The Lawyer as Professional: Examination, Licensing, and the Problem of Deceptive Packaging

Robert H. Kennedy
Florida State University College of Law

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Legal Profession Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol7/iss4/2

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
THE LAWYER AS PROFESSIONAL: EXAMINATION, LICENSING, AND THE PROBLEM OF DECEPTIVE PACKAGING

ROBERT H. KENNEDY*

The intent of the tree expert law was primarily to protect the public against tree quacks, shysters and inexperienced persons.¹

I. INTRODUCTION

The practice of law is a public occupation which is privately performed. A great deal is written about lawyers, yet the public knows very little about lawyering. What the public is told—that the members of the profession do certain kinds of well identified things, plus a lot of other things less generally associated with the profession, and that all the things they do are important—is told by lawyers. Who the lawyers are, what they alone may do, and how well they are required to perform within their exclusive domain are matters left for lawyers to determine. Theirs is quintessentially a self-regulating and self-disciplining occupation; lawyers define their own market, determine who shall be licensed to enter it, and decide who is to be disciplined and removed. They determine the manner in which the legal market is to be organized and how its activities are to be performed. The exercise of this power is supported by law and is asserted to take place solely in the public interest.

In fact, lawyers have little information about themselves. They don’t know much about who they are or what they corporately do; they have no satisfactory concept of the public interest, nor any common idea about how it ought to be served. In other words, lawyers exercise significant governmental authority but without the informing standards, criteria, or data necessary for the task. Consequently, it is impossible to determine whether their authority is well or poorly exercised.

It is the thesis of this article that it is not so important to lawyers that they actually know these things; what is important to the profession is that the public believes that they do. It is this author's purpose to consider the practice of the admission of lawyers to, and

* Professor of Law, Florida State University College of Law. B.A. 1956, Antioch College; LL.B. 1959, Yale University.

1. Testimony of N. Johnson, chairman, Illinois State Tree Expert Examining Board, before the Illinois State Legislature, quoted in Moore, The Purpose of Licensing, 4 J.L. & Econ. 93, 93 n.1 (1961); cf. State v. Sperry, 140 So. 2d 587, 595 (Fla. 1962), vacated, 373 U.S. 379 (1963), rev’d for mootness, 159 So. 2d 229 (Fla. 1964) (“It [lawyer licensing] is done to protect the public from being advised and represented in legal matters by unqualified persons . . . .”).
the preclusion of individuals from lawyering, and then to relate those activities to a theory of professionalization that in turn may be employed both to identify the public interest and incidentally to judge lawyering.\(^2\)

The asserted interest served by government supported licensure and self-regulation is the protection of the community from incompetent legal services. This goal is addressed almost exclusively by regulation of who may practice law.\(^3\) The control mechanism consists of examination, character investigation, laws forbidding unauthorized practice, and the discipline of licensed practitioners.\(^4\) The licensing process, however, has been shown consistently to ignore and perhaps invade the public's interest in good lawyering.\(^5\) The current system of market control is sustained through collaboration between the members of the legal profession and the state judicial and legislative departments;\(^6\) it persists with neither information

\(^2\) This is a self-evident professional responsibility of lawyers. "Because we have been entrusted with this solemn responsibility, our profession's right to self-governance is only as good as its pledge to public service." Address of Chief Justice Arthur J. England of the Florida Supreme Court, Convention of the Florida Bar (June 16, 1979). Florida Bar News, June 25, 1979, at 12, col. 1.

\(^3\) James Bradner, Assistant Director of the ABA's National Center for Professional Discipline, reports that "[t]he critical issue regarding to [sic] the practice of law in the United States, however, is the determination of who may practice law not how that practice is constituted." Bradner, Responses Regarding the Practice of Law in the United States of America to a Questionnaire on Government Regulation of the Practice of Law as it Affects the Professional Conduct and Practice of Lawyers For Use by the International Bar Association Sidney Conference, September 10-17, 1978, at 26 (March 10, 1978) (emphasis added). Prescription of the manner in which lawyers may organize themselves to provide services and rules governing how and where services may be delivered and how they may be paid for are examples of other limitations that, together with the informational regulations, unify control.

\(^4\) Only some barriers and regulations are considered here to illustrate function (or its absence) within those accepted theoretical bases used to justify the public cost of licensure. We will look at those regulatory processes specifically said to offer public protection against incompetent legal services. Other limitations, barriers and expressions of regulatory power are treated as either supportive or substantially irrelevant (such as market division treaties between lawyers and other occupational groups; see, e.g., Statements of Principles and Agreements Between the American Bar Association and Various Other Groups—Statement of Principles Relative to Realtors, 14 (no. 3) UNAUTH. PRAC. NEWS 17, app. 27-29 (1948)). Some limitations, such as prohibitions on advertising, organizational limits, etc., will be considered in a forthcoming article.

\(^5\) The present authority of the profession will not be permanently insulated against outside intervention by reliance upon rhetoric or "state action" theories such as that in Parker v. Brown, 317 U.S. 341 (1943), and despite language such as that found in Leis v. Flynt, 99 S. Ct. 698 (1979). Any lawyer who believes that prior case law, or mere posturing in the public interest, will withstand a tide of public opinion is a poor historian. Resistance will, however, delay the process. The American Bar Association is reported to have pledged its support to state bar associations in resisting the Federal Trade Commission's recent inquiries into state restraints on lawyering. Picket, ABA Offers Bar Units Help with FTC Probe, NAT'L L.J., Feb. 26, 1979, at 3.

\(^6\) It is a circumstance of little more than history that the boundaries of the legal services market are essentially geographic. Each state has, within its boundaries, almost total control
nor language adequate to the task of identifying, much less fulfilling, its function. That the process is dedicated to the public interest is immaterial. An awareness of the true value of this process is gradually developing: Licensing for the practice of law is a symbolic act, a ceremonial process that impedes the profession in its efforts to address its role, that permits the profession largely to ignore the community interests involved in what it does, and that allows the profession to avoid considering the substantial public costs resulting from self-regulation.  

The legal profession has, in sum, failed to identify or to measure the public costs and benefits associated with self-control of its markets. Lawyers, supported by government, adhere to a self-perpetuating system of market control. They defend a ceremonial system using declaration as a proxy for information, and they describe what they are doing with language that is hazardously dependent upon abstractions for which there are few if any corresponding realities. What the actual merits or public usages of these market of admissions, discipline, and regulation. See Leis v. Flynt, 99 S. Ct. 698, 700-01 (1979); Appell v. Reiner, 204 A.2d 146, 148 (N.J. 1964). The boundaries are under increasing assault by the needs of national commerce, the growth in importance of federal constitutional, statutory and administrative law, and the multistate law practices which respond to these needs. State courts and state bars—eyeing many factors, not the least of which is the protection of local markets—are not quick to lower those barriers. In Florida Bar v. Savitt, 363 So. 2d 559 (Fla. 1978), the Florida Supreme Court detailed the terms of a permanent injunction issued against a New York law firm's “unauthorized practice of law” in connection with the firm's Miami office. The injunction includes a prohibition upon "engaging in such other professional activities . . . as may be prohibited hereafter by reason of any court decision, or rule or regulation . . . or custom or practice which may hereafter be promulgated or accepted by this Court . . . ." Id. at 560. One must step lightly indeed to avoid violating any "custom" later "accepted" by a court.

7. "Licensure" here applies an exclusive right to engage in an activity which is enforced through state action. Certification, registration, and other lesser forms of restriction or identification of practitioners and/or their degrees of competence generally confer no such right. See generally M. FREIDMAN, CAPITALISM AND FREEDOM 137-60 (1962). It is not useful to certify lawyers, because certification attests to compliance with a standard of competence; in the law, competence has never been identified.

8. For a review of the literature reaching much the same conclusion, i.e., that any connection between professional licensing practices and protection of the public is not established and probably is specious, see generally M. FREIDMAN, supra note 7; Gross, The Myth of Professional Licensing, 1978 (no. 11) AMER. PSYCH. 1009. There appears to be no theoretical or empirical study that supports the claim that licensing can be shown to be in the public interest. But see S. CARROLL & R. GASTON, OCCUPATIONAL LICENSING: FINAL REPORT (1977) [hereinafter cited as CARROLL STUDY]. This study suggests, in a preliminary analysis, that in law (alone of the professions) there may be some statistically positive association between restrictive licensing and the quality of service delivered. Id. at 29. However, the CARROLL Study is acknowledged by its authors to be dependent on the assumption that "licensing authorities truly use quality as a limiting device." Id. app. II, at 6. Of course, that is an assumption that comes close to throwing the game. Furthermore, the validity of the lawyer "rating" system which was employed by the study (the MARTINDALE-HUBBEL LAW DIRECTORY) is, as the authors acknowledge, subject to question.
controls may be is left professionally unaddressed.

The public costs imposed by lawyer self-regulation are partly recognized, rarely acknowledged, and never measured. No compensating public benefits have yet been demonstrated. Government intervention currently gives every appearance of being little more than a form of social and economic protectionism which promotes income redistribution to lawyers, imposes a wealth dependent allocation of public legal rights, and provides no identifiable encouragement to the provision of adequate and competent services. The defensive mentality increasingly exhibited by the organized bar is likely a consequence of its continued attempt to defend this inherited, unstudied, and, upon analysis, unwarranted monopoly of a broad and varied range of essential public services. The bar's longstanding obligation, and its current need, is to justify its self-asserted and self-defined monopoly by developing a means to define what it does—and what it should be doing—to promote the quantity and quality of services provided to the public.

This article will survey some of the components of the current licensing system and their utility in reaching the goal of lawyer competence. In a forthcoming article, this author will consider a theory of licensure and will propose measures that might be taken in a renewed effort both to define the tasks and the self-governance needs of lawyering and to more properly relate those tasks and needs to the public interest.

9. Whether or not entry barriers actually benefit lawyers economically is unknown. They are believed to do so. That they are maintained, at least in part, with that purpose in mind is clear. As Leffler notes about physician licensure, the "[e]conomic literature has not satisfactorily specified the objective function of an occupational cartel." Leffler, Physician Licensure: Competition and Monopoly in American Medicine, 21 J.L. & ECON. 165, 166 (1978).

10. The defensive posture of the organized bar is in part a response to social and economic changes for which lawyers are not responsible and over which they perhaps sense failing control. While lawyers are accustomed to considerable uncertainty, ambiguity, and change in their work for others, they are not demonstrably comfortable with social changes which alter the forms in which (and the persons to whom and by whom) legal services are delivered. New distribution mechanisms such as prepaid legal insurance, group and clinical practice, government funding, law stores, a wholesale market in services, high volume delivery, do-it-yourself kits, the use of charge accounts and the like are inconsistent with the traditional image of the professional dignity of the bar. See generally J. JENKINS, FUTURE LAW: LAWYERS CONFRONT THE 21ST CENTURY (B.N.A. 1979). Things are simply changing quickly and, for lawyers, getting out of hand. The 19th century rise to prominence of the profession was dependent upon an alliance between legal and economic interests which together commercialized American society. M. Horwitz, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 140 (1977). There is evidence that the commercial dominance of American life may be giving way. In the process, American lawyers are losing that ally without which they cannot continue to exercise traditional controls.
II. PROFESSIONAL REGULATION—THE MAINTENANCE OF MYTHICAL STANDARDS

It is part of our economic faith that markets in which competition operates to reward merit provide the best opportunity for efficient development and consumption of quality products. We claim that the public interest is best served when professions\(^{11}\) and other commercial endeavors are subjected to state regulation only where, and to the extent that, it can be demonstrated that intervention is necessary to protect the public health, safety, and welfare from an identifiable harm.\(^{12}\) The licensing of lawyers has never been shown to meet any such standard.

Lawyer licensing exists upon no adequate theoretical or empirical basis. The “public interest” to which it is constantly rededicated is either unstated or mistated.\(^{13}\) Justification for the public and private expenditures involved in licensing, and for the economic inefficiency created by market control, is sought wholly in sweeping abstractions which cannot be evaluated.\(^{14}\) The elements of public and private need, expectation, motive, cost and benefit traditionally have been treated without the development of any theoretical base. Although it cannot easily be denied that “the public interest” could be favored by the provision of a “sufficient” supply of “competent” legal services at “reasonable cost,” none of these terms have recognizable content. There is no serviceable definition of “the practice of

---

11. I assume that lawyering is a “profession.” According to Marks & Cathcart, Discipline Within the Legal Profession: Is It Self-Regulation?, 1974 U. ILL. L.F. 193, 193 n.1, a profession is to be distinguished from an occupation by the former’s “assertion of . . . authority . . . over at least minimum standards of professional conduct and perhaps performance.” If this is so, the practice of law qualifies. If, on the other hand, the mere assertion of authority without its exercise is insufficient, then lawyering fails to qualify. For articles indispensible to consideration of this subject, see Carlson, Measuring the Quality of Legal Services: An Idea Whose Time Has Not Come, 11 L. & Soc’y Rev. 287 (1976); Rosenthal, Evaluating the Competence of Lawyers, 11 L. & Soc’y Rev. 257 (1976).

12. See, e.g., Regulatory Reform Act of 1976, ch. 76-168, § 2(1), 1976 Fla. Laws 295 (“That no profession . . . shall be subject to the state’s regulatory power unless the exercise of such power is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage. The exercise of the state’s police power shall be done only to the extent necessary for that purpose.”).

13. Incantatory phrases such as “in the public interest,” employed by the bar and the judiciary, are, standing alone, without substance. As Professor Davis has noted in another context: “Every legislative body may be assumed to favor the true, the good, and the beautiful, and whether it says so or not is of no consequence.” 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 2.04 at 87 (1958).

14. Among lawyers, as no doubt among some others, there is a tendency to suppose that where there is a name for something there is a reality to which it corresponds. One can speak, as lawyers do, of “the public interest,” of “the practice of law,” of “competence,” and of other abstractions, but these are maps for which no territories exist. Their usefulness lies in the comfortable fact that if you don’t know where you are going, not only will any road take you there but no one can claim to have better directions.
law," just as there is no accepted understanding of its "competent" performance or of "reasonable cost." Only a small portion of what lawyers do is done publicly, that is, performed before those who, nevertheless, claim to assert regulatory control. We know (more or less) how many lawyers there are, but that's practically all we know. We have no idea of how much, or even how, lawyering is done, because we don't know what lawyering is. If, as is mistakenly assumed by those who rely on courts to monitor the practice, what lawyers do were an observed phenomenon, there would still be no standard of performance against which to measure competence; nonetheless, all serious justifications for the imposition of the public cost of this monopolized market are bottomed upon claims of maintaining competent and affordable professional services.15

III. WHO SEeks LICENSURE?

There is little if any evidence of public initiative for the licensing and regulation of lawyers.16 Licensing and the prohibition against "unauthorized practice" are promoted as efforts to protect the community from incompetence and misconduct.17 Notwithstanding these promoted justifications, the full energizing effort comes from the professionals themselves, those who believe that without licensure both they and the public would suffer economic or other deprivation. Courts and lawyers alike realize that the public (when not simply indifferent to or ignorant of licensure) perceives the process as a method to preserve the economic advantages of the members

15. See generally Marks & Cathcart, supra note 11, at 219. This excellent article is a most comprehensive review of the relation between lawyer behavior and lawyer discipline.

16. In fact, one is unlikely to discover any instance where an occupational group has sought out public supervision of its activities. While limited public participation has been allowed on occasion, there is little evidence that such participation has made professional regulation more responsive to public needs. Florida, for example, like most other states which now mandate lay membership on grievance committees, has taken no comparable steps toward lay participation in the mechanism of admission to the practice. See Fla. Sup. Ct. Bar Admiss. R. I, § 2.

17. The language of the cases is derivative and incantatory. See, e.g., Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978) ("to protect the public from those who are willing to give legal advice and render legal service, for their own profit, without being competent to do so . . . "); (Karl, J., concurring specially); State v. Sperry, 140 So. 2d 587, 595 (Fla. 1962), vacated, 373 U.S. 379 (1963), rev'd for mootness, 159 So. 2d 229 (Fla. 1964) ("It is done to protect the public from being advised and represented in legal matters by unqualified persons . . . "); Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 31 (Mass. 1943) ("but in the protection of the public from being advised and represented in legal matters by incompetent and unreliable persons . . . "); State ex rel. Daniel v. Wells, 5 S.E.2d 181, 186 (S.C. 1939) ("but to assure the public adequate protection [from] incompetent and unlearned persons . . . "); Grievance Comm. State Bar v. Coryell, 190 S.W.2d 130, 131 (Tex. Ct. App. 1954) ("to protect the public against persons inexperienced and unlearned in legal matters . . . ").
of the bar. This perception is largely but not wholly accurate. While the process definitely does protect the market advantages of those holding licenses, it may also have other public and practitioner values which the profession has itself ignored.

IV. WHAT IT IS THAT IS BEING LICENSED—THE DRIFTING FENCE

“We can’t define lawyering, but we know it should be licensed.”

It is entirely consistent with the theory of professionalization proposed here and with the exploitation of a captured market that the legal occupation has escaped all useful definition. The practice of

18. See, e.g., Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978), where Justice Karl, concurring specially, said “[t]here is a popular notion that every attempt to define the practice of law and restrict the activities within the definition to those who are authorized to practice law is nothing more than a method of providing economic protection for lawyers.” Cf. Lowell Bar Ass'n v. Loeb, 52 N.E.2d 27, 31 (Mass. 1943) (It is “not in the protection of the bar from competition, but in the protection of the public . . . .”); State ex rel. Daniel v. Wells, 5 S.E.2d 181, 186 (S.C. 1939) (It is “not for the purpose of creating a monopoly in the legal profession, not for its protection, but to assure the public . . . .”); Project, The Unauthorized Practice of Law and Pro Se Divorce: An Empirical Analysis, 86 Yale L.J. 104, 113-14 n.42 (reporting the 1976 remarks of the chairman of the A.B.A.'s Committee on Unauthorized Practice of Law to the same effect) [hereinafter cited as An Empirical Analysis].

The Florida Supreme Court suggests that maintaining the monopoly is a public service made available only through the altruism of the bar. In State v. Sperry, 140 So. 2d 587 (Fla. 1962), vacated, 373 U.S. 379 (1963), rev'd for mootness, 159 So. 2d 229 (Fla. 1964), the court, without reference to the record, noted:

If the truth be known the unauthorized practice of law by those not qualified and admitted actually creates work for the legal profession because of the errors and mistakes of those who for others illegally perform legal work they are not competent to perform. In this the members of the legal profession gain, but the unfortunate members of the public who were ill-advised lose, in some instances quite badly. Id. at 595. In Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978) the same court stated: Because of the natural tendency of all professions to act in their own self interest, however, this Court must closely scrutinize all regulations tending to limit competition in the delivery of legal services to the public, and determine whether or not such regulations are truly in the public interest.

19. Marks & Cathcart, supra note 11, at 226 n.65.

20. The ABA Code of Professional Responsibility states that “[i]t is neither necessary nor desirable” to define what it is to which the Code itself relates. Id. at EC 3-5. It is easier to identify those things people don’t do as lawyers than to define lawyering. American lawyers engage in an almost infinite variety of services for their clients. There is little of business or commercial life that could not be considered “lawyering.” See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 773 n.25 (1976). Even in states which impose criminal penalties for practicing without a license, e.g., Florida, Fla. Stat. § 454.23 (1977), courts off-handedly acknowledge an inability to define what “it” is. “[A]ny attempt to formulate a lasting, all encompassing definition of ‘practice of law’ is doomed to failure . . . .” State Bar v. Cramer, 249 N.W.2d 1, 7 (Mich. 1976), quoted with approval in Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1191-92 (Fla. 1978). But see State ex rel. Norvel v. Credit Bureau, 514 P.2d 40 (1973):

indicia of the practice of law, insofar as court proceedings are concerned, include the following: (1) representation of parties before judicial or administrative bodies, (2) preparation of pleadings and other papers incident to actions and special pro-
law is what lawyers currently say it is. Trespass on this occupied territory by unlicensed persons is the public evil said to be avoided by governmental intervention. This is truly a land of myths and fogs.

Terms used by courts to discuss those points where public and guild interests converge (such as "the practice of law," "the public interest," "incompetent," and "unlearned person") simply have no meaning; indeed, they are not supposed to have meaning in the sense of having descriptive or predictive content. Their meaning, like that of other ceremonial terms, is in their effect. Meanwhile, the nature, range, and quality of legal services and the private behavior of lawyers may remain hidden, unstudied, and unmeasured. Both the scope of this historically omnivorous occupation and the state of its art remain a mystery to the public, to its practitioners, and to those who have assumed public responsibility for its governance.

One might look with fair expectation to case and statutory law dealing with the "unauthorized practice" of law for a definition of what it is that can be done legally only when licensed. One might also expect to find there some identification of the harm which results from the nonlicensed doing of it.\(^2\) One would look for a long

---

\(^2\) It must be remembered that if the bar were able to illustrate any objective harm to the consumers served by unlicensed practitioners, that demonstration would only tend to support costly efforts to prohibit unlicensed provision of services. Who speaks for those well served by the unlicensed or not served at all? Justification of enforced licensure requires at the least adequate information about the quantity and quality of licensed services and about the amount of unserviced needs that results from market restriction. Interestingly, although any natural person may represent himself in court (Faretta v. California, 422 U.S. 806 (1975); ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 3-7) either well or poorly, that same person cannot obtain the assistance (good or bad) of anyone not a licensed lawyer. This points again to the theory that the evil being avoided is that done to unknown third parties or to the community in general. Even if this were a valid argument (hidden dangers to secret persons), it would call also for a net cost-benefit analysis that has not been made; that is, what comparable community loss or third party harm results from the current limitation of services?
time, because there are few hints in that lamentable collection. The unlicensed services rendered in individual cases in which governmental censure has been sought are consistently said to have been performed with competence by the lawyer's own measure. Incompetence seems wholly irrelevant to these decisions. The harm to which the public is exposed by unlicensed practice is an assertion—it is potential, a convention, a given. Public harm is, further, a factor in none of the statutes. Consequently, neither a serviceable definition of the craft subject to licensure, nor of the harm of its being done without a license, can be discovered from the opinions or the statutes. We know that something bad exists, but it is not tested against experience. Whatever it is, it results from the condition of nonlicensure.

Judges, themselves lawyers, called upon to rule in these matters, use language full of marginal uncertainty; their opinions contain little if any rational force. They are declaratory, not persuasive.

22. These cases are not brought by complaining customers, they are initiated by lawyers. In State v. Sperry, 140 So. 2d 587 (Fla. 1962), vacated, 373 U.S. 379 (1963), rev'd for mootness, 159 So. 2d 229 (Fla. 1964), where there was, as is typical, no injured party, the court noted:

It may be that he is fully competent to practice law, that he has the educational and other qualifications required of an applicant for admission to the Bar of this state, and that he is well able to pass the bar examination, but until he had done so we have no way of assuring the public that he is qualified to practice law in this state.

Id. at 595 (emphasis added). In Grievance Comm. of the Bar v. Dacey, 222 A.2d 339 (Conn. 1966), appeal dismissed, 386 U.S. 683 (1967), the plaintiff bar association was not required to support allegations that the respondent's practice injured "the public" as such evidence was "irrelevant." The court noted

[T]he complaint alleged an injury to the public, not from the fact that Dacey had practiced law in an incompetent manner or to the particular injury of his clients, but from the fact that he had practiced law without having satisfied the uniform, standard, requirements for admission to the bar imposed for the benefit and protection of the public . . . .

Id. at 350. See also Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1004 (Colo. 1957) (the court stated that because the suit was in behalf of the public, specific consumer harm need not have been shown).

The Florida Bar's response to interrogatories in Florida Bar v. Furman, 19 Fla. L.W. 202 (Sup. Ct. May 10, 1979) illustrates the standard position of the organized bar in unauthorized practice cases:

Q: To your knowledge, has any person suffered any legal, economic, personal or other harm or disability as a result of the Respondent's activities which are the subject matter of this action.

A: Petitioner [Bar] is unable to furnish the name of any specific person who has suffered any legal, economic, personal or other harm, as distinguished from that suffered by the general public from the giving of untrained and erroneous legal advice by a layman.


That courts seem defensive, embarrassed, and mystified by the regulatory process has not lessened their support of it. Eventually, because they don't understand what is afoot but believe they must persist, courts settle upon rhetorical screens which substitute for needed analysis. Most common to the opinions are bare declarations, consistent with our understanding of professionalization, that licensure and enforcement are justified by the seriousness of the legal undertaking and the extent of the potential public harm. How that harm is avoided by licensure is never addressed.

V. THE COST OF LAWYER LICENSURE AND MARKET OCCUPATION—A PUBLIC TAX

Courts recognize and acknowledge some of the costs associated with market controls effected through licensure and enforcement. Most costs are difficult to measure and are ignored: all are painful to acknowledge. For example, a few able courts have noted that these barriers impose constraints upon constitutional and other primary rights of persons who might otherwise either render legal services or who might purchase such services from nonlicensed providers.

[A]ny limitations on the free practice of law by all persons necessarily affects important constitutional rights. Our decision here certainly affects the constitutional rights of Marilyn Brumbaugh to pursue a lawful occupation or business. . . . Our decision also affects respondent's First Amendment rights to speak and print what she chooses. In addition, her customers and potential customers have the constitutional right of self representation . . . and the right of privacy inherent in the marriage relationship . . . . All citizens in our state are also guaranteed access to our courts by Article I, Section 21, Florida Constitution (1968).

24. On occasion, expressions of potential injury from "this dangerous and insidious movement" toward nonlicensed practice reach truly metaphoric heights. In Florida Bar v. Furman, there are reports of "grave danger to the citizens," of "a chaotic mess [that] will be created to the detriment of society as a whole." Report of Referee at 57, 60, Florida Bar v. Furman, 19 FLA. L.W. 202 (Sup. Ct. May 10, 1979). The creation of "life-time misery and suffering to a multitude of people" is foreseen. Id. at 60. "[U]nder the guise of a small fee, [unlicensed practice] is leading many innocent people's future into mudholes and quicksand." Id. at 61. This "unauthorized practice of law, which is a menace to society," must be prevented "to protect the public from being victimized, damaged, and the suffering [sic] caused by those engaged in the unauthorized practice of law." Id. at 62. The bar had stipulated that none of respondent's customers believed they had suffered any damage.

25. Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1192 (Fla. 1978) (citations omitted). It is at least arguable that, whatever their bona fides, the constitutional rights of citizens should not be left for their protection to those who appear to profit from their restriction.
Courts that, as here, emphasize the nonmonetary costs of the legal monopoly hint at what may be a significant difference between law and other professions: the control of civic rights not generally conceded to be subject to market allocation. As we shall note, almost everyone who applies to practice law is admitted, law schools abound, enrollment is relatively open, and the direct capital investment necessary to obtain the qualifying education is relatively little. The principal public cost imposed by lawyer regulation is, consequently, probably not the high cost associated with monopoly control of the supply of those services for which lawyers are trained. Rather, the public economic cost results from the almost unlimited scope of the monopoly, that is, from the wide range of activities brought within an intentionally undefined yet guaranteed market. Lawyers have captured both socially necessary tasks requiring special competence and many other tasks that require neither particular training nor experience nor special intelligence. The advantages of this monopoly are obtained by a happy combination of control over market definition and demand. Persons trained and then licensed at high public cost are permitted exclusively to supply the demand for a wide range of rote, repetitive, essentially clerical tasks which provide a high return. The control of these captured clerical tasks is protected by the intimidation of both actual and potential sanctions for trespass across the undefined and drifting boundaries.

Further nonmonetary costs are, of course, apparent in the restrictions imposed, for purposes of professionalization, on public informational rights such as those recognized in Bates v. State Bar. The Bates case may point the way to that definition of "lawyering" that is a necessary first step in establishing boundaries for the profession and in advancing the public interest in quality services within those boundaries. Further direct public cost is evident in the probable price elevation for true legal services, although the legal monopoly's failure to limit significantly the number of practitioners suggests that that effect may not be great. Other unmeasured social costs


27. The direct monetary costs of the system relevant to obtaining an uncontested divorce were considered in An Empirical Analysis, supra note 18, at 153-60. That a limitation on the number of suppliers of any sought-for service (or a controlled expansion of demand) will both increase the cost of that service and alter the distribution of income from consumers to those who are licensed to provide would seem beyond question. See CARROLL STUDY, supra note 8, at 2. The manner in which such market controls guarantee economic inefficiency in the performance of nonskilled but included tasks, and the way they give rise to various subterfuges and avoidances which require costly policing, requires study that the organized bar has never instituted.
are those associated with the nonneutral allocation of public services that results from any producer controlled monopoly of those services. That is, as the legal services market today can be characterized as one of consumer disorganization and ignorance and increasing producer organization (coupled with an unknown elasticity of demand), there results an information imbalance which, when combined with the socially strategic position of the legal profession, provides a system in which rights which ought to be universally available actually are allocated by wealth.

This market control system is mandatory, binding both producer and consumer. The provider's market is limited to those who hold a state permit. Others may not distribute any "legal" services at any price, nor of any quality. Only those consumers who qualify by wealth or by governmental fiat can obtain a share of the supply.

Nothing in the ABA Code of Professional Responsibility limits the right of lawyers to charge such fees as the consuming public will bear, short of that which the members themselves find "clearly excessive." The monetary cost of restrictions on legal information was considered by the Supreme Court in Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975). The extensive costs of applicant examination eventually are reimbursed to lawyers by the consuming public in the fees of those who are admitted.

To the extent to which it is lawyers themselves who determine clients' needs for services, the market can be considered as one of managed elasticity. The number of lawyers demanded seems to depend, as one would expect, inversely on lawyer earnings and directly on, inter alia, a community's real income. See generally Pashigian, The Number and Earnings of Lawyers: Some Recent Findings, 1978 AM. B. FOUNDATION RESEARCH J. 51. The substitution of a prepaid service system for the current fee-for-services system may put the demand shoe on a different foot. As Professor Friedman notes, the influence of the political concentration and high interest of members of the profession overcome the politically diverse and incidental interest of consumers and allows all professions to control the definition of "public interest" and how it is to be served. M. Freidman, supra note 7, at 143.

The rationing of legal services by wealth is a problem of recognized constitutional proportions. See, e.g., Boddie v. Connecticut, 401 U.S. 371 (1971) (Supreme Court ruled on due process grounds that it was unconstitutional to deny, for indigency, access to an essential legal service (divorce) where no other avenue for relief existed); Grissom v. Dade County, 293 So. 2d 59, 61 (Fla. 1974) (Florida Supreme Court extended the Boddie doctrine to include adoptions, noting that "appellant is precluded from our courts because she cannot 'purchase jurisdiction' . . . ."); accord Deason v. Deason, 296 N.E.2d 229 (N.Y. 1973) (divorce); cf. United States v. Kras, 409 U.S. 434 (1973) (discharge of debts in bankruptcy is neither a fundamental nor a constitutional right). Florida judges have, in several contexts, carefully scrutinized wealth impediments to the state's constitutional right of access to the courts (Fla. CONST. art. I, § 21). See, e.g., Carter v. Sparkman, 335 So. 2d 802, 805-06 (Fla. 1976), cert. denied, 429 U.S. 1041 (1977) (medical liability mediations panels); G.B.B. Investments, Inc. v. Hinterkopf, 343 So. 2d 899, 900-01 (Fla. 3d Dist. Ct. App. 1977); Bell v. State, 281 So. 2d 361, 361-62 (Fla. 2d Dist. Ct. App. 1973) (reimbursement to state for certain trial and appeal costs). The more indirect restrictions on access, imposed by licensure and market ambiguity, have nothing more to recommend them.

Prohibitions, often criminal, on the "unauthorized practice of law" exist in all jurisdictions. The high income derived from rendering legal services, the need for these services, and the limited supply of licensed practitioners all encourage an illegal market which, in turn, requires costly policing.

E.g., Argersinger v. Hamlin, 407 U.S. 25 (1972); In re Gault, 387 U.S. 1 (1967); Gideon
While the receipt of unlicensed services is not in itself punishable, consumers who would choose to engage the same or alternative services at a different price or quality if rendered by laymen, must or will forego them. No one is free (as would be the case were lawyers merely certified) to assume the risk of employing a nonlicensed lawyer; no one may impose that risk on another by offering "legal services" without a state license.

Thus the licensing of lawyers and the policing of the cartel carry, in addition to substantial direct costs, indirect and unmeasured social costs as well. Unless this system's benefits are merely assumed to outweigh the costs (or unless mere abstract proclamations of a net addition to the public welfare are to constitute proof), the nature and extent of the public's gain must be identified and weighed against those costs. To do less would appear professionally irresponsible.

VI. How Is the Cost of Licensure Justified Today?

A. Some Common Justifications

There are several theoretical bases upon which licensure and enforcement have been defended as being in the public interest. Oddly, none of them rely directly on the values of monopoly per se. That is, an argument which hasn't been made could be made that barriers which limit supply and guard the boundaries of the market underwrite the economic health of practitioners and are, therefore, in the public interest. It is arguable that the economic well-being of lawyers encourages an independent, virtuous, and courageous bar which is critical to the maintenance of our free and democratic society. Possibly because the economic values are uncertain or


32. For example, the peculiar problems of the "middle-class majority," which can neither qualify for government funded services nor afford high fees, were noted in Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 473 n.4 (1978) (Marshall, J., concurring). See generally B. CHISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS; SOME PROBLEMS OF AVAILABILITY OF LEGAL SERVICES (1970); Cheatham, A Lawyer When Needed: Legal Services For the Middle Classes, 63 COLUM. L. REV. 973 (1963).

33. The organized bar's interest in the maintenance of a high fee structure is evinced by its willingness to defend it in court. See, e.g., United Transp. Union v. State Bar, 401 U.S. 576, 577-78 (1971) (in which Justice Black accurately characterized the bar's argument as a "plea for court protection of unlimited legal fees").

34. The ABA CODE OF PROFESSIONAL RESPONSIBILITY Preamble at 1 tells us "[t]he continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual . . .," and that "[l]awyers, as guardians of the law, play a vital role in the preservation of society." This ethics code also states that "[t]he legal profession cannot remain a viable force in fulfilling its role in our society unless its members receive adequate compensation for services rendered . . .." Id. at EC 2-16. Further, "adequate compensation is necessary
because this "family farm" theory would suggest an unflattering relationship between prosperity and courage, the bar and the courts have only obliquely suggested it.  

Let us review some other common justifications of licensing that are also easily passed over. Most relate the regulatory process to the maintenance of competence. There is an argument that market limitations are merely a necessary, if costly, consequence of the otherwise beneficial mechanism by which they are sustained. This "means justifies the ends" defense has several variations. One is that licensure, because of its dependence upon entrance examinations, compels a drawing together of an applicant's entire legal education and focuses it to the public's future benefit. This theme is so pragmatically and educationally dubious that it would have little currency but for the prestige of those who have played it. As we shall note, entrance examinations are largely unrelated to legal education and even more tenuously related to the practice of law; whatever is "drawn together" in preparation for them is almost certainly the wrong stuff. A second subdivision of this argument is that licensure needs examinations and that examinations keep law schools in line by concentrating on necessaries and maintaining standards; thus, we must keep licensing to keep examining. Since education for examination passage is accomplished almost exclusively by commercial bar exam cram courses (and legal educators don't equate high pass rates with academic quality), the influence is likely minimal.

Another defense is what we might call the high hurdles for invisible runners theory. Relying on a belief in anonymous intimidation, it claims that a comparison of the number of bar applications sought with the number of applications actually filed proves the value of

in order to enable the lawyer to serve his client effectively and to preserve the integrity and independence of the profession." Id. at EC 2-17. "When members of the Bar are induced to render legal services for inadequate compensation, as a consequence the quality of the service rendered may be lowered, the welfare of the profession injured and the administration of justice made less efficient." ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 302 (1967). See also In re Anastaplo, 366 U.S. 82, 114-16 (1961) (Black, J., dissenting); A. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK 450 (1972) ("The public have almost as deep an interest in the independence of the bar as of the bench.").

35. The amount of courage to be expected from a profession that historically has organized itself as an oligopoly and excluded those whose political, social and economic views were at variance with its own is limited. Collections have been made of those instances where it was exhibited; e.g., Leis v. Flynt, 99 S. Ct. 698, 705 (1979) (Stevens, J., dissenting) (suggesting, perhaps, that it is often pro hac vice virtue, i.e., more easily exercised away from home).


37. See generally Seligman, Why the Bar Exam Should Be Abolished, 8 (no. 7) JURIS DOCTOR 48 (1978).
licensing as an exclusionary tool. The looming spectors of examination and character investigation, it is said, deter both unseen crooks and potential incompetents.38

A third common defense of licensing is that the law involves such extensive and sensitive negotiation and counseling processes that it cannot, in the public interest, be left to the untrained. As neither negotiation nor counseling has been traditionally or centrally a part of the law curriculum, and as the ability competently to engage in neither activity is tested on any bar examination, it remains a mystery how those skills become more highly developed among the licensed than among the lay public.39

A further defense is made that examination and other barriers guarantee at least minimal competence and, therefore, some degree of efficiency by those who use limited public resources such as courtrooms, judicial energy and the like. This argument rests on two erroneous assumptions—first, that lawyering is done in public, i.e., in courtrooms,40 and second, that licensure is capable of predicting minimal competence. Even if more soundly based, the public resource conservation effect of excluding lay persons cannot be significant if we are to accept (as we should not) Chief Justice Warren Burger's widespread announcements that judges perceive a great part of the licensed bar to be incompetent.41

38. Florida, for example, reports as evidence of the success of its "in-depth character investigation" program, that requests for application forms exceed the number of applications filed. See NATIONAL CONFERENCE OF BAR EXAMINERS, THE BAR EXAMINERS' HANDBOOK 94 (1968) [hereinafter cited as BAR EXAMINERS]. Florida does not report what all that really means. This is the magic tea bag theory: "Why do you wear a tea bag around your neck?" "To avoid arthritis." "But you have arthritis." "Of course, but think how bad it'd be without the tea bag."

39. Griswold, supra note 36, at 83, notes the significance of the lawyer's role as counselor, planner, negotiator, draftsman, and advisor; unfortunately, the manner in which bar examinations contribute to either the acquisition or discovery of these skills is not revealed by the author.

40. While no study of the distribution of lawyering time between offices, courts, public buildings, and other places is available, it is highly unlikely that more than a small part of even most trial advocates' work takes place in public facilities. See Rubin, A Causerie on Lawyers' Ethics in Negotiation, 35 La. L. Rev. 557, 578 & n.2 (1975) (concluding, on a wholly informal basis, that fewer than 25% of all lawyers in practice devote a majority of their time to litigation). To assume that the formalized behavior and ritualized etiquettes of public advocacy is characteristic of lawyer behavior is simply plain error.

41. Burger, A Sick Profession, 42 (no. 5) Wis. B. Bull. 7 (1969) (taken from his 1967 address to the American College of Trial Lawyers). The Chief Justice's "sky is falling" conclusions appear to have been the renderings of something like informal judicial gossip, far short of the serious analysis one might expect from the nation's most prominent jurist. See also Final Report of the Advisory Comm. on Proposed Rules for Admission to Practice, 67 F.R.D. 161 (1975); Burger, The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?, 42 FORDHAM L. REV. 227 (1973); Kaufman, The Court Needs A Friend in Court, 60 A.B.A.J. 175 (1974). A subsequent empirical examination of judicial perceptions found that the trial bar was perceived by judges
There is yet another line of defense which, while little more than an argument for standing based upon a description of actual practice, comes close to defining one source of high costs in the industry and hints at the true burdens that licensing imposes on the public. This is the "no poaching" approach. It derives from several undistinguished cases which speak of lawyers' "property rights" in the practice, of legal franchises subject to protection from "encroachment" by the unlicensed. The fact that some courts recognize that a "property right" or a "franchise" once granted needs protection fails to address the propriety or public advantage in recognizing either. In fact, it is not the existence but rather the breadth and the ambiguity of the lawyers' franchise that is flawed and must be analyzed.

B. The Public Ignorance/Licensure as Information Justification

The most commonly accepted argument for market intervention, and that which underlies all considered justifications of the prevention of unlicensed practice, is based on a theory of market failure. This theory, which again turns on the need for consumer protection, is derived from the assumed intersection of two aspects which are, as generally competent. Maddi, Trial Advocacy Competence: The Judicial Perspective, 1978 AM. B. FOUNDATION RESEARCH J. 105. A nice tonic to all this "chicken littling" was provided by Judge Marvin Frankel: "There are no objective measures or tests of lawyers' competence. Individual impressions collected in relatively casual conversations, reflecting unstated standards, are disparate to the verge of worthlessness." Frankel, Curing Lawyers' Incompetence: Primum Non Nocere, 10 CREIGHTON L. REV. 613, 614-15 (1977).

A more useful and unspoken question is whether judges, in fact and by definition, are not arguably in the worst possible position to assess the competence of even trial advocates. Most if not all inquiries and surveys of judges in this regard fail to distinguish between counsel's dual obligations of assisting the court to identify and resolve issues on the one hand, and of client representation on the other. That the two are frequently and perhaps inherently in conflict is an essential consideration to any analysis of judicial perceptions. Which function is any particular court evaluating?

If there is any truth in the above beliefs that a high proportion of American trial lawyers are incompetent, one is compelled to wonder why an almost insurmountable presumption of competence must be overcome by a criminal defendant claiming inadequate trial representation. See, e.g., Crowe v. South Dakota, 484 F.2d 1359, 1361 (8th Cir.), cert. denied, 415 U.S. 927 (1974) ("It is presumed that court-appointed counsel is competent, and a showing must be made before that presumption can be overcome. . . . After having carefully reviewed the record in this cause, we are satisfied that appellant has failed to carry his burden of overcoming the presumption of counsel's competency."); United States ex rel. Weber v. Ragen, 176 F.2d 579, 586 (7th Cir.), cert. dismissed, 338 U.S. 809 (1949) ("Court-appointed [sic] counsel was a member of the Peoria Bar in good standing. That is prima facie evidence of his competency."). The last nonconflict reversal by the Supreme Court for incompetent counsel was Powell v. Alabama, 287 U.S. 45 (1932). See also Wainwright v. Sykes, 433 U.S. 72, 91-94 (1977) (Burger, C.J., concurring); Estelle v. Williams, 425 U.S. 501 (1976); Henry v. Mississippi, 379 U.S. 433 (1965).

42. See, e.g., Conway-Bogue Realty Inv. Co. v. Denver Bar Ass'n, 312 P.2d 998, 1003-04 (Colo. 1957), and cases collected therein.
by definition, characteristic of the market for rendition of all professional services. The first characteristic (or component) is the inevitability of public ignorance; the second is that licensure serves as a substitute for absent public information. The first determinant (public ignorance) is now substantially true but in large measure artificially maintained by the profession; the existence of the second (licensure as information) is, at best, without any reliable evidentiary support.

According to this argument, it is first to be assumed as an attribute of the professions, including law, that a free market in the services would be incapable of maintaining a socially necessary standard of performance. The quality of the product would fall below a level consistent with the general welfare because, it is argued, in such a market the buyer is too ill-informed to distinguish good from poor service. As legal knowledge, in common with the special technical information claimed to be associated with all professions, is by definition accessible only to the trained, the lay consumer of services is unable, in either an absolute or a relative sense, to obtain the information necessary to evaluate lawyers or lawyering before or after a service is rendered. Since the consumer is unable to recognize and to reward merit, the low quality product has as good a competitive position as the high quality product, and occupational rewards will be allocated upon bases other than quality, i.e., the market will behave irrationally in an economic sense and harmfully in a social sense. If one assumes that there is a valid public interest in maintaining some minimal standard of legal service, as one must because of the defined importance of the work, the government must intervene with examinations and licensure to bar those who will not meet minimal competency or performance standards. The consumer and the social unit thereby are insulated from the hazards (costs) of incompetence. Let us consider the elements of the first component.

43. See Benham & Benham, Regulating Through the Professions: A Perspective on Information Control, 18 J.L. & Econ. 421 (1975) (analyzing the subject of professional information control in optometrics).

44. In the language used by Carlson in his interesting comparison of competency monitoring in medicine and suggested methods for assessing and regulating competence in law, this is an “input” measure of control: control of the quality of the practitioner upon admission to practice. Carlson, supra note 11, at 295. Carlson includes academic standards (accreditation and educational), licensure, and examination in this category. His other categories are “process measures” (essentially discipline, peer review, and continuing education) and “output measures” (malpractice litigation). As Carlson notes, input measures assume that quality is being assured, but do so without measuring it. Id.

45. “A license to practice law is a proclamation by this Court that the holder is one to whom the public may entrust [all?] professional matters.” Integration Rule of the Florida Bar, Preamble. The Florida Supreme Court has recently rejected its special committee’s
1. The Virtues of the Ignorant Consumer Component

There can be little argument that the public is, for want of information, largely unable to rationally compare or assess either lawyers or the value of their product. To a large extent this disability results from the high value the organized bar, supported by the judiciary, has always placed on public ignorance. Knowledge of the law, of lawyers, and of legal services is the commodity which lawyers control and which they alone supply to the public; whatever the justification, dissemination of this knowledge has been actively and effectively restrained.

Consumers and potential consumers of legal services do vary in their relative inability to judge the need for service, to assess the relative quality of lawyers, and to evaluate services. An established lawyer’s reputation for upholding standards of honesty, for maintaining confidentiality, and for similar character attributes is sometimes available within a group or community. These groups and communities (ethnic, social, geographic, occupational, trade associational and the like) often serve informally to gather and circulate such service information. Most citizens, however, have little or no lawyer contact, are not within such a community, or have no contact with a lawyer-using entity; they are denied access even to such proposal for “qualification procedures” against allegedly unqualified or incompetent lawyers, finding its present rule for placing an attorney on an “inactive” list for physical or mental incapacity or other infirmity to be “adequate.” In re Supreme Court Special Comm. for Lawyer Disciplinary Procedures to Amend Integration Rule, Article II and Article XI, 373 So. 2d 1, 4-5 (Fla. 1979). See also Smith v. Superior Court, 440 P.2d 65, 73 (Cal. 1968) (“To begin with, we observe that the admission of an attorney to the bar establishes that the State deems him competent to undertake the practice of law before all our courts, in all types of actions.”); Steele & Nimmer, Lawyers, Clients, and Professional Regulation, 1976 Am. B. Foundation Research J. 917, 1006 (“A basic aspect of a licensing system is the assurance that every licensee has the basic skills necessary to perform those services for which he is engaged.”). Whatever the quality effect on those who become licensed may be, it can have direct meaning only to those members of the public who can and do employ those lawyers. It is entirely possible that, even if the quality of public legal services actually rendered were raised, the total quality of public legal services would decline because of unmet needs, substitution, and the like.

46. See Bates v. State Bar, 433 U.S. 350, 370 n.23 (1977) (“The preliminary release of some of the results of a survey conducted by the ABA Special Committee to Survey Legal Needs in collaboration with the American Bar Foundation reveals that [in 1976] 48.7% strongly agreed and another 30.2% slightly agreed with the statement that people do not go to lawyers because they have no way of knowing which lawyers are competent to handle their particular problems. ABA, Legal Services and the Public, 3 Alternatives 15 (Jan. 1976).”). Business entities, of course, sometimes have very sophisticated information with which to make very good choices among lawyers. There is no indication, however, that even such sophisticated consumers of legal services actually make their lawyer-choice decisions upon quality of performance grounds.

47. The American Bar Association reported in 1976 that 35.8% of the adult population has never visited an attorney; another 27.9% has visited one only once. 433 U.S. at 376 n.33.
faulted reputational information. While the ability to determine whether services are needed and to evaluate the relative quality of the product provided by the professional will vary somewhat among individuals and groups, the central and constant characteristic of that market remains consumer ignorance.

Public inability to identify legal need and to choose rationally among providers of legal services is a circumstance often lamented by the bar. It is, however, self-imposed. Access to even such traditional (and slippery) indicators of professional ability as academic achievement, continued education, professional honors, guild recognition and the like is made available to only a narrow range of consumers. Public information about legal services is treated in a niggardly manner, typically as an element of bar association public relations rather than as a public service.

Although its public aspirations are to the contrary, the organized bar has purposefully denied to the public (and substantially to itself) all information necessary to inform the public of the law and to permit evaluation of lawyers and their services. The role of


49. In the words of the ABA CODE OF PROFESSIONAL RESPONSIBILITY,

EC 2-6 Formerly a potential client usually knew the reputations of local lawyers for competency and integrity and therefore could select a practitioner in whom he had confidence. This traditional selection process worked well because it was initiated by the client and the choice was an informed one.

EC 2-7 Changed conditions, however, have seriously restricted the effectiveness of the traditional selection process. Often the reputations of lawyers are not sufficiently known to enable laymen to make intelligent choices. . . . The selection of legal counsel is particularly difficult for transients, persons moving into new areas, persons of limited education or means, and others who have little or no contact with lawyers.


51. The Florida Bar budgeted (for 1979) $25,000 for public education and nearly six times that amount for lobbying the legislature. Address of Chief Justice Arthur J. England, supra note 2, at 12, col. 3.

52. Professionally imposed limitations on information about practitioners, services, and fees act to control both the consumer and the members of the profession. Benham & Benham, supra note 43, at 421-23. Restraints on advertising, on practice methods, on use of names, and on publication of experience and education qualifications tend to support homogenization, to sustain a theory of universal competence, and to prohibit or retard initiation of more efficient methods of providing professional services.

53. Canon 2 of the ABA CODE OF PROFESSIONAL RESPONSIBILITY provides: "A Lawyer Should Assist the Legal Profession in Fulfilling Its Duty to Make Legal Counsel Available." EC 2-1 of the Code imposes an aspirational obligation upon lawyers "to facilitate the process of
lawyers in protecting their specialized knowledge is entirely consistent with our understanding of the symbolic importance to all professions of a belief in a body of arcane and technical information available only to the initiates. Lawyers are by law required to assume a faceless posture of universal competence and passive availability. Any public relaxation of this posture has subjected offending lawyers to randomly imposed forms of professional discipline. All economic incentives to fulfill the public information obligations of the Code of Professional Responsibility, i.e., to make legal information publicly available, are forbidden. Even that limited training and experience information that may be made available to other lawyers has not been made available to the public. Oblique efforts by the organized bar to give the appearance of compliance with expressed obligations have had little success. For example, lawyer referral systems operated, organized or approved by the bar, avowedly with the purpose of complying with the profession's obligation to inform the public and make legal services readily available, are commonly nothing more than new-lawyer employment agencies. They do not evaluate attorneys and they rarely, if ever, establish any experience levels as a prerequisite for placement on a referral list. Only recently, and over the organized bar's strenuous argument that such activity would be "unprofessional," have federal courts struck down bar prohibitions on limited price advertising and associational exchange of legal service information. In

intelligent selection of lawyers . . . ." These nonmandatory expressions of good faith are followed by a series of disciplinary rules prohibiting their accomplishment. In addition, all forms of direct or indirect public communication that would inform the public of a lawyer's ability or experience have been directly forbidden. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-101.

54. For example, a lawyer who offers unsolicited advice to one not already a client that legal services are in order, traditionally has been prohibited from then representing that person. ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 2-104(A).

55. CARROL STUDY, supra note 8, app. II at 2 n.3. The uncertain rating system published by the MARTINDALE-HUBBLE LAW DIRECTORY while found in some public libraries, is generally available only to other lawyers and those in contact with lawyers.

56. Anyone who seeks a lawyer through a bar referral service is almost guaranteed to be referred to one both inexperienced and in need of work.

57. In Bates v. State Bar, 433 U.S. 350 (1977), the Court held that bar-imposed prohibitions against lawyer advertising of fees for routine legal services violated first amendment speech guarantees. Id. at 384. The American Bar Association, the state bars of California, Virginia, Maryland and North Carolina, and the American Medical, Dental, Optometric, and Veterinary Medical Associations entered the case as AMICI CURIAE, urging continued secrecy "in the public interest." Bates, 53 L. Ed. 2d at 1262.

sum, the bar, while denying the fact, has so thoroughly insisted on the benefits of public ignorance that its activities have come into collision with fundamental public statutory and constitutional rights. Public ignorance has been enshrined as legal ethics.

The true complexities of some kinds of legal problems, and the information-possessive activities of the organized bar, have made it virtually impossible for the majority of individual consumers of legal services to evaluate lawyers or the quality of their services, either before or after rendition. Thus the first requirement of the consumer protection theory of intervention through licensing is founded in present fact. The legal market is characterized by consumers unable to identify and classify either product or producer by quality. It is reasonable to presume that such a market might well tend to nurture substandard performance and expose the public to intolerable risks of incompetence.

2. Government Intervention as Information Substitute—A Co-ordinate Myth of Professionalization

The theory's second aspect is belief that the interposition of governmental licensure between producers and consumers insulates the community from the risks of public ignorance by acting as a substitute for absent consumer information. Public benefits flow from the governmental interposition of the protective shield of examination between the ignorant consuming public and those who would provide substandard legal services. The utility of licensure thus lies in its culling function; it simply bars, (as do prohibitions on lay practice) substandard producers from the market. Subsequently, professional discipline operates to correct errors made during the licensing process. The entire regulatory process, as a substitute for information, ensures that all who are licensed are competent. Licensure,

59. See generally Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457-58 (1979); Bates v. State Bar, 433 U.S. 350, 398 (1977) (Justice Powell, dissenting in part and concurring in part, gave "the organized bar" credit for recognizing these problems and for implementing innovative measures to correct them. His doing so suggests a failure to distinguish between the authority and function of the American Bar Association, of which he is a past president, and the functions and activities of state and local bar associations.).
consequently, *is* competence.\(^6^0\) The significant individual and social risks which would result from consumer error are thus prevented where, as in law, the cost of information is seen either to be infinite (i.e., the data are unavailable) or excessive (i.e., the cost of the data appears to exceed the cost of error).\(^6^1\) Low quality consumption is made unavailable by prohibiting low quality production. With licensure and discipline, the consumer has no "quality" choice to make;\(^6^2\) the only choice is from among competent producers. Such choices may safely be made, as they routinely are, on nonquality grounds. Even adjusting these assertions downward from the absolutes just stated, is any of this true?

The ability to provide absolute consumer protection is, of course, not claimed. A system which guaranteed safe consumption of legal services would be prohibitively expensive, for there is a theoretical point where a further increase in the quality of available service would be more costly to guarantee than the benefits it could confer. The desired level of quality maintenance is reached (and additional governmental intervention is accordingly unjustified) when a marginal increase in the "standard" no longer increases the welfare of some enough to compensate for the loss to others.\(^6^3\) The licensure, examination, and disciplinary processes are thought to work together toward reaching that optimal point. The necessary inquiry therefore concerns whether or not a cost-benefit equation relevant to this discussion can possibly be drawn. If so, how do we determine whether the limits of legal monopoly and of self-disciplining licensure are coextensive with the public "competence" interests they

---

\(^6^0\) It is this equation that presents the ethical problem to the professional. It is known to be valid only in a symbolic sense. How does one locate the lines between symbolic truth, self-deception, and misleading the public?

\(^6^1\) A subsequent part of this article, to be published in a later issue of this *Review*, will explore some consequences of the failure to differentiate among legal tasks, *i.e.*, to distinguish between those jobs which, for individual or community interests, may indeed require technical competence even at high cost, and those which are rote, routine, and repetitive, which require but slight skill and information, which are relatively risk-free to the individual and community, and for which no high competency cost can be justified. The latter tasks constitute a large part of what lawyers do and ought to be identified as not lawyering at all; they should be decisionally released from the monopoly market.

\(^6^2\) It is important to note that if "quality" means, as it seems to, "adherence to a recognized standard of performance," the justification ball game is over. No accepted standards exist for the practice of law. One of the useful characteristics of an abstraction used as justification for action is that the action cannot thereafter be evaluated by reference to anything else.

\(^6^3\) In any such analysis, a distinction must be drawn between the quality of services actually rendered and the level of utilization of services. It is entirely possible to provide a very few high quality services. The cost of unfulfilled needs for service—of whatever quality—is, however, a social cost which should not be disregarded in assessing the cost of poorly delivered service. The question that must be answered is, can poor quality service add value?
claim to serve?  
If we proceed as if a cost-benefit analysis were possible, evaluation of the benefits of licensure as an informational device (in the sense we have discussed it) can sensibly begin by considering whether examination-based licensure actually relates positively to the quality of legal services.  
If licensure and its enforcement cannot be shown to be positively related to quality of service, then licensure cannot be justified according to this theory. The crucial question is: Do we know if substandard producers are identified and prohibited from entering the market by examination-based licensure or from continuing in the market by organizational discipline?

VII. DOES LICENSURE DO ITS ASSIGNED TASK?

There is no good information one way or the other; however, the sparse information which does exist not only fails to support the claims made for licensure, but also suggests (consistent with the ceremonial nature of the process) that neither courts nor lawyers believe what they say about it. A controlled analysis is impossible because the quality of services rendered by illegally practicing individuals cannot directly be compared with the quality of licensed services.  
Although enforcement against unlicensed practice may be justified on the ground that unlicensed persons have not been tested for competence, the competence of licensed lawyers is never

64. Such an evaluation cannot be made in our current ignorance. For example, considering only the narrow matter of technical skill to achieve a routine legal task of some importance—say, residential conveyancing or obtaining a change of name—if we postulate that the services rendered by those who are licensed are vastly superior to the services that would be rendered by nonlicensed providers, the cost of unlicensed service becomes high, and substantial governmental intervention appears appropriate. If we postulate only a moderate differential in the quality of service, then intervention, at the same cost, can be defended less easily or not at all. If, for any particular "legal" job, we are unable to support any hypothesis with evidence one way or the other, the values evaporate and the cost imposed by retaining that service within the captured market cannot be justified. When we introduce the empirical probability that some laypersons could perform any given "legal" task with greater skill than would some lawyers, the difficulty of justifying licensure by creating a competence-cost calculus becomes more complex.

65. For a somewhat similar discussion of the effect of information control in market management in the optometrics field, see Benham & Benham, supra note 41 (although the situations of the two occupations are in many other respects dissimilar).

66. The data available here consist exclusively of court decisions involving the unauthorized practice of law. All appear to point out that there is no relative defect in the quality of service between that provided by unlicensed persons and that provided by licensed practitioners. Since there is no available information about the state of the art among those who are licensed, any comparative judgment would have to be airy indeed. Even if such a comparison could be drawn between the competence levels of those two populations, and the unlicensed were found to be less qualified, there still would be no reason to believe that those who practice without a license are the same people who are excluded by entry barriers or are removed by internal discipline.
evaluated. The idea of "competence" is itself an abstraction not subject to measurement or application. One might inquire whether there is any evidence that the services provided by those legally in practice who have never been examined are qualitatively different from services provided by those legally in practice who have been examined. Because many states have instituted current examination procedures only recently, significant numbers of practicing lawyers have never undertaken anything comparable to a modern bar examination; those in practice at the effective date of new examination requirements were universally grandfathered into the bar. No state, insofar as can be determined, has ever considered limiting the practice of such nonexamined practitioners, persons who no doubt include some of the most able and honored members of the bar and of the judiciary. Five states still require no examination of graduates of their own accredited, in-state, law schools. There is no evidence that the quality of legal services rendered in those states—by these untested graduates—is different from that of examined and licensed practitioners there or elsewhere. Moreover, there is no evidence that the legal services in jurisdictions that do not require examination of all practitioners are qualitatively any different from those provided in examination states. Thus the bar and the judiciary provide one useful—if private—response to our question, i.e., that the profession's own internal perception is that the licensing process is unrelated to competency.

While there is undoubtedly some evidence of individual and, arguably, social harm which may result from the rendition (by whomever) of inadequate or incompetent legal services, evidence that the system of examination and licensing (and concomitant enforcement

67. Florida, for example, extended a "diploma privilege" to graduates of its law schools until 1953. Prior to 1953, the overwhelming majority of lawyers were admitted without examination: between 1949 and 1953, only 352 of the 2,725 newly licensed lawyers were examined. Watts, Current Status of Admissions in Florida, 23 B. EXAMINER 99, 101 (1954). If we assume the average admittee's age in 1953 at 25 years, it is not unreasonable, even with foreign influx, to posit that over 75% of Florida lawyers now over the age of 50 were admitted without "qualifying" examination.

68. See BAR/BRI, NATIONAL BAR EXAMINATION DIGEST 3-35 (1979).

69. Interestingly, while the Carroll Study, supra note 8, attempts a tentative ranking of the states (as regards the quality of legal services provided in each) and sees some evidence of a positive correlation between strict or restrictive licensing and lawyer competence, it expresses no negative quality correlation between states with "diploma privilege" admissions and those requiring all applicants to be examined; for example, Wisconsin, a diploma privilege state, "ranks" sixth out of fifty in the competence sweepstakes. Carroll Study, supra note 8, app. II, at 4, table 1. Cross-jurisdictional comparisons may not be useful where a profession is strongly entrenched and employs a uniform, national code of ethics to control its members.

70. An alternate explanation of grandfathering is that bar politics have been permitted to overcome the public interest in this respect.
of prohibitions against lay practice) has any limiting effect on that harm is entirely absent. The reason lies largely in the ritualistic nature and purpose of the examination process.

A. Bar Examinations—A Public Ritual

Entrance requirements for the practice of law should be shaped to identify those who, by reason of ability and character, can be predicted to supply those lawyering services which are and will be required, and to identify those who will do so in a competent manner. Current bar examinations, by their nature, are inherently incapable of doing either the culling or the educating job claimed for them. They do have value, but assertions that examinations will screen from the practice those who are unable or unwilling to pass them, and that there is some positive correlation between those excluded persons and the substandard quality of service such persons would have provided, cannot be established. There simply is no evidence that those who are licensed will provide at least minimally adequate service or that the consumer may, with reasonable

71. One need not go so far as Leon Green's 1939 view that bar examinations "produce results pernicious in the extreme." Green, Why Bar Examinations?, 33 NW. U.L. Rev. 908, 912 (1939). It is more easily arguable that licensure carries excessive public cost, is highly misleading to laymen and practitioners, and has a pernicious diversionary effect. Lawyers become so distracted in defending a system of apparent quality control with which they are comfortable that they fail to develop a good one.

72. Examination and licensure are only the final barriers to practice. Permission to sit for the examination is dependent upon prolonged education which is unavailable to many. The social and economic culling for the profession begins at a very young age and extends throughout almost twenty years of formal education. Thereafter the successful emergent must establish his "character and fitness," i.e., that he has not participated in "social deviation" and that his "ideological holdings" are not questionable. It is not difficult to understand why lawyers by and large find themselves among their intellectual and social peers when representing a fairly narrow range of propertied interests.

73. The findings of this study clearly indicate that the reason for the adoption of the written bar examination requirement was protection of the public from harm occasioned by incompetent practitioners.

Since the risk of such harm not only still exists, but actually is even greater today, and since assurance of protection of the public from the incompetent is still a vital responsibility of the bench and bar, this reason for the adoption of the written bar examination as the basic testing device for admission to the bar remains valid and persuasive. Furthermore, no alternative to the written bar examination has yet been devised which gives the essential assurance of basic competency at a price either society or legal education is, or should be, willing to pay. Accordingly, it is recommended that the Association of American Law Schools continue its support of the American Bar Association Standard "that graduation from a law school should not alone confer the right of admission to the bar, and that every candidate for admission to the bar should be examined by public authority to determine his fitness for admission.

ASSOCIATION OF AMERICAN LAW SCHOOLS, BAR EXAMINATION STUDY PROJECT FINAL REPORT 3 (1976) (emphasis added) [hereinafter cited as FINAL REPORT].
safety, engage any licensed practitioner for any service. Bar examinations and licensure are not even designed to do that job.\textsuperscript{74}

Current examinations are geared, perhaps by necessity, to locate the competent notary. They by and large test applicants for retention of information of the sort one expects to be known by clerks and technicians. In other words, they test for knowledge of that sort of information which enables one to accomplish easy, rote and routine procedures. Basically exercises in the naming of parts, simple "issue" spotting, and the application of "buzz words," they reinforce the wholly nonprofessional phenomenon of "professional as test taker" and "lawyer as plumber."\textsuperscript{75} The material tested is not only highly unrelated to the practice, it is also misleading in its inadvertent suggestions about professional behavior itself.\textsuperscript{76} Short-term retention and recognition of bits of factual and procedural data, words, phrases, and simplistic problem solving are tested through extensive multiple choice\textsuperscript{77} and (alleged) essay questions.\textsuperscript{78}

\textsuperscript{74} While it is sometimes asserted that bar examinations do not test for competence, but rather for incompetence, the distinction—while on the surface facile—is a verbal avoidance. Either expression of objective is wholly without criteria.

\textsuperscript{75} See Twining, \textit{Pericles and the Plumber}, 83 L.Q. Rev. 396, 397-98 (1967) (The plumber is one who has "no-nonsense specialized training to make him a competent technician."). See also Gee & Jackson, \textit{Bridging the Gap: Legal Education and Lawyer Competency}, 1977 B.Y.U. L. Rev. 695, 928-31.

\textsuperscript{76} Current efforts to correlate bar examination subject matter with the kind of problems lawyers will, in the public interest, be called upon to resolve are in the "vast majority" of cases based upon nothing more than the personal experiences of individual bar examiners. \textit{Final Report, supra} note 73, Memorandum no. 9, at 9. The degree to which the "personal experiences" of the members of such examining boards could be expected to reflect the current, much less the potential, variety of practice within their jurisdictions is unstudied. Members of boards of bar examiners—like judges, authors of professional codes, teachers, and other persons occupying prestigious chairs within professions—in the main reflect a reasonably narrow socioeconomic experience. Research supported by the American Bar Foundation has made it evident that data can be developed from which the current incidence of legal problems can be measured and the need for various legal services adequately predicted for a given population. See Avichai, \textit{Trends in the Incidence of Legal Problems and in the Use of Lawyers}, 1978 Am. B. Foundation Research J. 289 (using data developed by B. Curran, \textit{The Legal Needs of the Public: The Final Report of a National Survey} (1977)).

\textsuperscript{77} While it can be asserted that state examinations at least drill applicants on some peculiar aspects of local law, the Multistate Bar Examination (MBE) can claim no such advantage. Bar examiners, responding to large numbers of applicants, had the Educational Testing Service produce this examination. See Pashingion, \textit{The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers}, 21 J.L. & Econ. 53, 53 (1977). Today it is used in over 40 states. It consists of one six-hour (two hundred multiple choice questions) exam. The test covers six "topics": contracts, criminal law, constitutional law, evidence, property, and torts. Success is achieved by the reduction and memorization of relevant fields of law to a few pages of rote rules. See generally Seligman, \textit{supra} note 37. The \textsc{Harcourt, Brace, Javonovich, BAR/BRI Bar Review}, characterized accurately by Seligman as the General Motors of Reviews, has an outline that, for examination purposes, adequately covers the law of "sales" in 22 pages, "secured transactions" in 11, and "real property" in 45. Outlines published by commercial bar review organizations are now filtering back into law schools as
Such examinations can, naturally, measure present retention of information useful in performing structured, routine procedures which lack the substance, ambiguities, and uncertainty which are identifying characteristics of the lawyer's professional life. As designed, however, they do not test for the judgment, motivation, commitment, capacity for concrete and abstract thought or expression, or analytic ability which constitute the materials necessary to adequate lawyering. They are not halfway measures compelled by circumstance; they are the wrong measures.

Bar examinations are, of course, unrelated to competent performance and are directly misleading in another sense; they fail to include for testing any material whatever relating to entire areas of law. These examinations typically ignore, inter alia, poverty law, international law, labor law, the law of employment discrimination, patents, copyrights, and environmental law. They rarely touch on either administrative procedure or the law of federal taxation. Ignorance of any one of these subjects virtually guarantees the provision of substandard services. Insofar as such examinations continue to be held out as identifying the minimum information necessary to the practice, and to the extent they affect law student choice of courses, they are entirely misleading. Furthermore, the examination cannot fairly be validated against experience. No such test can be validated without adequate knowledge of the populations involved and the goals sought; in law, both are unknowns. Forms of external validation to which job-competence examinations should be subjected are not and cannot be employed because the test is pass-fail, the tasks to be performed have not been identified, and there exists no recognized concept of minimum competence.

The examination and investigation procedure is nonetheless said study aids, so that legal education itself has become infected with the mechanical naming of parts necessary to pass these examinations.

Aside from signaling a misapprehension of the nature of professional activity, the MBE is otherwise fundamentally flawed in its attempt to examine for "national" law. The test is dependent upon terminology, forms, and purported analysis of nationwide validity. There are few legal matters, aside from the most primitive concepts, which can fairly be said to hold true and to hold still long enough for such testing; thus, the ambiguous or the changing law must be ignored. A fair examination of the included (i.e., static) items would be subject to an almost universal first-time success rate. Because tests, by definition, must discriminate among test takers, the authors of the MBE have been forced to introduce difficulty into the form of the questioning, e.g., to use successive double negatives, improbably convoluted and absurd fact situations, pattern switching and the like. This insures some credible failure rate. While these techniques are asserted to test "analytic ability," in fact they measure test taking skill.

78. The number of examinees and the time constraints imposed on grading suggest that the so called "essay" examinations are themselves graded on little more than a keyed, multiple-choice, or "buzz word" basis.

79. See generally In re Florida State Bar Ass'n, 186 So. 280, 287 (Fla. 1938).
to be "intended to insure some level of initial competence and moral character among the membership." There is, however, no evidence that this intention is serious enough to engage the rational attention of the organized bar. As, by definition, a profession is a limited access occupation, the existence of entrance barriers must be publicly asserted. The bar examination performs that function.

All this is not to say that entrance examinations fail to discourage or prevent some people from entering the legal services market. Some of those people are no doubt by reason of intelligence or information unfit to practice law. Probably some are fit for very little at all. There is, however, no information available about the competence or behavior patterns of the population excluded by examination; they are effectively anonymous, and they are posited to be incompetent. There is also no such information available about the

80. Steele & Nimmer, supra note 45, at 922. See also Final Report, supra note 73, at 273-74 n.17 (containing the statements of established practitioners, retired judges and the like of various explanations of the purpose of bar examinations). This Final Report (the proposal for which was far more ambitious than the final product) contains interesting data. In large measure the "examination effect" is studied for its retro-impact on law school curriculum and law student choice. There seems little question but that to one degree or another law schools and law students are aware of and anticipate bar examinations and respond to their presence. This recognition has, of course, no demonstrable effect on the quality of legal practice, and is entirely misleading with regard to the nature of professional activities.

81. The so called "character and fitness" investigations of state bars range from casual interviews to privacy-invading background searches. Since their validity depends upon the acceptance of the virtues of correct belief, these tawdry exercises are subject to the derision of those who are exposed to them and defended chiefly by those whose status has become engaged in the process. Carlin notes, for example, that in New York, "character and fitness" defaults caused rejection of approximately .03% of all applicants. J. CARLIN, LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR 163 n.1 (1966). At what cost in money and dignity?

Florida, which takes pride in its "comprehensive system of character investigation," is reported to have developed over the years extensive data, contained in "suspense files," which are said to be particularly useful "in matters of social deviation." Bar Examiners, supra note 38, at 90-91. The files contain information received anonymously, through "neighborhood investigations," by "infiltration," and as a consequence of "both loose and close surveillance." Id. at 91-92. In other words, determinations about "character" are based on hearsay, half-truths, suggestions, arrest reports, neighborhood gossip about personal habits, and impressionistic moral and lifestyle evaluations. "Probably the most time consuming investigations are those where the applicant's ideological holdings are in question." Id. at 93. To read the examiners' handbook is to cringe for any genuine concept of privacy. For all this, Florida compiles no information to show how many persons are actually denied admission for "character and fitness" disqualification. Letter from John H. Moore, Executive Director, Florida Board of Bar Examiners to Robert H. Kennedy (Oct. 17, 1978). The organized bar's increasing willingness to bludgeon the values for which the rule of law is supposed to stand, and law students' placid acquiescence in these exercises, suggests that our liberties may be wrongly entrusted indeed. The typical answer to objections to this wholesale assault is to rely upon the discredited right/privilege distinction or upon a recitation of individual instances when terrible people were almost admitted.

82. Every character and fitness board can point to the discovery of some thieves, rapists, and other bad actors who would arguably be unfit to practice law. Every bar association can also point to some of its members who have engaged in equally distasteful activities.
lawyer population, which is posited to be competent. The distinguishing characteristic is licensure: licensure means competence.\textsuperscript{83}

The examination process does, to some extent, delay admission to the market of individuals in each new generation of producers; many persons are licensed only after initial failure or a series of failures on the examination. Virtually all graduates, however, are eventually admitted.\textsuperscript{84} One would have to suspend reason to believe that the interval between initial failure and eventual success is employed in gaining professional competence of any lifetime value. On the contrary, all our experience indicates that the time is spent gaining competence in examination techniques.\textsuperscript{85}

In fact, the American legal system operates with something indistinguishable from a national diploma privilege; that a few people are excluded serves ceremonial purposes but is an event of no other social significance. Some states, for example, keep no records to determine the actual pass rate, \textit{i.e.}, the percentage of applicants who, once having taken the examination, eventually do pass it.\textsuperscript{86} In those states it is evident that the licensing process serves no known, nonceremonial purpose other than to delay the entrance of new producers. Its ceremonial aspect reassures both the public and the initiates of the professionalization of the occupation.

There is yet a further well-recognized element of magical thinking in the use of entrance examinations and "character" evaluations in most licensed professions, including law: they relate only to entry. Once licensed, practitioners are subjected to no retesting or continued monitoring of competence or character.\textsuperscript{87} Whatever may be the

\textsuperscript{83} It is, of course, no defense of examination and licensure barriers to note that law schools graduate some people who probably shouldn't be lawyers. Licensure cannot be shown to identify them nor to bar or limit their entry. It is, likewise, no answer to ask rhetorically, "You wouldn't just let anyone practice law, would you?" unless it can be demonstrated that those whom one would not just let in are currently excluded. Today, as noted, almost all who try are eventually licensed. Whatever culling takes place occurs at some point earlier than bar examination and licensure.

\textsuperscript{84} It has been asserted that about 98\% of graduates of accredited law schools who take bar examinations ultimately pass and are licensed. Seligman, \textit{supra} note 37, at 50. The National Conference of Bar Examiners reported in 1968 that although 2/3 of the examinees pass on their initial try, 85-90\% of all applicants eventually pass the examination. \textit{Bar Examiners, supra} note 38, at 17-18. Whatever the number actually excluded, it is apparently small and its membership unstudied. Though we know little about the competence of those actually licensed to practice, we know even less about those who are denied a license.

\textsuperscript{85} \textit{Contra}, \textit{Bar Examiners, supra} note 38, at 18 (The "strenuous preparation" required for the examination will "raise the level of competence" of those who initially failed the exam. How that magic happens is not reported.).

\textsuperscript{86} Florida, for all its aggressive testing system, does not maintain such information. It is consistent with the maintenance of professional status that knowing the results of the process is unnecessary. Such information would be quite meaningless. It is the act of excluding, the appearance of screening, that alone is significant.

\textsuperscript{87} \textit{See} Marks & Cathcart, \textit{supra} note 11, at 195 ("[A]ll semblance of following the
elements of "competence" and "character" thought to be revealed through the admission process, they are held to be so valid and immutable that they persist through all social, legal, and personal changes of the licensee's lifetime.88

In sum, the evidence utilized to justify licensure through both bar examinations and the prohibition of lay practice as quality control mechanisms is either too meager to be relied upon or nonexistent. All of this has been made clear before; there is no controversy about the condition of the evidence. Nonetheless, both bar and judiciary defend imposition of the substantial public costs of the process as necessary for the maintenance of "quality" legal services.

Let us assume the evidence, however, and agree for the sake of argument that examination and licensure are reasonably related to insuring competence. Clearly we cannot also assume that there is a perfect culling of the incompetents or that, once licensed, some lawyers won't change, i.e., become incompetent ex post licensure, so to speak. It is for these circumstances that costly professional self-disciplinary systems have been established. How well do they relate to the public interest in the delivery of competent legal services? The evidence suggests a minimal relationship.

B. Disciplinary Systems

After three years of studying lawyer discipline throughout the country, this Committee must report the existence of a scandalous situation that requires the immediate attention of the profession. With few exceptions, the prevailing attitude of lawyers toward disciplinary enforcement ranges from apathy to outright hostility. Disciplinary action is practically nonexistent in many jurisdi-

88. Various recertification and continuing education proposals have been made. Recertification is nowhere required. According to Steele & Nimmer, supra note 45, at 930 ("Traditionally, control of professional competence has been limited to establishing and enforcing prerequisites for entry into the profession. The implicit assumption has been that meeting these prerequisites establishes not only initial but also perpetual competence in all areas of legal practice.").
tions; practices and procedures are antiquated; many disciplinary agencies have little power to take effective steps against malefactors.89

Current disciplinary systems are known to be principally symbolic.90 They relate not to incompetence, but to a narrow range of quite different kinds of misbehavior. The bar and judiciary recognize that which is obvious; there are lawyers whose conduct is such that it warrants professional discipline. Incompetence, short of that which is visibly shocking, is not a category. The conduct inquired into by "grievance" committees and which forms the basis for discipline is not related to any minimum standard of performance.91 The formal complaint system upon which virtually all lawyer discipline is based is notoriously unable to identify even that socially insignificant range of misbehavior to which it is exclusively addressed. It pretends to consider, yet in actuality entirely ignores, questions of competence (except insofar as "incompetence" may be translated into bad conduct or subsumed for record-keeping purposes within such ambiguous categories as "neglect"). Systems for the receipt, recording, and processing of complaints and for disciplinary action are based on concepts of fault; there is no category for poor quality.92 Before examining the effect of the bar's formal disciplinary system on the maintenance of lawyer competence, we may first inquire into the existence of any informal market mechanisms which, it is sometimes asserted, tend to protect the public from substandard legal services.

1. There Are No Significant Informal Controls on Service Quality

Some unstudied effect on service quality no doubt exists from client reactions to lawyers, for both satisfied and dissatisfied clients voice opinions that may affect a lawyer's business. However, this client-based anecdotal system relies upon evaluations made by persons who, for the most part, are too ignorant to fairly evaluate

90. The disciplinary system is autonomous—the members of the profession assume authority to determine behavioral norms and the circumstances of deviance subject to inquiry; the members also determine the nature and degree of discipline, if any, to be imposed.
91. That it could be is clear from ABA Code of Professional Responsibility DR 6-101, which clearly obligates a lawyer to provide "competent services."
92. J. Carlin, supra note 81, at 53, does not include "competence" as a factor in his otherwise interesting "ethical behavior index."
professional performance. While Marks and Cathcart urge that this process will act as "some market check on the nature of services rendered," even that limited optimism seems quite unwarranted in a silent market where demand is substantial. Both dishonest lawyers and incompetent but honest ones may have happy clients. Happy clients do not complain.

The informal reputation effect within the guild is no more dependable. Lawyers, in time, gain professional reputations within a legal community, or within some segment of it, based upon their colleagues' perception of them. These reputations probably have some economic consequences with regard to ease of professional relationships, mobility of employment, and referral of clients. Further, as noted above, some laymen will have sufficient contact with lawyers to gain secondhand knowledge of these peer group views and this, perhaps, may affect business. Unfortunately, such reputations are based in large measure on considerations quite different from those that might define quality of service; usually they are bottomed upon anecdotal material and treatment of fellow lawyers. Even where they do exist, they can have little or no market effect on new lawyers, on professionally isolated practitioners, and on those whose reputations are derived principally from past ability, the club, the law firm, or the church with which they are associated.

The better question is whether this asserted market effect of client-based or peer-based reputation ever serves to identify and remove the "substandard" producer. It does not. If it did, the public interest in quality could be left largely to fend for itself in a free market. Substandard producers continue to "serve" the public. Some argue, however, that important, informal control mechanisms do exist. For example, in the context of acknowledging the absence of any effective formal bar controls other than the system of client complaints, staff counsel for one integrated state bar urged: "I think control is, however, effectively imposed upon lawyers who are not sole practitioners by their partners or employers. I.e., you fire the

---

93. Marks & Cathcart, supra note 11, at 206.

94. The history of "quality control" through private malpractice litigation is not encouraging. Complaints of legal malpractice seem more closely related to problems of estrangement between lawyer and client than to the lawyer's competence. The organized bar's response to rising lawyer malpractice claims has been to declare an emergency—"the malpractice crisis"—and increase public relations efforts. That burgeoning litigation may represent the consequences of increased public awareness is an issue not addressed. Whether and to what extent malpractice litigation could operate as a consumer protection device is a subject that is rarely, if ever, professionally considered. That the organized bar might encourage such suits apparently is unthinkable, as is the long-run and perhaps more likely potential for commercial malpractice insurers to regulate admission to and continuation in the profession through rate setting.
incompetent and promote the quality producer." A similar point was made by Marks and Cathcart: "[I]n large law offices . . . there are mechanisms for training, supervision, review, assignment, and, in extreme cases, severance of relationship." Whatever element of truth there may be in these assumptions—and there is no reason to believe there is much—one must see where that limited truth leads. The severed "incompetent" does not leave the market; he hangs up a shingle or joins a different association and continues to offer substandard legal services to the public. Of course, sole practitioners, to whom this supposed informal control mechanism cannot be asserted to apply, constitute one of the largest single categories of lawyers in the country.

There is simply no evidence of any effectively imposed informal control over substandard performance in the legal services market. In fact, it is commonly recognized that once a license is granted, once the individual joins the homogenized whole, every tendency of the market is to protect the incompetent lawyer, not to locate and expel him.

2. There Are No Significant Formal Controls on Service Quality

Lawyer self-discipline and self-regulation have been extensively analyzed and criticized both before and after the Clark Committee
report.99 No serious inquiry credits the current system with adequately protecting the public. All studies recognize the severe shortcomings of the current disciplinary system, even with regard to forms of obvious lawyer misbehavior, let alone competence. There simply are no standards and no systematic process for the review of legal work; lawyer competency is ignored.100

Disciplinary proceedings, in law, are activated solely by complaints. Their inability to monitor professional quality is widely recognized.101

A system of professional self regulation, to be adequate, must reach beyond reliance on client complaints; it must supplement client complaints with professional review of performance. Performance standards, as distinct from conduct standards, need to be applied in a no fault context; there must be adequate opportunities to review lawyer performance, and there must be refined criteria on which to base continuing judgments about competence. Moreover, the profession must want to regulate performance standards; it must be able to face the possibilities and realities of incompetence among those already holding the license.102

While exceptions occur, the discipline of practitioners, like initial licensing, remains essentially a mechanism, a private and public exhortation of professional status rather than the discharge of a professional responsibility. Self-discipline by lawyers is a definitional undertaking capable in reality of addressing only a limited kind and number of nonquality-related conduct grievances—disputes between clients and lawyers and between one lawyer and another.103 Marks and Cathcart, discussing the operation of grievance committees, have stated as one "central theme," that:

[W]hen we consider the disciplinary process as a whole we are looking at the ways that the legal profession gives the appearance of self-regulation without in fact engaging in the act of self-

99. CLARK REPORT, supra note 89. Much of this useful preliminary work has been underwritten by the American Bar Foundation. See, e.g., Marks & Cathcart, supra note 11, at 193 n.†; Steele & Nimmer, supra note 45, at 919 n.".

100. See generally Marks & Cathcart, supra note 11.

101. Steele & Nimmer, supra note 45, at 922-23 ("With few exceptions, contemporary disciplinary agencies maintain no significant, self-initiating investigative components. They rely instead on third-party complaints received from four sources: clients, other attorneys, nonprofessionals involved in a case, and public information (typically concerning criminal prosecution of an attorney).")

102. Marks & Cathcart, supra note 11, at 203 (emphasis added).

103. The latter category—between one lawyer and another—is what Jerome Carlin has classified as "offenses against colleagues . . . , usually some form of client solicitation." J. CARLIN, supra note 81, at 153. Certainly such offenses are rarely related to service quality.
There is a subtle conversion of complaints about lawyer performance into a search for misconduct, moral guilt, and deviance. Performance standards tend to be abandoned in the process.  

While some theft and rapacious conduct by lawyers may come to light, the honest rendering of inadequate legal services is an activity which remains highly insulated by judges, by fellow counsel, and by the bar-enforced ignorance of laymen. It is an activity wrapped safely in the service provider's inherent advantage, in the unequal relationship of lawyer to client, and in the guild etiquette between lawyer and lawyer.

The lawyer-client relationship, while technically a contractual one, is in fact often unilateral; it is also one in which the client is often in fact (and invariably by definition) unable to raise quality of performance issues. The attorney typically, sometimes necessarily, accepts a dominant and frequently intimidating posture of providing such services as he may deem appropriate in the manner he finds correct. The client, often anxious, assumes the passive and trusting posture of receiving those services. Clients—those upon whom the complaint system exclusively relies—ordinarily have little basis upon which to form any meaningful expectations for services to be rendered and no dependable criteria with which to measure what has been received. Consequently, the complaint process tends to reveal only that narrow range of gross misconduct by obvious losers that patently injures a client or so badly offends a fellow lawyer that it is clearly intolerable. Such a system may

104. Marks & Cathcart, supra note 11, at 228 (emphasis added).
105. Steele & Nimmer, supra note 45, at 950.
106. The dynamics of the lawyer-client relationship and its stages have never been adequately considered. It is a mixed game, often full of the ambivalence of each party in his relationship to the other—a mix of potential risk and mutual advantage, exposure, bargaining, dependence, conflict, partnership, and competition, with varying inequalities, expectations, and vulnerabilities. It is in many respects a reflection of conflict games between adversaries. For a good expression of some of the interdependent and collaborative aspects of the situation, see J. Carlin, supra note 81, at 66-83.
107. The Clark Report, supra note 89, at 6, which ignored questions of lawyer competence, further notes regarding “misconduct”:

Reliance on complaints only will never uncover some of the most serious forms of professional misconduct—those that involve a conspiracy between the attorney and the client. [A]reas of misconduct in which the client benefits as much as the attorney are not likely to be reported by a client's complaint to a disciplinary agency.

Clients are frequently a major source of the pressures on a lawyer to violate professional norms; the vulnerable lawyer may be subject to situational pressures from his client which he may resist only at great personal risk. The exploitation process between lawyer and client is often a two-way street. J. Carlin, supra note 81, at 71-76.
identify some forms of misbehavior, but it is unrelated to any systematic maintenance of professional service quality.

Even if we should assume that the complaint process reveals and disciplines those few forms of fault and misconduct for which the Code of Professional Responsibility provides some distinct guidelines, there would be no more than an oblique effect upon lawyer competence. Actual felons and able liars may well provide skilled services to happy clients. Incompetent service also is provided by the honest lawyer who ignores the simplicity or complexity of a matter brought to him, who fails to appreciate the true dimensions of a transaction, who is unmindful of his own ignorance, or who is lazy, tired, stupid, disinterested, unconcerned, lacks courage and the like. These are the elements of professional incompetence that injure people. While such a lawyer may satisfy his ignorant client, all of his product (except for client "comfort") is seriously deficient. If there is a professional duty to protect the public by assuring a minimum quality standard, it is not much advanced by looking to unhappy clients to make public complaints.

Judges do not monitor quality to any socially or professionally significant extent. Exposed to only the smallest part of what lawyers do, they are too ill-informed to do the job. They do not really see much lawyering. Even where poor service is rendered in their presence, judges routinely disassociate themselves from the task of supervision. Practicing lawyers know that frequent assertions by the courts (in defending licensure) that only licensed lawyers are subject to standards of behavior which are supervised by the judiciary, is

108. ABA Code of Professional Responsibility DR 6-101 states, inter alia, that a lawyer shall be subject to discipline for:

Failing to Act Competently.

(A) A lawyer shall not:

(1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.

(2) Handle a legal matter without preparation adequate in the circumstances.

It may be misconduct to not report observed misconduct (including incompetence) by another lawyer. The violation of any Disciplinary Rule is punishable misconduct under ABA Code of Professional Responsibility DR 1-102. DR 6-101 provides that lawyers must act competently, and DR 1-103 provides that lawyers shall report violations of Disciplinary Rules by other lawyers. The failure to report observed incompetence arguably subjects a lawyer (including a judge) to discipline. Here, as elsewhere in the Code, one problem is the difficulty of enforcing abstractions.

109. If the organized bar and courts really believed that "fitness and character" or "competence" were actually identified by the kind of inquiry presently made and by the examinations now required of applicants, it would be a simple administrative matter to require attorneys to regularly update their bar applications and it would be possible to have the membership periodically examined.
simple professional froth. Such language suggests that which is patently untrue, i.e., that the public may rely upon meaningful judicial supervision of the quality of legal services. There is no such supervision in any jurisdiction. Whatever theoretical obligation may be imposed upon or accepted by judges, they simply do not see enough of lawyering, much less actively monitor the quality of what they do see. Moreover, there is no evidence that judges are qualified to assess lawyering accurately.

The ultimate responsibility both for admission to practice and for the profession's self-enforcement of the Code of Professional Responsibility is vested in the state supreme courts. Exclusive judicial control over admissions and over discipline of lawyers is, where not incorporated into a constitutional provision, generally asserted to be inherent, and protected on the basis of a separation of governmental powers. These are powers ineptly exercised but jeal-

110. It [prohibiting unlicensed practice] is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe.

State v. Sperry, 140 So. 2d 587, 595 (Fla. 1962) (emphasis added).

111. Though no information concerning the in-public aspects of the practice of law is available, all of public advocacy is unlikely to represent as much as 25% of lawyering. See Rubin, supra note 40, at 578 & n.2.

112. Maddi reports that even among those judges who reported observing incompetent trial advocacy, 82% had never instituted disciplinary proceedings; of the remaining 18% who had done so, over half had done so only once. Maddi, supra note 41, at 129-30.


114. E.g., Fla. Const. art. V. § 2(a). The history of control over bar admissions in Florida contains one of those coincidences that may bemuse the social historian. Some form of licensing existed in Florida since the territorial act of August 12, 1822. From that time, with variations, authority was exercised concurrently by the legislature and supreme court. All graduates of state schools were admitted without examination after 1901. Sweat v. Painter, 339 U.S. 629 (1950) and McLaurin v. Oklahoma State Regents For Higher Educ., 339 U.S. 637 (1950) signaled the end of racially segregated professional schools in June 1950. By ch. 26655, 1951 Fla. Laws 341 (repealed 1955), the Florida Legislature abandoned to the supreme court its right to participate in bar admissions and simultaneously abolished the state's diploma privilege—effective 1953—the year that the newly legislated "Negro" law school at Florida Agricultural and Mechanical University was expected to graduate its first students.

115. See, e.g., Board of Comm'rs of Alabama State Bar v. State ex rel. Baxley, 324 So. 2d 266, 261-62 n.2 (Ala. 1976) (containing a list of jurisdictions exercising inherent control over bar admissions); In re Florida State Bar Ass'n, 40 So. 2d 902, 905-06 (Fla. 1949) (the judiciary has the inherent power to integrate the bar); Wallace v. Wallace, 166 S.E.2d 718,
ously guarded against legislative (i.e., public) intervention. It is only recently that the judiciary has exerted exclusive control over all lawyer conduct and lawyer licensing. The extension of judicial power to supervise nonforensic legal activities and to monitor representation before forums other than courts is recent, and also questionable. It raises perplexing questions of separation of powers. Despite this almost complete judicial occupation of the lawyering process, the courts have proved themselves clearly incapable of adequately monitoring the quality of services provided to the public.

The judicial power that now exists is exercised, almost without exception, in rulemaking and in final review of disciplinary matters initiated by the disabled and presented for decision, if at all, by the interested guild. Judicial rulemaking has some quality monitoring potential, but it is not so employed in practice. Generally the disciplinary process is abandoned by the courts to grievance committees of the bar. The committees operate on nothing much more limiting than the abstractions and homilies of the ABA Code of Professional

116. See, e.g., In re Florida State Bar Ass'n, 40 So. 2d 902 (Fla. 1949); In re Integration of Nebraska State Bar Ass'n., 275 N.W. 265 (Neb. 1937); R.J. Edwards, Inc. v. Hert, 504 P.2d 407 (Okla. 1972).

117. The regulation of admissions to the profession is quite distinct from the judicial power over discipline of practitioners. Admission is, absent specific controversy, not actually a judicial function at all; no real adjudication is involved. In most professions, control is maintained by legislative delegation of authority to a licensing board or committee (which may or may not become a captive of the regulated group). In law, the admission process has been delegated by the courts to an entity (usually held to be an administrative agency of the court itself) commonly identified as the Board of Bar Examiners. The membership of these boards is bar controlled; for example, in Florida, although the members of the Board of Bar Examiners are appointed by the supreme court, the appointments are made solely from a list of names submitted by the bar. Thus, eligibility is exclusively within the profession's determination. Furthermore, this delegation of power is accomplished without useful standards or any adequate informing process. The standard applied in Florida is a wistful abstraction, i.e., the Board "attempts to view the . . . whole person . . . ." to isolate "that degree of honesty, integrity and discretion that the public, and members of the bench and bar, have the right to demand of a lawyer, judged by contemporary professional standards." Florida Board of Bar Examiners, Application for Admission to the Florida Bar. The Florida Supreme Court has, in the context of legislative delegation, insisted that "objective guidelines and standards should appear expressly in the act or be within the realm of reasonable inference from the language of the act where a delegation of power is involved and especially so where the legislation contemplates a delegation of power to intrude into the privacy of citizens." Smith v. Portante, 212 So. 2d 298, 299 (Fla. 1968). Yet nothing approaching standards exists to govern the court's own agency in the exercise of its powers.

118. For example, it would appear questionable that the judiciary has the right to determine from whom the executive and legislative branches of government may receive legal advice; however, such an asserted right may be inferred from the Florida Bar's recent allegations that an unlicensed member of a state university law faculty was engaged in "unauthorized practice" for service as a legal resource person for the 1977 Constitution Revision Commission, an independent constitutional entity.
Responsibility and what slim common law development may have occurred. Court retention of the power of final review may preserve appearances, but judicial potency was lost when the agenda was relinquished. The power to initiate investigation and to charge attorneys with misconduct has been effectively surrendered, and courts see only what the bar finds distressing and reveals. The incidence of disciplinary proceedings directly initiated or actually reviewed by courts is so low as to be meaningless. Consequently, at neither of the two points of contact between the judiciary and the practicing bar, at neither the client representation level nor at the disciplinary level, is there real judicial contact, judicial knowledge, or significant judicial effect on the quality of legal services. The public interest in lawyer competence is not advanced by judicial assertions of quality control where no control in fact exists.

VIII. CONCLUSION

Consideration of entrance barriers to the practice of law—examination, character investigation, and licensure—together with lawyer self-discipline, suggests that these costly public processes are significantly unrelated to the maintenance of a level of competent services. The negative evidence seems conclusive. These mechanisms cannot be demonstrated to have more than a marginal and random efficacy in that regard. They do not, in sum, provide those public benefits which assertedly justify or compensate the public for imposition of their cost. The professional task remains, therefore, to determine why the community is to be taxed for the maintenance of these barrier systems. What public benefits, if any, result from these costly processes? A forthcoming article, to be published in a later issue of this Review, will present a theory of licensure which will attempt to answer these questions. An outline follows:

The efficacy of professional entrance examinations, of licensure, market control, and of self-discipline is in no manner dependent upon their real ability to determine, certify, or monitor the competence of those who practice the craft. Rather, their serviceability is dependent upon a widely held belief (shared by public and bar) that

119. Carlin reports, for example, that of the approximately 1,450 complaints made annually to the Association of the Bar of New York between 1951 and 1962, only about 19 ever reached the courts. J. CARLIN, supra note 81, at 151.

In some states, e.g., Florida, even standing to initiate complaints of "unauthorized practice of law" has been held an exclusive incident of the integrated state bar. The power is denied even to local associations of lawyers. Dade-Commonwealth Title Ins. Co. v. North Dade Bar Ass'n, 152 So. 2d 723 (Fla. 1963). See also Lathrop v. Donohue, 367 U.S. 820, 878 (1961) (Douglas, J., dissenting).
they do so. These barriers and mechanisms are components of the process of professionalization and are, in the main, ceremonial. The achievement and maintenance of professional status for an occupation is dependent upon wide public acceptance of and belief in the existence of a body of quasi-scientific information that is sufficiently arcane that it can be obtained only through special intelligence, long study, or both, and which is believed to be employed neutrally by the initiate in addressing important public matters. Widespread belief in the technical difficulty of the knowledge and in the public importance of its neutral use are essential characteristics without which professional status can neither be achieved nor maintained; if the belief is lost, the status can be lost. The ceremonies of examination, licensure, and discipline satisfy the need for assurance that practitioners possess a requisite amount of the special knowledge. Character and fitness certifications are public attestations that the initiate will employ that special information properly in the public interest. Self-discipline is significant not in its particulars, but in the public knowledge that it exists to address a recognized degree of error in initial choice—or the effects of changed circumstance. These functions, not valued for their ability to accomplish their formalized objectives, are valued for their definitional function. Consequently, to demonstrate that professional examinations, licensure, and discipline are incompetent to do the job publically assigned to them, i.e., to assure some minimum degree of professional competence, is not to demonstrate that they are without value; it is merely to suggest that function and value must be otherwise described. It is that function and those values which must then eventually be weighed against the costs they impose.