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Law Students in Criminal Law Practice

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LAW STUDENTS IN CRIMINAL LAW PRACTICE

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IN 1965, 2,780,000 crimes were reported, an increase of 6% over 1964,[1] and during that year in the federal courts alone there were 31,569 criminal cases filed, an increase of 5% over the cases filed in 1964.[2] Public awareness as to the existence of crime and number of persons involved in crime has caused serious judicial and legislative review of our criminal law procedures.

The preeminence of criminal law practice has not occupied a similar position among lawyers, and the absence of adequate fees is a principal cause for the avoidance and non-interest by attorneys. Many attorneys deliberately avoided appointments to escape the stigma from the association with unpopular criminal cases. Many lawyers have accepted their responsibility in criminal cases, and as proven historically, they have given the best service possible, without compensation or reimbursement and often with censure from both the public and the client. The courts were not unaware of the hardships imposed upon the members of the bar by appointment and have often hesitated making appointments or sought the defendant's waiver of counsel. Now the

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1 U.S. FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS 1 (1965).

2 ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 1965 11–13. Also, applications from both state and federal prisoners amounted to 9% of all civil actions filed in the district courts during 1965.

courts must insure that a criminal defendant will have adequate representation, and such services are not dependent upon a request.[3]

Until 1963, the legal requirement for counsel in criminal proceeding was extended only to capital cases, but with the announcement of *Gideon v. Wainwright*,[4] the United States Supreme Court recognized the need of an indigent defendant for the guiding hand of counsel in a criminal proceeding. The Court spelled out the need for counsel:

> Not only these precedents but also reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.[5]

The magnitude of the problem of furnishing legal services to indigent defendants in criminal cases was demonstrated by a recent study that revealed of the 300,000 persons each year charged with felonies in American state courts, at least half of these persons cannot afford to hire a lawyer to defend them.[6] In a survey conducted by the Attorney General's Committee on Poverty and Administration of Criminal Justice, counsel were appointed in approximately 50% of the criminal cases surveyed.[7] Estimates of the number of indigent felony cases vary from jurisdiction to jurisdiction, and in citing references estimating such cases at 50–90% of the total, the United States Supreme Court has recognized the fact that most criminal cases involve those unable to retain attorneys and unable to pay other expenses incidental to an adequate defense.[8]

[3] Carnley v. Cochran, 369 U.S. 506, 516 (1962). Any waiver of counsel must be intelligently and understandingly made.

[4] 372 U.S. 335 (1963).

[5] *Id.* at 344.

[6] SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 8 (1965).

[7] ALLEN, REPORT OF THE ATTORNEY GENERAL'S COMMITTEE ON POVERTY AND THE ADMINISTRATION OF FEDERAL CRIMINAL JUSTICE 134 (1963).

[8] Miranda v. Arizona, 384 U.S. 436, 472 (1966).

The right of an indigent defendant to consul in a felony case[9] and in the first appeal is now a matter of right,[10] and there is growing authority that the indigent defendant also has the right to call upon the services of counsel when charged with a misdemeanor offense.[11] The scope of the problem can extend to those situations where there is a deprivation of liberty such as mental health proceedings[12] and juvenile cases.[13] Such proceedings, as well as many post-conviction remedies,[14] are labeled civil proceedings, but procedures which result in the deprivation of a person's liberty might necessitate representation by counsel as a requirement of due process.

The need for counsel presupposes the existence of an adequate number of qualified attorneys to meet these needs. Many communities are meeting these needs with the institution of organized defender services, such as the public defender and legal aid society,[15] as well as the

[9] Gideon v. Wainwright, 372 U.S. 335 (1963).

[10] Douglas v. California, 372 U.S. 353 (1963).

[11] Harvey v. Mississippi, 340 F.2d 263 (5th Cir. 1965); McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965); People v. Witenski, 15 N.Y. 2d 392, 207 N.E.2d 358 (1965). ILL. REV. STAT. ch. 38, § 113-13 (1965) and MASS. SUP. JUD. CT. R. 10 require the appointment of counsel whenever imprisonment is possible.

[12] ILL. REV. STAT. ch. 91½, § 7-2, § 8-21.1 (1965). The defendant in a proceeding to determine if he was a sexually dangerous person that required commitment (a civil action) is not only entitled to appointed counsel but must be effectively advised of that right. People v. Breese, 34 Ill. 2d 61, 213 N.E.2d 500 (1966). Having been committed under the Sexually Dangerous Persons Act (Ill. Rev. Stat. ch. 38, § 105-1—105-12 (1965)), the individual is entitled to appointed counsel in his application for discharge. People v. Olmstead, 32 Ill. 2d 306, 205 N.E.2d 625 (1965).

[13] Under the recently enacted Juvenile Court Act of 1965 (ILL. REV. STAT. ch. 37, § 701-1 (1965)), the minor or other party to the action is entitled to counsel during the "adjudicatory hearing," but not during the "dispositional hearing," § 701-20(1). See *In re* Gault, 407 P.2d 760 (Ariz. 1965), in which the Arizona Supreme Court held that a juvenile who was confined was not entitled, and on appeal the U.S. Supreme Court has noted probable jurisdiction. 384 U.S. 997 (1966).

[14] In Illinois a prisoner has a statutory right to appointed counsel in a post-conviction hearing if the prisoner so requests and has no means to procure counsel. ILL. REV. STAT. ch. 38, § 122-4 (1965).

[15] The Cook County Public Defender has 30 full-time defender attorneys to provide representation at both the trial and appellate level. The Los Angeles County Public Defender has over 115 full-time attorneys, and the Criminal Division of the Legal Aid Society of New York City has over 110 full-time attorneys. In Florida, shortly after the Gideon decision a public defender office was established for each judicial circuit, even though a public defender had been available in four large metropolitan areas. Today there are approximately 200 defender organizations, but the principal form of representation available throughout the country to criminal defendants is assigned counsel.

sponsorship of assistance programs to assigned counsel.[16] Several states since *Gideon* recognized the duty to reimburse counsel for their out-of-pocket expenses and also have afforded nominal compensation for these attorneys. Two states[17] have followed the example of the Criminal Justice Act of 1964[18] which provides appointed counsel with reduced compensation of $15.00 an hour for in-court time and $10.00 an hour for out-of-court time. Money alone will not insure adequate representation by attorneys, for the obligation of the lawyer as an officer of the court must move individual practitioners to fulfill this non-remunerative and often unpleasant duty. A spirit of public duty is the principal motivation for those who accept a career as a defender attorney, but these attorneys are few. Moreover, after a young attorney gains experience in the defender office, he leaves for the more lucrative civil practice. The need for counsel will be satisfied, when every lawyer recognizes his personal individual responsibility to answer the call for an assigned case. The first steps in achieving the inculcation of this responsibility should start at the law school, where the practice of criminal law should be explained in terms of a personal responsibility for each attorney, whether or not criminal law is selected as his interest in the law.

The criminal law course and the criminal law procedure course should give the student an understanding and awakening of the administration of criminal law, but the books alone and lecture sessions are not sufficient.[19] The student can learn much from courtroom participation, and counsel representing the indigent defendant will also benefit much from effective supervised law student assistance. The students should be employed within the framework of legal education, for student contacts with the courtroom should be connected with the legal principles explained in the classroom. The student-lawyer relationship should be far more than that of a "law clerk" or "employee" to an employer. The student will perform simple and basic procedures, and the

[16] In Harris County (Houston), Texas, an imaginative form of defender program has been formed through the efforts of the local bar association. An administrator defender program was funded to provide attorney and related services to the individual lawyers appointed to represent indigents. All lawyers are subject to appointment, and computer services insure an equal distribution of the appointed cases.

[17] N.Y. COUNTY LAW, § 722-b (1965). N.H. REV. STAT. ANN. § 604-A:5 (1965).

[18] P.L. 88-455, 18 U.S.C. 3006A (1964).

[19] See Pye, *Law School Training in Criminal Law: A Teacher's Viewpoint* 3 AM. CRIM. L. Q. 172 (1965).

attorney should be careful to explain background reasoning and policy of these actions. The ability of the lawyer will be enhanced by his teaching of others and at the same time he will be fulfilling an important obligation to potential members of the profession. The sagacity in fostering law student defender programs will be realized in a greater number of qualified lawyers interested in accepting appointments in the ever-expanding number of indigent criminal cases. The future lawyer through actual experience with the problem of furnishing counsel for the indigent defendant will become an advocate for better defender services in his community.

AN EDUCATIONAL OPPORTUNITY FOR LAW STUDENTS

The role of the law student as an assistant to appointed counsel in a criminal case as part of the formal legal training has been questioned. A student is said to be a mere observer to the proceeding and that his observations are often limited to sporadic and disjointed contacts of a given case. Abuse can occur if the student is restricted to a diet of menial duties without ever receiving a challenge to his ability as a future lawyer. Students who perform research should not be insulated from contact with parties and issues outside of the scope of the research. Some attorneys have complained of the additional burden imposed by student help, for without giving the student the necessary orientation some believe they can dispose of a case more efficiently. Such beliefs are short-sighted. Some other attorneys, although able advocates, are poor teachers, and they are neither able nor desirous of explaining the procedures that have become automatic to them in their day-to-day work. Other attorneys, usually younger attorneys, can become embarrassed by student assistance, because experienced students who have participated in several cases with other attorneys might be more familiar with the law and procedure than the appointed attorney. However, these limitations can be overcome through careful planning in structuring the program under combined attorney and faculty supervision that will give both continuity and variety.

One of the initial advantages of participation in a student defender program is that the law student will have his first opportunity to meet a "live" case. He has previously dealt with a situation described in a casebook, an experience far removed from daily living. The casebook recites a reduced version of an actual appellate court opinion, which

in itself is a condensed and synthesized opinion of the merits of a case as extracted from a cold record and the briefs of counsel. The appellate opinion has often been described as the product of a winnowing process, whereby all the irrelevancies of life that give the case personality have been excised. At the trial level, the force of a principle of law becomes subdued when the student encounters a "live" defendant. The law is then understood in the framework of the defendant, and the case takes on a new glow. Empathy or projection, which was not feasible before, is exercised by the student, and the whole criminal law process, focusing on one specific offense involving one defendant, becomes a very personal concern for the student. Sometimes there is the danger of overidentification with the defendant, and the student will lose his objectivity, but this too is part of the learning experience of making the distinction between a personal and professional relationship. One actual criminal trial will leave an indelible mark on the student, and in all likelihood the case making this lasting impression will never be enshrined in a legal textbook.

The importance of factual analysis cannot be underemphasized in the handling of a legal problem. In law school, the facts are definite and certain, whereas the starting point of any adversary proceeding is the collection and evaluation of the facts. The organization and presentation of the facts will have a direct influence on the outcome of the case. Fact acquisition is not easy, and new methods must be learned and skills acquired. The work habits formed in law school must be reformed to meet with actual criminal practice—"another world" from that of the law school.[20] Not only must this basic data be accumulated, but it must be put into proper form so as to qualify as proof at the trial. Ideas stimulate, but the legal practice will oftentimes involve routine and repetitive work assignments. A student might understand the principle of the *McNabb-Mallory* rule[21] in the abstract, but it becomes a tedious and painstaking job to prepare a motion to suppress a confession which has violated that principle of law with the necessary supporting affidavit. Even when interest wanes, the student will realize

[20] WRIGHT, *Law School Training in Criminal Law: A Judge's Viewpoint* 3 AM. CRIM. L. Q. 172 (1965).

[21] The failure of police authorities to bring a defendant promptly before a commissioner renders a confession obtained during the unlawful delay inadmissible. McNabb v. United States, 318 U.S. 322 (1943); Mallory v. United States, 354 U.S. 449 (1957). See RULE 5, FED. R. CRIM. P.

that much work is required. It is through this sustained effort that a good practitioner is distinguished from the poor one.

Trial lawyers are becoming scarce in this day of specialization. A student in a defender program would be given a chance to experience the function of a lawyer in the courtroom and to understand the transformation of a legal problem into a case. A criminal case, like any cause of action, is a complicated transaction in which the appearances in the courtroom are the portion of the iceberg above water, but the true measure of the scope of a case is determined by the underlying factual and legal research—hidden beneath the surface. Pretrial and post-trial procedures are essential to any litigation and the student must learn their function. Observations both in and out of the courtroom will define what a good trial lawyer should be. This exposure to the practicing profession should be an integral part of the educational process that should be incorporated in some form in every law school curriculum.

OPPORTUNITIES FOR USE OF LAW STUDENTS IN THE CRIMINAL PROCESS

Effective June 13, 1966 a person suspected of crime must be advised of his right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.[22] If police interrogation is to be effective, it must be subsequently admissible in a court of law, and the foundation for the introduction of a confession or statement will require an affirmative showing that this warning was given and that if the assistance of counsel was waived, that the waiver was understandingly and intelligently made. The law student could serve as an impartial observer to the interrogation so as to certify later to the court that a proper warning was given and that the waiver was valid. Beyond the neutral role of an observer, the law student could be more actively engaged as liaison between the police and the bar or organized defender service in securing the assistance of an attorney for indigent criminal suspects who request legal assistance. Chief Justice Warren in the *Miranda* decision indicated that a "station house lawyer" will not be necessary in every precinct,[23] but law students could fill a vital role

[22] Miranda v. Arizona, *supra* note 8, at 479.

[23] *Id.* at 474.

by insuring that police interrogators adhered to the newly established constitutional procedures for questioning.

One of the newer and more valuable student programs has been in the area of securing pretrial release for indigent defendants on recognizance or without surety. After arrest, release is ordinarily obtained through bail by the defendant leaving security with the court to insure his reappearance at trial.[24] Such release would depend upon the wealth of the defendant, and often if the defendant was able to secure probation, the only time he served in jail was during a period in which he was sheltered by the presumption of innocence. In New York City a pilot project[25] demonstrated that the accused's local ties to the community, i.e., residence, employment, relatives and criminal record, were a more realistic basis in insuring his presence at trial. Instead of a bail bondsman, the law student would interview a defendant about these background factors and then verify them by telephone. These factors would be evaluated on an objective point system, and if rated favorably, a recommendation would be made to the court to secure the defendant's release on recognizance. These pretrial release programs, or "R.O.R." (release on recognizance) programs, have demonstrated that the percentage of persons released on recognizance failing to appear are still less than the percentage for those who are released for a money surety. Encouraged by the success of the R.O.R. programs, law students have been placed in the police precinct stations to make the same evaluations but to secure the release of the defendant prior to his first appearance before a magistrate or a judge.[26] The recommendation of the law student is made to the precinct captain or desk officer, and if favorably considered, the defendant is issued a summons or a notice to appear in court and released at that time. Indigent defendants

[24] The operation of a pretrial release program with forms and a summary of existing projects is set forth in III DEFENDER NEWSLETTER No. 6 (Nov. 1965). See also U.S. DEPT. OF JUSTICE AND THE VERA FOUNDATION, INC., PROCEEDING AND INTERIM REPORT ON NATIONAL CONFERENCE ON BAIL AND CRIMINAL JUSTICE (1965).

[25] Manhattan Bail Project sponsored by a grant from the Vera Foundation.

[26] The use of summons in lieu of arrest extends to misdemeanor offenses, but narcotics addicts, pickpockets, prostitutes, professional thieves, known criminals or gamblers, and incapacitated persons were excluded. The procedure of the summons project is further explained in C.I. MEMO 72, dated December 16, 1964, and C.I. MEMO 13-1, dated June 30, 1965, issued by the Police Department of the City of New York.

have avoided unnecessary periods of incarceration, and at the same time the law student has acquired valuable skill in interviewing.[27]

A concomitant feature of the R.O.R. program is the status check of persons confined in jails or detention centers. Law students can be used to visit the jails to inquire on the status of accused persons for the purpose of seeing that they have been advised of their rights and have been able to contact an attorney or relatives and that their case is being expedited to avoid unnecessary delay in the judicial process. One jail check program discovered that confined individuals who were unable to secure their release on bail or recognizance, but who faced only minor misdemeanor charges, could have their cases advanced which resulted in short *nunc pro tunc* sentences and their release. Jail checks have revealed the improper detentions of juveniles with adult offenders. In one case an elderly lady with adequate funds to secure her release was discovered during a jail check, but she was bewildered by the criminal procedure after arrest. She was subsequently released after being referred to legal assistance.[28] Especially in larger communities, prisoners scheduled for preliminary hearings or court calls are sometimes forgotten and passed over, and a jail check can avoid these errors and delays. Jail interviewers can also contact employers in the hopes that the defendant's employment status can be maintained, or if he loses his job, other employment prospects can be obtained for the prisoner after his release. The student will gain a first-hand view of detention procedure, and his very presence will usually result in improved procedures in the handling of prisoners.

Investigation by law students is one of the most traditional uses, because the lawyer often needs the services of an investigator.[29] Investigation can be one of the more interesting aspects of a criminal case. However, if such duties are not placed within a legal framework lead-

[27] On June 22, 1966, President Johnson signed into law the BAIL REFORM ACT OF 1966, PUB. L. 89-465, which incorporated many of the features of the R.O.R. programs.

[28] The listed advantages of the jail check were references to actual situations described by the Probation and Parole Officer of Duval County, Florida in a report dated September 20, 1966.

[29] Under the Criminal Justice Act of 1964, appointed counsel can request investigative services which will also be compensated under this Act. 18 U.S.C. § 3006A(e). Compensation available under this section might be paid to law students assisting the attorneys in the capacity of an investigator, but such arrangement should be approved by the district judge.

ing to a finished product for presentation in the court, they will become meaningless as an educational tool. Interviewing of witnesses and the defendant increases the skill of the student-investigator in ferreting out the important and relevant facts and discarding the unessential. Interviewing entails the use of judgment in assessing the credibility, both real and apparent, of the future witness or defendant. Learning is developed through repetition of practical skills, and often a student will have to repeat an interview or investigation if the first has been faulty. In training student-investigators, some attorney-supervisors have made use of a tape recorder, and in a group session the students critique both the interviewing technique used and information elicited by the student investigator. In other programs the student-investigator initially accompanies the professional investigator or an attorney as an observer, and thereafter the student is allowed to conduct interviews on his own.

In addition to general fact gathering, students can be used to contact experts in such areas as ballistics, chemical analysis, metallurgy, handwriting examination, fingerprinting, and other specialized fields. In a criminal trial today where the defendant exhibits instability outside the doing of the criminal act, a valuable expert witness will be the psychiatrist. The student can be assigned not only the job of liaison with the psychiatrist to assist in his examination of the defendant, but the student can prepare the questions to be asked the psychiatrist at the time of trial. For information on non-technical subjects, such as local bank procedures on handling a forged check, the lawyer can often use the law student to become his expert on this topic, but this student use can extend to any area of specialized knowledge. The scope of the inquiry by the students should not be limited to the traditional role of an investigator, but should cover the personal background of the accused which might reveal matters in extenuation and mitigation. Social service records can be helpful in evaluating the background and family life of a defendant.

The broadening experience as an investigator who participates in the whole case will further his understanding of law practice. No matter what area of the law or specialization is chosen, the law student will have benefited from this immersion in reality, and in his future career, he will come to know that every legal problem depends upon the facts presented.

The criminal case starts long before a jury is selected. Actions preliminary to trial will often have a substantial effect on the ultimate outcome of the case, and law students can learn and aid during this phase of the case. Law students can assist in the general pretrial motion practice, which involves motions to dismiss, motions for discovery, and motions to suppress confessions or evidence. The use of motions teaches the student the value of preserving a record for appellate review, and many cases will be decided squarely on the motion to dismiss or motion to suppress the confession or evidence. Pretrial discovery motions test the cooperation between prosecutors and defense counsel, for often such motions will not be necessary if the prosecutors voluntarily allow disclosure of their file. Simple points of pretrial tactics become apparent. If a prosecutor has a sound case, he is usually most willing to disclose his file to the defense counsel, but if the case is questionable, he is often not so generous. One of the most efficacious pretrial actions is the negotiation of pleas of guilty. In saving the court time and the prosecutor the hardship of presenting a case before a jury, the prosecutor will often accept pleas to lesser offenses or make agreements as to a recommended sentence. This practice varies from jurisdiction to jurisdiction, and in any event, the plea of guilty must be free and voluntarily made without any form of inducement.[80] This paradoxical procedure controls the disposition of a substantial number of cases in our courts today, and law students will have an opportunity not only to participate but also to evaluate the merits of such procedures.

From the standpoint of the law student, cumulative experience reveals that students most enjoy their activity in the courtroom, particularly the trial. An identification with lawyers can never be more pronounced than association with lawyers during a jury trial. However, as with other lay persons, the law student fails to understand that the case is made both on the facts and on the law prior to the actual presentation in the courtroom. Good trial techniques make the unfolding of a case at trial easier. Cross-examination is the acid test of testimonial evidence, and oral argument is an important vehicle of communication

[80] In a recent federal district court holding, a state conviction was set aside because the judge did not keep his promise as to the sentence he would impose in return for the defendant's plea of guilty. The opinion also criticized the participation by the judge in plea bargaining. United States *ex rel.* Elksnis v. Gilligan, 65 Civil 2478 (S.D.N.Y. 1966), reported in III DEFENDER NEWSLETTER, No. 4, 9 (July, 1966).

with the jury in setting forth the theory of the case. However, these many trial techniques depend upon substantial preparation and work done outside the courtroom. The value of hard work in thorough case preparation is what the law student can learn from the better trial attorneys.

Since the student desires to actively participate, the court and bar should foster the controlled use of students at trial if it will channel his energies in support of the work necessary for preparation. The minimum role at trial of a student is the permission to sit at counsel table, where he might have an on-the-scene view of the case with an opportunity for discussion with the trial defense counsel. Several jurisdictions by court rule or statute[31] have authorized student assistance for counsel, and the New Jersey Supreme Court Rule[32] encourages and directs the use of law students appointed counsel whenever possible. In Massachusetts and Tennessee, the Supreme Court rule authorizing representation by students under the general supervision of counsel does not require the physical presence of the supervising attorney.[33]

In criminal cases, the requirement of *Gideon* means *effective* and competent counsel, and without the presence of a qualified attorney during the trial of the case, the convicted criminal defendant will have much ammunition to assert as error either in his appeal or in his efforts to seek post-conviction relief. Although some law students might possess the skill and ability of a licensed practitioner, the lack of immediate attorney supervision detracts from the educational experience the program was designed to furnish. Although law students can be extremely helpful, they should not be used as lawyer substitutes. The use of law students is accepted and valid so long as the management and control of the case rests with a qualified attorney. If the authority authorizing student participation does not require the presence of the attorney at a

[31] For a summary of statutes and court rules authorizing student participation, see *Law Students in Court*, 24 THE LEGAL AID BRIEF CASE 266 (1966). This same issue contains a summary review of several student programs in operation throughout the United States supported by grants from the National Defender Project, an activity of the National Legal Aid and Defender Association. McArdle, *Law Students' Participation in National Defender Projects*, 24 THE LEGAL AID BRIEF CASE 262 (1966).

[32] "[L]aw clerks and law students shall be assigned to assist assigned counsel, whenever possible, in the investigation and preparation of assigned matters." N.J. SUP. CT. R. 1:12-9. See also RULE 1:13-8A (c) authorizing the appearance of students in the county district courts.

[33] Massachusetts: MASS. SUP. JUD. CT. R. 11 (June 25, 1966). Tennessee: TENN. SUP. CT. R. 37, § 21.

trial, the degree of attorney management and supervision may be questioned. In pretrial motion practice, for example, a motion for continuance, the assigned attorney need not be present when the student handles the matter, because the doing of the act is primarily standardized in most situations. When qualified counsel for the defense is present, the law student could perform any action that he might do at any time throughout the trial. If the student goes astray, the attorney will be available to correct any error, and at trial he can step in and take over the case so as to protect the defendant's rights at all times. The use of a student by an attorney is analogous to an extension of the attorney himself, and the attorney, depending upon his estimate of the ability of the law student, would have sufficient leeway to determine what duties he might perform.

If a conviction results, the case is not over.[34] The defendant must yet be sentenced, and often this is the crux of the criminal proceeding. The information supplied to the court to determine the appropriate sentence should be reviewed and verified. In the federal courts a standard presentence investigation report is submitted by a probation officer,[35] and until the amendment in the Federal Rules of Criminal Procedure effective July, 1966,[36] this report was not often shown to defense counsel. Although the court now has discretion to release this report, this report still may be withheld from defense counsel. If such a nondisclosed report will be made, then defense counsel should prepare an independent report objectively stating the background of the defendant but in a manner so as to achieve an advantageous disposition.[37] The law student will become familiar with the many sentencing alternatives, and many dispositions other than confinement are possible. In

[34] One of the principal criticisms of our system of criminal justice is the lack of finality. After appeal, the prisoner has the avenue of collateral attack in both state and federal courts. Efforts, unsuccessful to date, have been made to limit the scope of federal habeas corpus (28 U.S.C. 2254 (1948)) that review state convictions, which have been affirmed by the state appellate court. The scope of federal review of state convictions is set out in Townsend v. Sain, 372 U.S. 293 (1963).

[35] DIVISION OF PROBATION, ADMINISTRATION OFFICE OF THE U.S. COURTS, THE PRESENTENCE INVESTIGATION REPORT (1965).

[36] FED. R. CRIM. P. 32(c)(2) "The court before imposing sentence *may* disclose to the defendant or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon." See Advisory Committee Note, H.R. Doc. No. 30, 89th Cong., 2d Sess. §§ 31-32 (1966).

[37] If no presentence report is prepared, *a fortiori* defense counsel should prepare a report and plan for disposition of the convicted defendant.

1964 over 50% of the defendants sentenced in federal court were placed on probation.[38] In state courts, especially where presentence reports might be inadequate or where they are not available at all, law students can investigate and review the background of the defendant so that the judge will have sufficient factual data to render a sentence consistent with the needs of society and best fitted to help the defendant. Even when reports are available, such as in the federal courts, law students through cooperation with the probation officer will gain some idea of the nature of the report being prepared for the court and can take action to make sure this report is on a firm foundation and impartial.

Under *Griffin v. Illinois*,[39] the defendant is entitled to a transcript of the proceedings if he is unable to pay for the cost in order to protect his right of appeal. Counsel will be appointed to represent the defendant on appeal, and there is some question as to whether counsel must prepare a brief and present oral argument if the appeal is completely without merit.[40] The case might have taken three days to try, but it might take more than a year to prepare and argue the appeal. The delay at the appellate level is caused by the substantial amount of time that must be devoted in reviewing a transcript and preparing the briefs, and the increasing number of criminal appeals has added to the appellate court backlog. One of the beneficial applications of law student aid is in the preparation of indigent criminal appeals, and the advantages flow to the court and prosecutor, as well as the defendant. Student service could take the form of summarizing the transcript of the trial proceedings in a narrative form, which will be submitted with the brief as an appendix or abstract. During a review of the record and transcript, possible legal errors could be noted, and research could be performed under direction of the assigned counsel. Memoranda of law drafted by the law students might be later integrated as portions of the appellate brief. Although the student will have the opportunity to sit down and study the complete handling of an actual case in the trial court, student interest will often diminish because of the lack of personal contact, and efforts should be undertaken to establish some per-

[38] ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR IV-3 (1965).

[39] 351 U.S. 12 (1956).

[40] For procedures permitting counsel to withdraw if the appeal is frivolous, see Johnson v. United States, 352 U.S. 565 (1957) and Ellis v. United States, 356 U.S. 674 (1958). If counsel is permitted to withdraw, the appellant may proceed *pro se*.

sonal contact.[41] The criminal appeal conducted under competent supervision of a qualified attorney has proven to be an excellent method of training the law student and introducing the novice lawyer to the criminal law practice.

One of the more controversial uses of law students involves prisoner counselling and assistance in the preparation of petitions seeking post-conviction relief.[42] Often the experience for the young law student can be very disenchanting when he must face prisoners whose only philosophy is to use any means to get out of prison. Lying is commonplace, but the seasoned student often performs a worthwhile service in explaining to the prisoner the lack of merit in his petition. If the student possesses the legal background to understand the nature of post-conviction writs, his advice to the prisoner will be respected. Even if a prisoner would persist in filing a petition, the burden of the court in reviewing the petition would be greatly aided if legal assistance were made available at the prisons.[43] At least, such assistance would hopefully reduce the quantity or size of some of these petitions, which often contain extensive court quotations and extracts from legal encyclopedias. Legal advice on other matters is also welcomed at the penitentiary, and this counselling pertains to the administrative and legal requirements governing their release date, the possible dismissal of detainers against them, and their rights as prisoners within the penal institution. The prisoners need legal advice on civil matters, and the students can fill a void in this area as well as help the prisoner on even non-legal problems. The principal advantage of student-prisoner contact is the formation of an interviewing technique and the exposure to a lawyer-client relationship where the client is not always truthful.

OBJECTIONS TO LAW STUDENT PARTICIPATION

One of the most often cited objections to the use of law students assisting counsel in the defense of a criminal case either in or out of the courtroom has been the argument that such assistance constitutes the

[41] In the handling of an indigent criminal appeal, often face-to-face contact with the defendant-appellant, who is confined at some distance, is not practical. However, correspondence can be an effective means of communication, and prisoners are not hesitant to ask questions or give advice.

[42] In addition to questions of unauthorized practice of law, law students have been criticized for solicitation and stirring up litigation.

[43] Legal assistance made available to prisoners will probably have the effect of reducing the number of prisoner petitions. *Report of the Committee on Habeas Corpus of the Judicial Conference of the United States,* 33 FRD 363, 384–385 (1963).

unauthorized practice of law. If the student holds himself out as a lawyer, and such practice is not authorized by court rule or statute, then such holding out as an attorney would be a valid objection to the use of students in these cases. However, the use of students is always under the general supervision and management of an attorney. As long as the student is identified as a student or an assistant counsel, this problem is obviated. The distinction between that which is independent legal action by a person associated with a lawyer which might constitute the unauthorized practice of law and that which is merely assistance to counsel has been defined in *Ferris v. Snively*.[44] This court in reviewing what constituted the independent work of the law clerk and the work done in behalf of the attorney made this distinction:

> We realize that law clerks have their place in a law office, and we recognize the fact that the nature of their work approaches in a degree that of their employers. The line of demarcation as to where their work begins and where it ends cannot always be drawn with absolute distinction or accuracy. Probably as nearly as it can be fixed, and it is sufficient to say that it is work of a preparatory nature, such as research, investigation of details, the assemblage of data and other necessary information, and such other work as will assist the employing attorney in carrying the matter to a completed product, either by his personal examination and approval thereof or by additional effort on his part. The work must be such however, as loses its separate identity and becomes either the product, or else merged in the product, of the attorney himself.[45]

The law student is much closer to professional status than the employee of a lawyer, and so long as the student was under the general supervision of an attorney, the court would most likely give greater latitude to the scope of his efforts. The President of the American Bar Association, Orison S. Marden, has suggested that the law student, in fact, becomes a member of the profession when he enters law school.[46]

Although the stated objection to the use of law students is that it would constitute the unauthorized practice of law, more fundamental and selfish objections underlie the resistance of some members of the bar. The one objection, which manifests a fear of losing a fee-paying client, is levelled against the extension of legal services for the poor. This objection is applicable to attorneys as well as students. The logic

[44] Ferris v. Snively, 172 Wash. 167, 19 P.2d 942 (1933).

[45] *Id.* at 176–177, 19 P.2d at 945–946.

[46] Mr. Marden's speech before University of Willamette College of Law, Salem, Oregon, September 10, 1966. Mr. Marden is also Chairman of the National Advisory Council of the National Defender Project, which has funded 27 law school student-defender programs.

of the objection reflects the simple fact that if the supply of legal services are increased with the introduction of students, the demand for legal services from the regularly admitted members of the bar might be reduced, either in the number of clients or the size of fee. This fear is unfounded,[47] for the legal services available of the students extend only to those who are financially unable to obtain an attorney. Once a standard of indigency is established that conforms with the prevailing norms in the community, the bar can take measures to see that it is adequately enforced. Several legal services programs for the poor funded by the Office of Economic Opportunity, after the first year of operation, indicated that the demand for retained legal services in the same community increased. This experience reflects the fact that if people are made more aware of the need for legal services, they will have greater demand for the services, and those with funds will seek to retain their own attorney.

One of the other tacit reasons not often expressed is that the law students, although they might be competent and under proper attorney supervision, have not been admitted to the bar, and without the formal induction ceremony, some feel they should be barred from any form of courtroom participation. This objection is an over-jealous regard of the exclusiveness of the legal profession. The indigent client does have an attorney of record, and exposure of the student will not infringe on the licensed domain of the practitioner. The function of the law school is to provide attorneys who are competent when admitted to the bar—a situation now that does not immediately follow from the swearing-in ceremony, and the rules of the profession do not bar the student from seeking experience that will guarantee his competency at the time of his admission to practice.

TYPE OF PROGRAMS THROUGHOUT THE UNITED STATES

Stetson University College of Law.[48] To provide student participation in the defense of criminal cases, the Stetson University College of

[47] Although the brethren of the legal profession must be protected, such protection of fee is subordinate to the principle that competent legal services should be available to all—even those who cannot pay for them. "In fixing fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." ABA COMM. ON PROFESSIONAL ETHICS, CANONS OF PROFESSIONAL ETHICS, Canon No. 12 (1965).

[48] Information on this student program has been derived from the FIRST ANNUAL REPORT (1964–1965) and SECOND ANNUAL REPORT (1965–1966) of the PUBLIC DEFENDER CLINIC.

Law at St. Petersburg, Florida, established a Public Defender Clinic. Under Criminal Procedure Rule 2 of the Supreme Court of Florida, a senior law student in an accredited law school, which maintained a faculty supervised legal aid program, is allowed to appear in any municipal or trial court in behalf of the insolvent person accused of crime provided that the conduct of the case was under the immediate and personal supervision of a public defender or assistant public defender. Professor Paul Barnard as director of the program was appointed a special assistant public defender so that he could supervise the appearance of students in court. The focus of the project centered on assistance to indigent defendants at the preliminary hearing in the justice of the peace courts. The public defender did not have sufficient assistants to provide representation in the preliminary hearings. To preserve a record of the hearing the students were allowed to make a tape recording of the proceedings, which later proved to be indispensable when the case went to trial. In addition, the students, under the supervision of the public defender, participated in the trial of felony cases. During the two years of operation, certain techniques evolved. Law students were found to work best in teams of two, even though a team of three students was tried. The program was originally planned as a one semester course for the law student, but the duration was found to be too short, and now the program has been lengthened to two semesters. The courses are entitled "Public Defender Clinic I" and "Public Defender Clinic II." One test case worked on by the students explored the need under Florida law for representation in misdemeanor hearings, and after exhausting several judicial avenues, including the filing of a writ of habeas corpus in the local federal district court, a state court order was issued recognizing the right of an indigent misdemeanant to counsel. The program has taken on many other projects including an appraisal of the bail bond system, new teaching methods on the learning of good interview techniques, and visits to the state penal and mental institutions. As a by-product of this clinic, the students prepared and published a trial manual for ready reference in the handling of both legal problems and procedural aspects of a criminal case under Florida law. The program has had the strong support of the local public defender, and the student assistance program under the faculty instructor has complemented and expanded the availability of defender services for this community.

Boston University–Roxbury District Court. The most liberal rule authorizing student participation is Massachusetts Supreme Judicial Court Rule 11 which authorizes student representation under the general supervision of an attorney, but that attorney need not be present at trial.[49] Student representation is limited to the district court, a court of limited criminal jurisdiction which has the authority to confine a person up to 2½ years. Under the supervision of an attorney-supervisor, 25 students provide representation for indigent defendants in the district court.[50] Students handle the case on their own, but the attorney-supervisor is present not only during the trial of the case but also during the interviewing of the defendant and witnesses. After a case has been assigned to a student team of two, they are given at least one week to prepare the case for trial. After receipt of the charge, students research the legal aspects of the case, and then they conduct a background factual investigation which includes the personal background of the accused. As long as the student does not jeopardize the rights of the accused, the student is given a free hand in the conduct and presentation of the case. The district court judge is extremely sympathetic to the program, but imposes the same standards of conduct and performance upon the students as he does for the attorneys. The student program is designed to develop responsibility on the part of the students and at the same time to provide competent legal representation for those facing possible imprisonment.[51] The program was well received,[52] but the close attorney supervision has required that an assistant be provided for the attorney-supervisor. The attorney-supervisor is now on the staff of the law school, which planned and originated this student program. The effectiveness of the program can be

[49] "[T]he expression 'general supervision' shall not be construed to require the attendance in court of the supervising member of the bar." MASS. SUP. JUD. CT. R. 11(c).

[50] This student program is explained in the article, Spangenberg, *Legal Services for the Poor–The Boston University Roxbury Defender Project.* 49 MASS. L. Q. 319 (Dec. 1964).

[51] Under MASS. SUP. JUD. CT. R. 10, appointed counsel must be furnished any indigent defendant facing possible imprisonment.

[52] The Roxbury District in Boston contains a predominantly lower-income population (total 85,000) with almost 5500 families with an income under $3,000 per year. Spangenberg, *supra* note 50, at 322–323. The practicing attorneys welcomed the influx of these additional legal services, because a referral system for true indigent cases would not deprive them of fee-paying clients.

measured by the recent modification of the supreme court rule to now authorize student assistance for the prosecution of cases in the district court.[53]

Montana. The University of Montana School of Law established the Montana Defender Project which is a comprehensive program whereby students provide assistance to the 730 practicing attorneys in the state. Students prepare legal memoranda on points of law and rough drafts of necessary motions in addition to investigating the case in preparation for trial. One of the unique aspects of the program is that it places student interns in the tribal courts on Indian reservations.[54] The student services will also be available in the justice of the peace courts, in which under Montana statutes[55] representation by laymen is permitted. Students under close attorney supervision will interview prisoners with respect to post-conviction writs and will also study the procedures for legal representation at the hearing on revocation of parole. The students will work in a pretrial release program, and they will gather data for the purpose of improving criminal law and defender services in the state through legislation. The inauguration of this legal aid program at the law school will (1) develop professional responsibility of the student by his direct participation, (2) provide an introduction to the practice of law for senior law students, (3) provide a base for the continuing education of the bar in criminal law, (4) afford the opportunities for in-depth research of these unknown areas such as representation of Indians and in parole revocation proceedings, (5) require mandatory participation of law students except those on the Montana Law Review, and (6) develop an interest of all lawyers in every level of administration of criminal justice.[56]

[53] MASS. SUP. JUD. CT. R. 11. The rule limits representation by the students to the district court, from which on appeal to the Superior Court there is a trial de novo. This right of appeal would be a strong argument to counter a competency challenge, but the Boston University program described is conducted under the present and immediate supervision, which not only eliminates the question of competency, but also provides the best method for a critical evaluation of the students' performance in court.

[54] The jurisdiction of the tribal court, which summarily disposes of minor criminal matters, was recently held to be subject to review in federal courts by a writ of habeas corpus. Colliflower v. Garland, 342 F.2d 369 (9th Cir. 1965).

[55] MONT. REV. CODE ANN. § 97-6704 (1947).

[56] DECKER, COMMENTS OF THE DIRECTOR, NATIONAL DEFENDER PROJECT (February 7, 1966), which summarized and evaluated the Montana proposal.

The assistance to prisoners part of this program has received the specific endorsement of the Montana Supreme Court.[57]

Duke University.[58] Duke University School of Law with a foundation in advanced courses in criminal law established a summer internship for ten to fourteen students. In addition to the basic courses in criminal law, students were given a course in criminal procedure, both of which were a condition precedent to participation as a summer intern after the second year of law school. The students worked with assigned counsel in the local state courts, but were also authorized to assist the solicitor (local prosecutor) in the handling of criminal cases. Although the court might have had reservations about the use of law students, after their initial performance, the students were enthusiastically accepted. The students working with the prosecutor reviewed the backlog of cases and recommended the dismissal of many cases that should have not gone to trial. These cases were dismissed, and the court appreciated the assistance in reducing its backlog. The students had the opportunity to act as lawyers, and not only did they learn much of existing criminal practice, but by the end of the summer, they were considered in some fields to be experts. Through these small accomplishments the individual student gained self-confidence.

In the summer of 1966 the faculty supervisor explored the possibility of furnishing students at the state penitentiary in the "writ room." This "writ room" was the area in which the prisoners unaided by any legal training or assistance drafted their various petitions seeking release. The students could have been available to provide legal assistance to the prisoners in the hope that writs with merit would be put in proper form and frivolous writs discouraged. However, since some members of the North Carolina State Bar thought that student assistance might be solicitation, the program was dropped. To preserve the support of the bar in support of the trial internship program, a valuable student program was sacrificed. That which is endorsed in Montana, is challenged in North Carolina.

[57] "It is therefore ordered that senior students in the School of Law at the University of Montana, when under the supervision and direction of members of the faculty, or the State Director of the Montana Defender Project, be, and they are hereby, authorized to render legal aid and assistance to indigent inmates of the Montana State Prison in preparing and submitting petitions for post-conviction remedial writs." MONT. SUP. CT., IN THE MATTER OF FURNISHING LEGAL ASSISTANCE TO INDIGENT PRISONERS. (1966).

[58] Everett, *The Duke Law School Legal Internship Project,* 18 J. LEGAL ED. 185 (1966).

Colorado. A grant was made to the University of Colorado Law School to establish a coordinated assigned counsel system in several counties in Colorado in conjunction with a law school student training program. The faculty supervisor acted as the attorney of record, and the students assisted him in the handling of cases. The students also work with other appointed attorneys or with the public defender. Legal assistance for prisoners in the state penitentiary at Canon City and the state reformatory at Buena Vista were component parts of this student program. The student interviewers at the prison learned much. The prisoners who filed writs, contrary to other prevailing beliefs, candidly expressed their desire not to file frivolous petitions, because the going rate for "jail house" assistance was $35 a petition. From the viewpoint of the prisoners, the students would honestly criticize and candidly appraise the merits in their claim for release. Assistance was given to prisoners in administrative matters concerning the time of release.[59] One youthful offender incarcerated for bad check offenses had detainers placed against him on similar charges in other counties. These detainers were dismissed through the efforts of this defender program.

Prior to the grant establishing the defender program, the legal aid clinic at the University provided representation in the county courts, courts of limited criminal jurisdiction, on the authority of the state statute and county court rule.[60] The second year students provided representation for indigents in the county court without attorney supervision, but the students in the third year defender program, who had presented cases in the county court, felt that participation in felony cases in the district court was more valuable because of the emphasis on the law, greater precision in legal procedure, and the advantage of working with a qualified attorney.

STUDENT DEFENDER PROGRAMS IN ILLINOIS

Chicago Federal Defender Program.[61] Through the discussions originally stimulated by Justice Tom Clark, a student defender pro-

[59] Methods used in computing the release date, provisions for reduction in sentences for good behavior, and determination of parole eligibility dates and opportunities to appear before the parole board.

[60] COLO. REV. STAT. § 12-1-19 (1963); RULE 544, COLORADO RULES OF CRIMINAL PROCEDURE IN COUNTY COURTS (1965).

[61] Clark, *Fair Play and Decency*, 3 SAN DIEGO L. REV. 1 (1966); *The Federal Defender Program*, 15 DE PAUL L. REV. 313 (1966).

gram was developed for the District Court for the Northern District of Illinois.[62] The program coincided with the implementation of the Criminal Justice Act of 1964,[63] and enrolled ten students from each of the six local law schools in Chicago.[64] Trial attorneys to represent indigent defendants were selected for the federal panel and on an assigned "duty day" a team of two students would meet with a panel attorney to receive appointments from either the commissioner or the court. The students were absorbed into the general operation of the federal district court, and their participation in a criminal case, like that of the panel attorney, was designed to extend from initial contact before the commissioner through appeal in the U.S. Court of Appeals for the Seventh Circuit. Each student team received approximately six assignments during the school year, and class schedules were adjusted to allow the students to appear on the duty day.[65] Subsequent to the initial contact with the case, the students were left to their own discretion to follow through with the appointed attorney on the case.[66] Seminars conducted on the weekend dealt with specific aspects of a case, and leading criminal attorneys gave these lectures. Materials and transcription of the lectures were being prepared for distribution to the students. The second year of the program commences in October 1966, and an Assistant U.S. Attorney will give one-hour instruction on basic trial techniques and federal criminal law to the students prior to the start of their duty day. To allow the appearance of students in the court with counsel, U.S. District Court for the Northern District of Illinois, passed the first federal rule au-

[62] Chief Judge William Campbell prepared, organized, and implemented the student plan to encourage and stimulate the students' introduction to trial and appellate practice. At the same time, the defender created an administrator to coordinate and assist the efforts of assigned counsel under the Criminal Justice Act of 1964.

[63] Funds were made available for defender services rendered subsequent to Pub. L. No. 88-455, 88th Cong., 2d Sess. § 3 (Aug. 20, 1965).

[64] Chicago-Kent College of Law, De Paul University College of Law, John Marshall Law School, Loyola University School of Law, Northwestern University School of Law, and University of Chicago Law School.

[65] In the early days of the program, student substitutions were made so that far more than 10 students participated from some schools. Substitution diluted contact with the program, and continuity, essential to a learning process, was lost. The defect has been corrected during the second year by careful selection of 10 students from each school.

[66] Some students followed the case to completion or the end of the school year, but other students did no more than be physically present on the duty day. The duty day system requires follow-up and adjustment, because it was possible that no assignments would be made on a particular duty day.

thorizing students to appear with counsel,[67] and but for the provision prohibiting students from interrogating witnesses or presenting oral argument, it would be a model for other federal courts.[68]

One of the leading cases ruling on the propriety of the appearance of a law student–law clerk in a court is an Illinois decision. In *People v. Alexander*,[69] a law clerk studying to be an attorney appeared in behalf of the attorney of record and prepared an order for the trial judge continuing the case. The law clerk informed the judge that the attorney was engaged in trial in the federal court, but the court held that the appearance of the law clerk in behalf of the attorney constituted the unauthorized practice of law and found him guilty of contempt. The Illinois Appellate Court reversed and commented on the role of law clerks:

> We agree with the trial judge that clerks should not be permitted to make motions or participate in other proceedings which can be considered as 'managing' the litigation. However, if apprising the court of employer's engagement, or inability to be present constitutes the making of a motion, we must hold that clerks may make such motions for continuances without being guilty of the unauthorized practice of law. Certainly with the large volume of cases appearing on the trial calls these days, it is imperative that this practice be followed.[70]

The court not only held that the appearance of a law clerk without an attorney is not the unauthorized practice of law, but also recognized the need of such services because of the heavy demands upon attorneys. Similar consideration should be given to the circumstances of criminal cases where the volume is great, and the attorneys available limited. In a subsequent Illinois decision referring to *People v. Alexander*, the court noted the need for the legal profession to use

[67] "Law School Participation in Court Matters, Law Students who have successfully completed at least one scholastic year in an accredited law school and are participating in this Court's legal internship Federal Defender Program may, under the immediate supervision of an attorney admitted to practice before this Court, assist counsel in the preparation and presentation to which such students have been assigned, and be present at counsel table during all proceedings therein, provided, however, such students shall not interrogate witnesses or present oral argument to Court or jury." GENERAL RULE 41, U.S. Dist. Ct. N.D. Ill. (1966).

[68] So long as the supervising attorney is present no harm would occur from allowing the students to examine witnesses or present oral argument. The individual judge in his discretion could prevent inept students from these courtroom activities, but such blanket prohibition is unduly restrictive.

[69] 53 Ill. App. 2d 299, 202 N.E.2d 841 (1964).

[70] *Id.* at 303, 202 N.E.2d at 843.

"unlicensed" persons, such as investigators and clerks.[71] When supervised by an attorney who is present at trial, such participation should be considered the action of the appointed attorney and not objectionable.

Notwithstanding the *Alexander* decision, there is no authority in Illinois regulating student participation in state courts. Because of the assistance students might afford in extending legal services for the poor and because of the valid educational opportunity, the author proposes the adoption of an Illinois Supreme Court rule:

RULE 711. *Limited Practice by Law Students and Graduates*

Any student who has successfully completed his penultimate year of study in, or any graduate of, an approved law school may appear in any proceeding in any court of this state on behalf of any person financially unable to employ counsel or on behalf of the People, *provided:*

(1) The Chief Justice, Presiding Justice or chief judge of the court, district or division before which the student or graduate is to appear and the Dean of the student's or graduate's law school must file written approvals (in a form prescribed by this Court) with the Clerk of the Court before which the student is to appear, and

(2) A member in good standing of the Bar of this State must continually, immediately and personally supervise all activities of the student or graduate and, at all times, exercise control and management over each case, but need be physically present in court with the student or graduate only during trial or oral argument in an appellate proceeding.

Unless earlier revoked, written approvals shall be effective until the Monday following the distribution of results of the first Bar Examination for which an approved law graduate is eligible or, in the case of those who pass the first Bar Examination for which eligible, the date on which the graduate is admitted to practice under the Rules of this Court.

The above proposed rule is modeled after Massachusetts Supreme Judicial Court Rule 11, and it retains a provision for law students assistance to both the prosecution and defense in criminal cases.[72] One of the principal modifications from the Massachusetts rule is the extension of student assistance to civil proceedings involving indigents. This student help in civil proceedings is consistent with efforts now

[71] Federated Petroleum Services, Inc. v. Daniels, 56 Ill. App. 2d 236, 205 N.E.2d 741 (1965).

[72] Prosecution as well as defense is entitled to assistance, for the volume of criminal cases also affects the understaffed offices of the prosecutors. Federal legislation was passed to authorize grants for local law enforcement agencies, and these funds might be available to support a student program to help prosecutors or even to render legal assistance and to conduct training programs for the police. Law Enforcement Assistance Act of 1965, Pub. L. No. 89-197 89th Cong. 1st Sess. (Sept. 22, 1965).

being made to provide greater legal services for the poor.[73] The Massachusetts rule provided student representation only in the district court, whereas under this rule students can appear with counsel and assist in the preparation of a case before the Supreme Court, the district appellate court, or the circuit court. To provide flexibility with the individual court, a requirement is included that the court before whom the student would appear will have to certify the ability of the law student to effectively participate in courtroom proceedings. This court approval will add additional weight if later claims of incompetency from dissatisfied defendants are raised. In this manner, the court can tailor the participation of the students to its own docket and bar, and at the same time this need for court approval places an onus on the students to acquire minimum technical skills to become qualified prior to participation. Court certification could be limited to civil matters only or criminal matters, or criminal matters of a certain type. The purpose of the general rule is to authorize the appearance of law students, and the design of the program would be implemented by the particular court.

Under the Massachusetts rule the attorney need not be physically present at trial, but under this rule the attorney must be physically present during the actual trial. In light of the *Alexander*[74] decision, the control and management of the case rests with the attorney of record, and he maintains responsibility throughout the case for the activities of the law student. Entitlement to student legal assistance is limited to indigents and indigency as measured by the standards set forth in the Criminal Justice Act of 1964[75] which provides an elastic standard in determining the person's ability to employ counsel in a given case. A person may have some funds, but such funds might be grossly inadequate to secure appropriate and competent legal relief. The test is the availability of counsel, for if counsel in the community will accept the case in return for a small fee, then the case will fall without the scope of student assistance.

Participation by both night and day law students is authorized and the scope of the rule will even include students attending an out of state law school. The duration of the students' authority to participate and

[73] Under the Office of Economic Opportunity grants for legal services programs, federal funds are available to support law student programs. 73 U.S. O.E.O. GUIDELINES FOR LEGAL SERVICES PROGRAMS 28–29 (1966).

[74] *Supra* note 69.

[75] 18 U.S.C. § 3006A (1964).

assist in indigent cases is sufficiently long to allow him to participate until his admission to the bar. The services of the law graduate prior to admission can still be utilized in the defender program, for the graduate may be eager to gain the experience immediately prior to the commencement of his practice.

Although the law students might be sincerely interested in participating in extension of legal services to the poor, they will not have that opportunity until some type of legal authority is formulated and promulgated by competent authority. In Illinois the leadership of the Supreme Court is necessary to a program of this nature, and the Supreme Court possesses the authority to create and regulate a student assistance program.

CONCLUSION

The impetus of recent U.S. Supreme Court decisions in the application of due process clause of the fourteenth amendment to state laws and procedures in the prosecution of criminal cases has caused greater interest in defender services for the poor. The number of attorneys skilled in criminal law practice are limited, and the use of other attorneys not familiar with this field imposes a difficulty for the court, practitioner, and defendant. The resources of law student assistance have not been fully tapped, and with the cooperation of the law schools, students subject to competent attorney supervision might be employed to meet the growing demand for defender services. From the viewpoint of legal education, there exists an unparalleled opportunity for the law student to learn the principles and legal skills necessary to become an effective trial advocate while still in law school. If the bar and the courts call upon the law students and they are able to respond, an investment will be made that can have for its only effect the continuing improvement of defender services. Much progress has been made since the announcement of *Gideon* in 1963, but the legal profession has a serious obligation to insure that existing legal services for the indigent provide "equal justice under law."