinical Semester*, 44 U.S.C. L. REV. 664 (1971); Bird, *The Clinical Defense Seminar: A Method for Teaching Legal Process and Professional Responsibility*, 14 SANTA CLARA L. REV. 246 (1976); Wenke, *My View From the Bench, Clinical Education for the Law Student*, 292-305, CLERP REPORTER (1973); Kaufman, *Advocacy as Craft—Law School is More than a Paper Chase*, 60 A.B.A.J. 802 (1974).

129. Chief Justice Burger, *Has the Time Come?* 55 F.R.N. 119 (1972); Bazelon, *Defective Assistance of Counsel*, 42 U. CINN. L. REV. 1 (1973); Kaufman, *Does a Judge Have a Right to Qualify Counsel?* 61 A.B.A.J. 569 (1975). See also recent statements made by Chief Justice Burger to British Bar Association in London (1978).

130. Bazelon, *supra* note 128, at 13-14.

131. While the California Bar Exam is notorious for its failure rate, it does not measure advocacy, or working knowledge of the courts. This defect will only be accentuated if the meager practical training now received is curtailed or terminated.

rise in malpractice, mistrials and appeals are foreseeable due to neophyte attorneys, their heads brimming with "law" and empty of experience, stumbling through the judicial process. Such cannot be the desire of the courts or of the general public.

C. The Courts, as Guardians of the Profession Have a Duty to Increase Legal Education, Not Decrease It

The courts have long been recognized as the supervising guardians of the legal profession.¹³² While the courts may delegate administrative power affecting the profession to the State Bar, they have always retained control.¹³³

It should not be the policy of the court to shed the greatest advance in legal education in the last fifty years¹³⁴ without fundamentally sound reasons and careful consideration.

The impact of the decision reveals harmful results in several areas. First, the long-standing goal of the judiciary to extend representation to all levels of our society has been set back substantially by *Perez*. Second, the training of law students is restricted substantially in scope, a fact which will cause a significant reduction in the profession's overall level of competence. Such a reduction will most certainly result in serious hardships for the people of California. And finally, the court is beginning a withdrawal from its long held position as guardian of legal education, a withdrawal based upon insufficient reasons.

XI. CONCLUSION

The court of appeal in *Perez* not only failed to use the proper standards on the question of adequacy of representation, but stretched and construed the State Bar Rules and the history of those rules beyond reasonable interpretation. The court seems to have used a selective pen in its choice of facts and a selective memory with regard to the choice of controlling law. The *Perez* decision is not a proper interpretation of the law, and should be reversed.

WILLIAM A. ROBERTS
GREG F. JANSON

132. *Brotsky v. State Bar*, 57 Cal. 2d 287, 368 P. 697, 19 Cal. Rptr. 153 (1962); *Barton v. State Bar*, 209 Cal. 677, 289 P. 818 (1930); *Brydonjack v. State Bar*, 208 Cal. 439, 281 P. 1018, 66 A.L.R. 1507 (1929); *People v. Turner*, 1 Cal. 143 (1850).

133. *In re Lavine*, *supra* note 17, at 328, *aff'd*. *Brotsky*, *supra* note 131.

134. *Supra* note 16.