CURING LAWYERS' INCOMPETENCE:
PRIMUM NON NOCERE*

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We are living through a time of widely voiced concern within the legal profession over a perceived decline in the quality of advocacy. It is not a unique phenomenon; similar waves of discontent have rolled by in the past. Negative views of lawyers from outside the profession have been, of course, steady staples of our cultural heritage. Suspicion, mistrust, hostility, and fear of the legalist's wiles have been mixed for centuries with more appreciative sentiments—all earned or unearned in varying proportions from time to time. The focus of this paper, however, is on a mainly intraprofessional phenomenon—a view from within that lawyers are serving their clients and the courts less effectively than they should.

The thought is expressed, presumably with diverse motivations, at diverse points on the ideological spectrum. It is voiced by judges of our highest courts and by committees appointed to pursue their concerns. It is heard from people concerned for the poor and dis-

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* Primum Non Nocere (“First, do no harm”) is, of course, the traditional fundament for physicians. Its application is obvious, however, to anyone claiming to perceive, and offering to heal, the maladies of other people.


1. From times antedating the birth of the Republic, the pendulum has swung from strong antilawyer sentiment favoring easy admission to practice (or even abolition of the profession) over to emphasis upon the need for more rigorous training and licensure. See J. Hurst, THE GROWTH OF AMERICAN LAW 6, 250, 275, 277, 278 (1950); M. Bloomfield, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876, 32-34, 44, 46, 49-52, 84-85, 136-37 (1976); Wolkin, On Improving the Quality of Lawyering, 50 St. John's L. Rev. 523 (1978) [hereinafter cited as Wolkin].

advantaged, people who assert that lawyers available to, or afford-
able by, the unprivileged are "defective" in an appalling number of
cases. It is echoed by law students who complain that their studies
are too "abstract," insufficiently "clinical" to equip them sufficiently
soon for effective performance in the courtroom.

Malaise like this begets demands for reform; acute malaise calls
for speedy reform. Whether the swift cures are effective is another
question. Discerning that too many incumbent members are inade-
quate, an active school of therapy prescribes, or would prescribe,
particular courses of law school study as prerequisites for admission
of future applicants to the bar. Under important auspices, it has
been suggested we should move toward a separate, specialized ex-
amination for admission to practice in the federal courts. Compul-
sory post-admission legal education, with specified numbers of
hours to be clocked in attendance as an ostensible listener for con-
tinued good standing, emerges as a major growth industry. There
is an exhilarating sense that things are getting done. It is a time
for skepticism.

The skeptic's questions need not be stratagems designed only
to resist change at all costs. They should serve instead to increase
the probability that change will be beneficial rather than useless
or destructive. So it may be helpful to ask:

- What seems to be the problem?
- What is the nature and extent of the incompetence that
gives concern?
- How suited are the curative measures for the actual disorders?
- What are the side effects, if any?
- What may be the alternatives, if any?

These questions are approached, if by no means exhaustively an-
swered, in the following parts of this essay.

I. EVIDENCE AND PERCEPTIONS OF INCOMPETENCE

There are no objective measures or tests of lawyers' compet-

6. Occupationally warped or prejudiced, this writer deals mainly
with the problems and current debate touching the lawyer as advocate. But
the issues cut substantially across the profession. Inevitably, therefore, the
discussion will extend often beyond litigators, as in dealing, for example,
with general proposals for mandatory continuing legal education. See text
at notes 55-71 infra.
ence. Individual impressions collected in relatively casual conversations, reflecting unstated standards, are disparate to the verge of worthlessness. It may be that good advocacy is in this sense like hard core pornography and a variety of other things; that you can know it when you see it without being able to define it.7 The agonies and the idiocies of trying to regulate obscenity ought perhaps to suggest that we should act as seldom as possible on undefined and undefinable premises.

Definable or not, inferior advocacy is something that a number of august people have been claiming to see and worry about in recent years. Their perceptions and resulting prescriptions have become matters of wide concern. A notable starting point for this current wave of upset was a lecture by Chief Justice Burger reporting his “anxieties . . . concerning the quality of advocacy in our courts.”8 The Chief Justice illustrated the deficiencies he perceived as follows:

1. Insufficient skill in “the seemingly simple but actually difficult art of asking questions . . . .”

2. Failure to learn “really . . . the art of cross-examination, including the high art of when not to cross-examine.”

3. The tendency of inexperienced lawyers to “waste time making wooden objections to simple, acceptable questions, on uncontested factual matters.”

4. The tendency, again in inexperienced lawyers, to be “unaware that ‘inflammatory’ exhibits such as weapons or bloody clothes should not be exposed to jurors’ sight until they are offered in evidence.”

5. Wasteful development of immaterial facts.9

Somewhat more broadly, and perhaps on a somewhat different level, the Chief Justice deplored “the failure of lawyers to observe the rules of professional manners and professional etiquette that are essential for effective trial advocacy.”10

Directly after the Chief Justice spoke, another distinguished Chief, Judge Irving R. Kaufman of the Second Circuit, wrote in a similar vein. He told of a widely perceived “decline in the quality of advocacy at both the trial and appellate levels.”11 The reference to a “decline” seemed possibly to reflect a generational judgment.

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9. Id. at 234–35.
10. Id. at 235.
11. Kaufman, supra note 2, at 175.
The appearance was buttressed as the Chief Judge proceeded to refer repeatedly to the problems of inexperience of “very young lawyers” who are “newly admitted” to the bar.\textsuperscript{12} Chief Judge Kaufman summarized the defects sweepingly as “lack of experience, lack of competence, and lack of integrity.”\textsuperscript{13} When it came to more particular identification, he wrote that a portion of the bar appearing in his court does not know the rules of court, files “late and oversized briefs, without authorization of the court, . . . [submits] appendixes that ignore the Federal Rules of Appellate Procedure or the Second Circuit rules, . . . [and perpetrates] shoddy briefs or arguments, glaringly inadequate because of miscitations, misstatements of fact, and missed points.”\textsuperscript{14} The quoted list, it may be observed, records mainly sins either unpardonable in a paralegal or unexpected from a competent second-year law student. The point is worth remembering when we come later to some of the nostrums being proposed either as requirements for admission to the bar or as continued treatment for life after admission.

More chiefs and followers have been writing about the prevalence of incompetence and the need for treatment. To mention only one more here, Chief Judge Bazelon of the District of Columbia Circuit has written colorfully of “The Defective Assistance of Counsel.”\textsuperscript{15} Concerned primarily about indigent defendants in criminal cases, Judge Bazelon reports an estimate, which he presumably deems responsible, that if his “court were to reverse every case in which there was inadequate counsel, [they] would have to send back half the convictions in [his] jurisdiction.”\textsuperscript{16} One might wonder about the totality of a system of justice that produced such a monstrous (and largely uncorrected) rate of injustice. But Chief Judge Bazelon, like many others, found it sufficient to view the matter primarily in terms of “defective” lawyers. The defects he reported were for the preponderant part unlike the Chief Justice’s list in that they were not lapses in the skills. Also, they differed mostly from Chief Judge Kaufman’s, which related to slovenly use of the techniques. What Chief Judge Bazelon reported for the most part were fantastic examples of sloth, dishonesty, indifference, and seeming psychopathology—ranging from lawyers who neglect to see their clients or interview witnesses to one who abbreviated his sum-

\textsuperscript{12} Id. at 176-77.
\textsuperscript{13} Id. at 176.
\textsuperscript{14} Id.
\textsuperscript{15} Bazelon, supra note 3.
\textsuperscript{16} Id. at 22-23.
The three cited Chiefs may be enough to make an obvious point: those who diagnose "incompetence" differ markedly in their identification of its symptoms. The diversity is a problem of importance when it comes to prescribing remedies. More significantly, the charge of widespread incompetence is widely disputed. A large portion of the profession, in which I am here to be counted, questions much of the talk about incompetence and doubts the utility of the cures we hear touted. This different perception may be summarized briefly:

First, many of us do not share at all the idea that the state of the art of advocacy is notably low or a particular cause for concern in itself at this time. Of course advocates are imperfect. Of course the art and its practitioners could bear improvement. But that is banal and more or less beside the point. Everything and everybody can stand improvement. The question is as to the particular and current wave of viewing with alarm, and what it means, and how it happened, and where, if anywhere, we should allow ourselves to be swept by it.

Second, we do not share, and urge that we should all approach somewhat warily, the notion that the "young and inexperienced" are a special source of concern—or, indeed, any proper source of concern whatever in the present context. Recent generations of law graduates are probably the best we've ever had. Law schools by and large are better than ever. To be sure, lightning has flashed in recent times across the generation gap. Some younger people, like some older people, have behaved destructively and disruptively as members of the bar as well as in other professions. There is no doubt that this handful, seriously exaggerated in its supposed importance, has loomed large in the worries of the establishment about the "competence" of advocates. But that does not lessen the dubiety of assertions that our juniors, preponderantly industrious and conformist, justify large and novel worries about incompetence.

Third, and most importantly, I think it mostly wrong, and almost wholly irrelevant, to concentrate attention and worry on the essentially technical and even mechanical paraphernalia of the American advocate's courtroom tools—the asking of questions, the
making of objections, the accurate citation of cases, the knowledge of local court rules, and similar challenges neither large nor arcane. Again, one need not doubt the importance of these things or the room for improvement in them, given the existing system of practicing law and ostensibly pursuing justice.\textsuperscript{19} What is doubtful is that these aspects of lawyers' functioning warrant the diagnosis of "incompetence" in any vital sense of that conception. The lawyer who asks questions badly or is clumsy about objections is undoubtedly an aesthetic nuisance, or worse, for the working judge. But unless the judge himself behaves badly, such defects are not likely to affect ultimate outcomes. Even the high, probably overrated act of cross-examination is rarely a decisive factor in the adversary game. There are exceptions, to be sure. But in the big picture of what is good and bad about the management of lawsuits, most of us at work in courtrooms would have trouble recalling many instances when lapses of the kind so central for some critics have made or appeared to make a critical difference.

The significant qualities distinguishing good from bad lawyers—and, thus, the areas for truly major concern about "competence"—are matters of character, judgment, wisdom, morals, and attitude, not the business of technical proficiency. This is reflected in the perennial sentiments of our clients and in the relatively objective reports of cases about asserted incompetence, none of which are necessarily conclusive, but all of which are at least as impressive as the impressionistic musings of judges.

The familiar, and deeply troublesome, complaints of the laity rarely suggest that the lawyer is resented for clumsiness in the advocate's histrionic assignments. Through the ages, people have not reviled lawyers for being insufficiently expert. Often, the most bitter criticisms have been that the lawyers are too expert—and too often expert at the wrong things. The traditional complaints have centered not upon the lack of skill, but upon the lawyer's essential dishonesty in failing to perform his promise of faithful service in the client's interest. The prevalent charges have sounded in neglect (letting the statute of limitations run, failing to interview witnesses, omitting to research the law while knowing perfectly well how that work is done), or, worse, blatant treachery (striking swift plea and fee bargains rather than mounting a proper defense, overcharging, misrepresenting, or simply stealing the client's money). Whether well- or ill-founded, complaints like these are the common ones, not charges of technical "incompetence." Such

\textsuperscript{19. But see text at notes 75-82 infra.}
complaints should be, but too frequently have not been, our primary concern. For they are assertions that the lawyer as tradesman has been cheating the customer. The profound and essential grievance is that we have sinned against the commandment that we above all others are to seek justice.

There is some relatively objective evidence, in the volumes of law reports, that want of probity rather than of artistry is the advocate's main failing. A search through West's Decennial Digest for 1966-76 revealed at most 10% of malpractice complaints relating to litigation which could even arguably be read as alleging lack of technical proficiency, e.g., errors in assessing the substantive law or mistakes in trial tactics. The rest were cases of neglect or betrayal (failure to prosecute, allowing time limits to run, failure to note appeals, breach of attorney-client privilege, etc.). The charges of incompetence in criminal defense work are somewhat more supportive of the view that lack of technical skills may be a major concern. Searching 173 volumes of the Federal Reporter, 2d Series, for the decade beginning with Gideon's proclamation that everyone charged with a serious crime is entitled to counsel, we count 405 cases charging ineffective assistance of counsel. About eighty-seven, or 22%, alleged, if rarely successfully, things like failures to object to evidence, to make suppression motions, or to give accurate advice. These could suggest technical incompetence though the decisions, characteristically rejecting the defendants' claims, explain them almost always as permissible tactical choices. Again, however, a far larger percentage of the cases charge more characterological than technical defaults, sins of sloth, indifference, and infidelity, such as failure to interview or call witnesses, failure to note or perfect an appeal, conflicted representation, and even total absence during trial or other vital proceedings.

One further point worthy of note emerges from the criminal cases where clients charge incompetence of defense counsel—namely, the rarity of the cases in which the charges are sustained.

21. A number of these cases (54) allege actions by the trial court, police, or prosecutors (denial of access, insufficient time to prepare, inadequate discovery), which have the effect of denying effective assistance of counsel—a different problem from incompetence of the lawyer.
22. The researches for the paragraph just ended were performed by my law clerks, Jeanne E. Thelwell, Esq., and Robert A. Rosenfeld, Esq. For that and countless other favors, I am indebted to them. If the numbers and percentages are not exact to the last decimal point, the fault is not theirs. The task seemed not to warrant micrometric precision.
23. In the decade reviewed, 1963-1973, we found no case in the Second
If advocates are meaningfully incompetent, how can we leave their clients in jail? If the incompetence is not sufficient to invalidate criminal judgments, how large a concern is it? If we are not being hypocritical in allowing the convictions to stand, are we distorting when we charge that lawyers bumble on a large scale?

Passing such questions, which might be thought specially interesting in the Second Circuit, it seems fair to summarize at this stage by saying that the evidence of "incompetence," like its very definition, is vague and ambiguous. Impressionistic accounts, by judges and others, are diverse and conflicting. There is no consensus. There is certainly no persuasive demonstration that identified defects among advocates stem from causes that we either know or know how to cure. Still, the morbid propensity to promote compulsory remedies threatens to assume epidemic proportions.

II. SOME PROPOSED CURES AND THEIR COSTS

A number of remedies for the supposed failings of advocates (or of lawyers generally) are being urged and/or employed in one jurisdiction or another. I have selected three for criticism here. The grounds of the criticism have, it is hoped, some possibly general application.

Circuit setting aside a federal conviction for incompetent counsel; there was a total of two setting aside state convictions on habeas. Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972); United States ex rel. Maselli v. Reincke, 383 F.2d 129 (2d Cir. 1967). These small numbers, not dramatically different from those in other circuits, seem, at least superficially, to contrast with Chief Judge Kaufman's findings of widespread incompetence. The seeming incongruity is diminished, but not eliminated, when we recall that the effort to nullify a conviction for incompetence of counsel has been sustained by the Second Circuit only where the complainant could show ineffectiveness "of such a kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." United States ex rel. Boucher v. Reincke, 341 F.2d 977, 982 (2d Cir. 1965) (quoting United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950)). That standard, less hospitable to charges of incompetence than the criteria of several other circuits, United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973); Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968); Moore v. United States, 432 F.2d 730 (3d Cir. 1970), may be in process of liberalization. See Rickenbacker v. The Warden, Auburn Correctional Facility, 550 F.2d 62, 65-66 (2d Cir. 1976); id. at 67 (Oakes, J., dissenting). It is, in any event, not a standard we would cheerfully accept as sufficient for complacency about the performance of counsel.

24. In keeping this paper to manageable proportions, I have been more or less selective in two dimensions. First, I have attended mostly to the debate about asserted incompetence among advocates. Somewhat inconsistently, the proposal for mandatory continued legal education (CLE) is considered (infra notes 55-71) though it relates, of course, to the whole of the profession, Second, in talking about only three kinds of proposals—
A. Educational Prerequisites to Membership in the Bar

When Chief Judge Kaufman concluded that too many advocates were deficient, he did not stop with mere talk. Characteristically energetic, he created a distinguished committee "to examine the problem and make appropriate recommendations for the federal courts of the Second Circuit." Known for its Chairman, Robert L. Clare, Jr., Esq., the Clare Committee was, in a word lately become invidious, of the Establishment; almost all of its members were post-youth, non-minority, successful, established. The Committee proceeded to interview some forty district judges in the circuit. If the interviews had any precise structure or organization, it was not reported. What was reported was a striking diversity of views; according to the Committee, the judges in my district are said to have estimated percentages "of lawyers criticized for lack of training [that] ranged from 15% to 75%." Even that vague account is debatable. Other districts in the circuit were said to have reported lower figures, approaching zero. Cited as "the most startling testimony" the Committee received was the statement of a former U.S. Attorney for Connecticut who stated that of the last twelve cases he tried as U.S. Attorney he was of the opinion that one-half of the defendants were convicted because of incompetency of their counsel. This so shocked him that he resigned his office to become the first head of the Connecticut Criminal Defense Committee.

It is perhaps notable, if understandable, that no one on the Committee appears to have asked about the reasons why that prosecutor evidently overlooked that "his duty is to seek justice, not merely to convict." The treatment of other "evidence," or the absence of evidence, was similarly straitened in its perspective. The Committee acknowledged that it had "no evidence that the direct cause of the criticism is lack of knowledge of the subject matters . . . ." Lacking such evidence about what caused the criticism, and cer-

26. See Final Report, supra note 2, at 162.
27. Id. at 164.
28. The reports of interviews were not published. However, several judges, including me, deny the report that they estimated anything as high as the stated bottom figure of 15% of lawyers "criticized for lack of training. . . ." Id.
29. Id. at 166.
31. Final Report, supra note 2, at 177.
tainly lacking knowledge about what caused the asserted defects in the lawyers being criticized, the Committee proceeded to rest a "finding" upon its interviews with the forty judges. It said it "finds there is a lack of competency in trial advocacy in the Federal Courts . . . directly attributable to the lack of legal training" (emphasis added).\textsuperscript{82} If anybody needs an example of a "finding" unsupported by competent evidence, the quoted one will do. But that was the rhetorical rock upon which the Committee built its key recommendation, namely, that the federal district courts adopt rules requiring applicants for admission to have taken courses in evidence; civil procedure, including federal jurisdiction, practice and procedure; criminal law and procedure; professional responsibility; and trial advocacy.\textsuperscript{83} The proposed rule would not in terms require completion of the courses in law school; they could be taken later or be waived for applicants who demonstrated to a Committee on Admissions that they "met the standards or requirements prescribed and deemed equivalent by the Committee. . . ."\textsuperscript{34} As a practical matter, however, few students would be disposed to risk the uncertain or postponed options; the impact of the proposal would surely be upon the law schools graduating students who knew or believed it possible that fate meant for them a life in the Second Circuit.

The Clare Committee's recommendations generated spirited debate, first within the Second Circuit, then spreading across the land. Within the circuit, the trial judges, whose views the Committee purported to reflect, displayed less enthusiasm than might have been expected. The larger districts considered and rejected the proposed admissions rule. The District of Vermont, whose two judges were said to have opined they detected a "perhaps 15%" incompetence rate at their existing bar,\textsuperscript{85} adopted the new requirements for future admissions. The Northern District of New York, where another two judges evidently deemed their bar adequate,\textsuperscript{86} has done likewise. Whatever reasons counseled the two small districts to do this have not—not yet at least—seemed persuasive to the others. And that is, I think, to their (our) credit.

\textsuperscript{32} Id. at 164.
\textsuperscript{33} Id. at 168, 188. Additional and alternative requirements were also recommended. In the Report itself and in the ensuing debate about it these have played an understandably minor part. It seems unnecessary to consider them here.
\textsuperscript{34} Id. at 188.
\textsuperscript{35} Id." at 165.
\textsuperscript{36} Id.
As against the dubious evidence for it, the arguments against
the "Clare Cure," as two hostile critics dubbed it, are numerous and powerful. Expectably in the forefront of the opposition has been an overwhelming majority of the academicians, upon whom the impact would be direct and potentially substantial. The major complaint is, of course, against the inroad upon academic freedom to design curriculum and determine the appropriate scope of student choice. This is no routine or automatic response; the law schools have not sought characteristically to have any wall of separation between themselves and the working profession. On the contrary, steadily embracing the training of practitioners as their primary mission, law teachers have a substantial history of willing collaboration with the bar for effective pursuit of that shared interest. The powerful resistance in this specific instance rests, very simply, on the proposition that free choice by students, curriculum control by the scholars, and continued experimentation are values to be overridden only when solid evidence supports an imposed uniformity.

The call to arms is strengthened by (1) evidences that Clare may be only an entering wedge and (2) a threat of pressures in which some have detected traces of philistinism. As for the first, Mr. Clare's Committee itself had found "desirability" in a list of eighteen courses, settling for the shorter list (perhaps for the time being) as seemingly indispensable. And if the danger of more

37. Pedrick & Frank, Questioning the Clare Cure, TRIAL, March 1976, at 47.
38. For a sampling of this opposition, see, e.g., Association of American Law Schools, Report on the Clare Committee Proposal . . . (1976); Pedrick & Frank, supra note 37; Sovern, A Better Prepared Bar—The Wrong Approach, 50 St. John's L. Rev. 473 (1976); Weinstein, Proper and Improper Interactions Between Bench and Law Schools: Law Student Practice, Law Student Clerkships, and Rules for Admission to the Federal Bar, 50 St. John's L. Rev. 441, 442 (1976) [hereinafter cited as Weinstein]. A few scholars, including one or two of those on the Clare Committee, have supported the Clare proposals, but research discloses no published view of this nature.
39. Legal education was a prime interest of those who organized the American Bar Association, which in turn gave birth in 1900 to the Association of American Law Schools. J. Hunsz, supra note 1, at 272, 362. There has been tension, to be sure, between the academicians and the practitioners, but usually of a "creative rather than a destructive" nature. Allen, The Prospects of University Law Training, 63 A.B.A.J. 346, 347 (1977) [hereinafter cited as Allen]. Indeed, critics have been heard to suggest that the law schools have too often been excessively allied with the "power elite" of the professional and business community. See J. Auerbach, Unequal Justice 27-28 (1976).
40. Final Report, supra note 2, at 168.
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later seems chimerical, Indiana proved its reality even before the Clare Report. That state, seemingly with no more basis than the Clare Committee, has prescribed by Supreme Court Rule a total of fifty-four semester hours in fourteen subject matter areas as prerequisites to bar admission.\(^{41}\) As for the second concern, the Clare Report must have jangled many a scholarly nerve when it sneered at law schools’ protests over the costs of teaching trial advocacy while “at the same time they apparently have no difficulty in funding courses in such subjects as ‘Urban Development’, ‘Macro-economics and the Law’, and ‘Psychoanalysis and the Law’ (defined as a ‘Study of the theory of psychoanalysis and its relevance (if any) to the law’).”\(^{42}\) Expressions like these illustrate the grounds for the concern recently voiced by a great legal scholar that there is among the criticisms of the legal academy “the rise of a new anti-intellectualism,” and a decline of “the tolerance and mutual forbearance on which the American system of legal education is founded and on which its prior achievements are based. . . .”\(^{43}\)

Nobody doubts that evidence and procedure, clinical training in advocacy, or the other required courses are likely to be valuable. It is generally acknowledged in fact that a preponderant majority of students elect these courses already, without formal compulsion. What is opposed is the unsupported premise that completion of these courses correlates so meaningfully with effectiveness at the bar that all must conform to the mold. The law teacher as faculty advisor may well recommend the evidence course and a clinical trial seminar to the aspiring advocate. He resists, on the most cogent of intellectual and historical grounds, the idea that he must order such a program for the student who would somehow prefer an extra course in Roman law and another seminar in jurisprudence, planning to cover evidence and trial practice in an unpaid, noncredit summer with a respected and scholarly trial lawyer. If John M. Harlan could manage with only an Oxford degree,\(^{44}\) and Robert

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41. The only published analysis of the Indiana Rule concludes, on seemingly persuasive grounds, that the requirements are not effective for their supposed purpose of promoting or ensuring competence. Cutright, Cutright & Boshkoff, Course Selection, Student Characteristics and Bar Examination Performance: The Indiana University Law School Experience, 27 J. LEGAL ED. 127 (1975).
42. Final Report, supra note 2, at 169.
43. Allen, supra note 39 at 346, 347.
44. Mr. Justice Harlan, remembered as an outstanding advocate, pursued “a thoroughly unpractical course” at Oxford, earning honors in jurisprudence, and had no American law school training at all beyond some courses at the New York Law School taken after beginning work at a law
H. Jackson with no law degree at all, who knows for sure that the Clare formula is universally sound? And, given the doubts, why the hasty and universal imposition?

Concluding this subject for the time being, it may be appropriate to note that the debates over the Clare Report and other factors mentioned earlier led to the appointment in September 1976, pursuant to a Federal Judicial Conference resolution, of a twenty-four member Special Committee of national scope “to study suggested rules for admission to practice in the federal district courts.”

Chairied by Chief Judge Edward J. Devitt of Minnesota, the Committee includes Mr. Clare, other distinguished lawyers, a possibly excessive number (five) of law school deans, a law professor simpliciter, and twelve of the federal judges for whose courts the Committee’s inquiries were launched. The Committee has determined to study its subject thoroughly before announcing conclusions and drafting rules (if any prove necessary). An impressive program of research, public hearings, and other investigations has been designed in collaboration with staff of the Federal Judicial Center. There is a stated, and plainly salutary, purpose to seek the pertinent information, attempt the difficult definitions, and seek a balanced array of opinions, not merely from judges, but also from the lawyers whose performances and professional lives are in question. There is reason to hope that the Committee’s judgments and recommendations will reflect the deliberate prudence with which the enterprise has been launched.

B. The Proposed Federal Bar Examination

Despite the absence of agreement on how to identify, let alone create, effective advocates, there is substantial sentiment for the position that we can administer a test to assess lawyers’ “over-all firm. Wood, John M. Harlan, As Seen by a Colleague in the Practice of Law, 85 Harv. L. Rev. 377 (1972).

45. Mr. Justice Frankfurter wrote in memory of Mr. Justice Jackson, in a Foreword to a memorial issue of the Columbia Law Review:

The depth and versatility of his culture shamed many of us who have had what is called the advantages of a higher education. He did not go beyond high school, and he was one of the last, as he was by far one of the very best, of office-trained lawyers. No matter how good the Albany Law School may have been in his day, one year at any law school affords a meager systematic legal training.


47. Id. at 475.
capacity to represent clients effectively in federal courts, that is, their over-all competence as advocates." The quoted proponent of a federal bar examination, a distinguished appellate judge, starts with the proposition that there exists an "inability of a startling percentage of lawyers to try a lawsuit." Noting that the bar of a federal court is strictly a litigating bar, and pointing out that there are extensive bodies of federal substantive and procedural rules, Judge Wilkey finds it unacceptable that people are generally admitted to the federal courts with no examination in these specialties.

It may be that advocates in the federal courts are incompetent because of ignorance in the fields of law to which Judge Wilkey refers. If that is a fact, it remains to be demonstrated. What is farther from being established is the premise that an examination can be devised that will effectively and fairly discriminate between those expectably adequate and those likely to be incompetent at the federal bar. There is, to put the point more positively, not the slightest published evidence that more pencil-and-paper examinations will help predict courtroom performance. Indeed, for those who find incompetence prevalent, the utility of bar examinations has to be suspect. After all, with rare exceptions, the incumbent incompetents passed the same examinations as those taken by their acceptable colleagues.

The dubious validity of many examinations ties to another, deeper concern: the danger of erecting new barriers that will work unequally against people already disadvantaged and underrepresented. Whatever may have grounded a sometime belief in our ability to test for all manner of things—including "over-all capacity to represent clients effectively"—that is no longer an easy or a universal faith. It has become evident that many of our tests even for relatively simple abilities have been invalid: that they did not test for what they purported to measure. It has been adjudged, and even more widely believed, that the tests served in reality, and were probably intended, as devices for fencing out disfavored minorities.

Existing bar examinations have been and are substantial

49. Id.
50. Id. Two federal district courts, the Southern District of Ohio and the Western District of Texas, have been requiring successful completion of a written examination as a requisite for admission. The Ohio practice approaches a half-century in age. There appear to be no published accounts or data suggesting the efficacy of these tests.
51. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v.
targets of such attacks by people who assert denials of their federal constitutional rights to due process and equal protection.\textsuperscript{52} As the cited cases reflect, the attacks have not thus far been successful. And it may be assumed that the charges of invidious discrimination have not been well founded. The fact remains that minority group members flunk bar examinations in disproportionately high numbers.\textsuperscript{53} Whatever the law may come to be in this troubled quarter,\textsuperscript{44} examinations are understandably perceived as helping to perpetuate intolerable disadvantages.

If for no other reason, this is the worst of times to emplace still another examination. The burden and the resentments could be borne, of course, were there a showing of need and a reasonable prospect that the examination would meet the need. But the evidence is nonexistent on both counts. I yield to few people in my reverent affection for 28 U.S.C., 18 U.S.C., Fed. R. Civ. P., and the other texts sacred in the federal courts. But after a dozen years sitting in one such court, after many prior years of standing in them, after seeing and doing my fair share of imperfect lawyering and imperfect judging, I am unconvinced that the significant defects are preventable by any species of test we are likely to see devised.

C. Mandatory Continuing Legal "Education"

Some ideas, though their times have come, remain poor ones. Phlogiston, however many imaginations it fired, was not useful. A current rage for compulsory course-taking by lawyers is not equally

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\item See, e.g., Tyler v. Vickery, 517 F.2d at 1092; Parrish v. Board of Comm'rs, 533 F.2d at 944; Report of the Philadelphia Bar Association, 44 TEMP. L.Q., supra note 52, at 172.
\item Washington v. Davis, 426 U.S. 229 (1976), upheld a reading comprehension test for applicants for the District of Columbia police force although the failure rate for blacks was four times that of whites. The case seems to stand clearly enough for the proposition that "a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is [not] unconstitutional solely because it has a racially disproportion-
\end{itemize}
fallacious. I think, however, it is a mostly vain and inglorious thing.

Minnesota led the way by installing a mandatory program of continuing legal education (CLE) in April, 1975. Its thoughtful Chief Justice has described and extolled the program from the very platform where Chief Justice Burger had sounded the call for better advocacy. Iowa, Wisconsin, and Washington have followed. It appears that Nebraska may be about to join. There is the rumble of a bandwagon. It may pass away; but it will leave rubble in the form of misconceived rules easier to enact than to repeal.

The idea is fairly simple. All members of the bar are required, as a condition of continued good standing, to take a prescribed number of hours of professional courses during a stated period. The prototype Minnesota rule requires completion of forty-five hours of "postgraduate legal education," so-called, every three years. A Board of Continuing Legal Education accredits courses, grants waivers, and adjudicates issues not uniformly grand in dimension.

The core of the enterprise is the fifteen fungible hours during which everybody must be educated in something, no matter what. Tax lawyers, depending on the season and the location, may study riparian rights while negligence lawyers are learning about antitrust. Listening is not compulsory. The successful grade is "present." The sponsors of the requirement proceed on the undoubtedly sound premise that lawyers and judges, if they must attend, will, with relatively few exceptions, attend to what is taught. Opponents of the idea may suppose, as I do, that the great majority, those who will pay attention, should not be subjected to the childish and superfluous discipline of recording forty-five hours every three years from among the hundreds every decent lawyer or judge must spend in one form or another of genuine continued education.

It should go without saying that any lawyer or judge entitled

55. Sheran & Harmon, Minnesota Plan: Mandatory Continuing Legal Education for Lawyers and Judges As a Condition For the Maintaining of Professional Licensing, 44 FORDHAM L. REV. 1081 (1976) [hereinafter cited as Sheran & Harmon].

56. Id.

57. See text at note 67 infra.
to a place among us is by definition a lifelong student. Continuing education has been always a central attraction, more than a burden, in the way we have chosen to live. Well after the twenty or so prescribed years of formal school, we go on studying in our several ways. The Learned Hands and the Clarence Darrows among us have not been found so much in organized "courses." But they, with the thousands less acclaimed, have carried through the years the stuffed weekend briefcases, have been the notorious shoptalkers, have gone back for intensive private schooling with endless regularity as new cases, clients, issues, and challenges have come their way. As the volume and complexity of the law have grown, voluntary programs of organized course work have made continuing legal education a rapidly expanding activity. The Practising (sic) Law Institute, the American Law Institute-American Bar Association program, plus uncounted law school, bar association, and private programs have been growing rapidly.\(^5\)

Why, then, the strong pressure and movement toward mandatory CLE? A good statement of the position comes from the above-cited essay Minnesota's Chief Justice co-authored with the State's Director of Continuing Legal Education. With candor, and without undue puffing, they explain the requirement of compulsory graduate work on the following grounds:

1. Conscientious lawyers and judges do such work in any event.\(^6\)

2. The existence of "strong voluntary CLE Programs for both attorneys and judges" was a consideration favoring the mandatory arrangement.\(^7\)

3. Rapid expansion and change in the law require it.\(^8\)

4. Legislatures and other groups grow restive about professional incompetence; the pressures of "consumerism" and Watergate require us to impose self-regulation lest worse things be imposed upon us.\(^9\)

With deference, the points seem unpersuasive. The first two arguments—about what conscientious people do without compul-

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58. Sheran & Harmon, supra note 55, at 1086. For a general discussion of the historical background of voluntary CLE programs leading to mandatory programs, see Friday, Continuing Legal Education: Historical Background, Recent Developments, and the Future, 50 St. John's L. Rev. 502 (1976) and Wolkin, supra note 1, at 543-44.
59. Sheran & Harmon, supra note 55, at 1082.
60. Id. at 1086.
61. Id. at 1082-83.
62. Id. at 1083, 1086-87, 1094.
sion—are not arguments for compulsion at all. As to those who are not conscientious, nobody has adduced the slightest reason to believe that inadequate service by lawyers and judges would or will be improved by fifteen hours a year of presence at miscellaneous lectures of some sort or other. All agree that competent professionals don't need the compulsion; the thought that incompetents will benefit is so improbable on its face as to make the across-the-board command a fantastic species of overkill. To be sure, some will take courses they would not have taken, and some will learn something. The price, however, is unacceptable.

As recognized by Chief Justice Sheran and his co-author, the kind of profession-wide compulsion effected by the Minnesota rule ought to be accepted only upon a powerful showing of need. They also recognized the want of experience or other evidence to make the showing. What comes through powerfully in the end, as these and other authors repeatedly reveal, is the sense of those “consumers” and other outsiders breathing down our necks, so that it is imperative to do something. That, I suggest, is an unworthy basis for any decision of consequence by a profession that seeks the respect for which self-respect is indispensable. It is, moreover, a mode of supposed self-defense that will leave us in the end less defensible than we were before.

If, as I believe, the solid causes of post-Watergate consumer upset are not seriously touched by mandatory CLE, we deceive the clientele as well as ourselves in proclaiming that self-regimentation of this kind will mean something substantial. We may distract the public and ourselves for a while. We will divert energies better directed to the real concerns. Like other ineffectual cures, this will do positive harm insofar as it postpones or prevents the search for effective measures. And it will diminish our credibility by raising and disappointing unfounded hopes.

Subjecting ourselves to a trivial regimen of fifteen compulsory hours of any old thing will diminish us in our aspiration to be, or to become, a worthy public profession. It does not appear that the proponents of mandatory CLE have looked elsewhere for instances of leading certified professional horses to fountains of learning. An analogy they or we might notice is the long-standing, little admired history of more or less compulsory “in-service training” among elementary and high school teachers. While the literature

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63. *Id.* at 1087.
64. *Id.* at 1095.
on that practice is not immense, many of us have reason to know it was among the things that kept teachers for too long subject to others' condescension and their own self-deprecation. A distinguished observer of the schools caused no surprises when he noted how commonly the graduate courses “taken” as requirements for professional standing or promotion were chosen upon such profound criteria as hour or season, were often as unrelated to the teacher's work as will be courses in patent law for real estate lawyers (e.g., driver’s education for teachers of German), were approached with correspondingly thin motivation, and were productive of little if any additions to wisdom or professional competence.65

Many of us, before law school ended, found ourselves chafing under the constraints of required attendance. There has been wide debate concerning the utility of the third year of law school. The importance of motivation for learning, even among the young and malleable, is familiar.66 The inauguration of fifteen compulsory hours, to be dutifully recorded and checked by lawyers and judges of all ages, promises in its very triviality to lessen us all. The pettiness is reflected in the administrative concerns that engaged the Minnesota Board of Continuing Legal Education during the first year of its functioning. The questions reported by the Board's Chairman were:

-How do you score courses given for legals and nonlegals—e.g., combined cerebration about court administration and court architecture? Do the whole days count or only fractions?
-Why should there be no credit for luncheon and dinner lectures? And if food for thought can be counted with meals, does a preliminary cocktail wash that out?
-“How long is an hour?” (Sic.) Does it require a whole sixty minutes, or does scholarship get clocked on a more lenient schedule?
-Should the teachers receive prescribed credit for preparation or the actual hours they report for that?

66. Plato’s wisdom on this point remains apt, especially for adult professionals who have completed many years of required schooling:

. . . [A] freeman ought not to be a slave in the acquisition of knowledge of any kind. Bodily exercise, when compulsory, does no harm to the body; but knowledge which is acquired under compulsion obtains no hold on the mind.


67. Byron, Mandatory Continuing Legal Education in Minnesota: The First Year, 50 St. John’s L. Rev. 512, 516-17 (1976).
It may be wondered whether trivia like these, inherent in the nature of the enterprise, manifest the occurrence of genuine learning in a learned profession. Perhaps, though it seems grubby, it will be good for us after all. But that is at least a matter for grave doubt in the present state of the record.

If the Minnesota experience is still too brief for final evaluations, it should certainly give pause to other states contemplating similar programs of compulsory presence at educational happenings. I would urge as a minimum position the stance announced after an ABA-sponsored National Conference on Continuing Legal Education held November 10-12, 1975. The Final Statement of the Conference included this passage:

A majority of the conference participants are of the view that the case for mandatory programs is not sufficiently persuasive to support a recommendation that all states now adopt them. We believe that there are unanswered questions concerning the specific relationship between required programs of continuing legal education and the quality of legal service.\(^6\)

In urging at least a similar reservation of judgment, I am aware that my Nebraska hosts have been participating of late in a burgeoning program of seemingly impressive seminars under the auspices of Nebraska Continuing Legal Education, Inc. I am also aware that the Nebraska Supreme Court has under advisement a Rule approved by the State Bar Association that would install mandatory CLE.\(^6\) I would hope that good intentions render it permissible for an outsider to join the substantial number, though a minority, of Nebraska lawyers who voted against the Rule.\(^7\) The plurality in favor is by no means so large, and the minority against by no means so small, as to support resoundingly the acceptance of dubious burdens that will not easily be shed.\(^7\)

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69. The awareness comes, like prior items of learning and wisdom, from my distinguished friend Robert J. Kutak, Esq., whom I am delighted to thank once again. While I have used Mr. Kutak’s information about Nebraska developments, I have refrained from soliciting his views on mandatory CLE. Once this essay is loosed, however, I look forward to conversing, and very possibly disagreeing, with him about it.

70. The tally, Nebraskans will know, showed that the Bar Association’s ballot on the mandatory CLE program went to the 2,756 active members, that 1,759 (64%) ballots were returned, that 1,030 (39%) voted for and 679 (25%) against.

71. “Educational nostrums, like chemical medications, require careful preliminary testing before they can be safely prescribed.” Allen, supra note 39, at 350.
III. CONCERNING FREEDOM AND AN ALTERNATIVE DIAGNOSIS

The steadily negative positions thus far pressed in this paper have been aimed eventually toward some positive positions and thoughts: (1) the defense of a free profession against unjustified compulsions and restrictions; (2) the support of experiment and diversity in the pursuit of professional excellence; and, eventually, (3) the thesis that problems of "competence" are only superficial manifestations of disorders that run deeper and require more profound diagnosis.

A. FOR VOLUNTARISM AND DIVERSITY

Repetitiously, but to avoid the possibility of misunderstanding, I acknowledge the probable utility of the courses favored by the Clare Committee, of continuing legal education in many of its manifestations, and of still other devices for preparing and improving us to seek justice. My main point until now has been to oppose narrow and inflexible formulae for competence to be forced upon everyone in the profession without regard to individual need, temper, or preference. The main objection to the proposed commands is the absence of convincing evidence that the benefits can justify the cost in lost autonomy, time, money, and professional integrity.

The profession is, after all, enormously diverse. The talents of good lawyers are various. The cultivation of such talents is the work of whole lives, not a matter of paltry course requirements or new licensing tests. Especially for the advocate, the practice of law is an art, truly a performing art. The style and strategy of asking questions, the tactics of cross-examination, the intellectual and emotional mastery of techniques of persuasion, the uses of voice, stance, gait, gesture, and the countless subtle tricks and gadgets of the forensic arena—all comprise an ineffable and infinitely variable ensemble that defies reduction to formula, uniformity, mechanical acquisition, or replication.72

72. An illustrious member of the Clare Committee, Judge Simon H. Rifkind, whose services to the community have multiplied since he graced the court on which I sit, has given a more eloquent description. He has said that a great lawyer must first be a great man who has tasted the intellectual and aesthetic wines of our civilization. That is never the product of any course offering. And for the rest, no school can endow a student with prodigious appetite for work, equip him with enormous endurance, make him the beneficiary of a keen mind,
The paths to professional excellence are and must be multifarious. The effective lawyer or judge, as we must all know, is compounded of concern, wisdom, energy, and judgment, not prescribed hours of training or other mechanical accomplishments. The several proposals now being pressed for narrow and compelled conformities are largely beside the point. Not that lawyers and judges don't need all the education they can get. We do, and we tend in numbers to demonstrate an awareness of the need. What is not shown to be needed is some particular species of universal gimmick for the promotion of competence. And it is not unfair, I submit, to label as gimmicks the narrow-gauged, partial, inflexible prescription of courses or attendance hours as conditions of admission or continued good standing.

Having said that, I would urge all law students to consider the thoughts of the Clare Committee as potentially sound advice for curriculum choices. Likewise, continuing education is a good idea for all of us—lawyers, judges, and teachers. The expanding opportunities for such education are among the most notable features of today's professional landscape.

Varieties of other ideas for improvement merit exploration and experimentation. The judges, while many complain about the advocates, have done little to lead or participate in the education of their bars for what may be deemed acceptable performance. As my imaginative colleague, Jack Weinstein, has noted, we have barely begun to experiment with the idea of student practitioners in the courts.\(^7\) Our profession has not yet explored seriously the device of peer review as a means for detecting and correcting incompetent performance of legal services (which is not to endorse the idea, only to favor its study).

There are many ways, known and yet to be devised, to approach improvement in advocacy as well as other aspects of the profession.\(^7\) Without trying to be exhaustive, I add a final illustration.

quick perception, elephantine memory, instant retrieval capacity and the uncanny perception of human motivation and behavior. Nor can it bestow upon him the gift of tongues, commanding presence and good voice. There have not been many lawyers so gifted; but then, we have not had many Leonardo da Vincis; that has not deprived the race of a flourishing art.

Remarks at the Judicial Conference of the Second Circuit, September, 1975, pp. 10-11. Judge Rifkind noted that the Clare Rules would not be for the "great trial lawyers," but that it would not "obstruct their creation." On that much there is agreement.

\(^7\) Weinstein, supra note 38, at 442-44.

\(^7\) Recommending against further programs of mandatory CLE, at
It would be useful to revisit and reformulate the idea of apprenticeships or clerkships as an attractive means of giving early experience to new members of the profession. We should perceive as meaningful the fact that while many complaints about incompetence emanate from Wall Street lawyers, the complaints are not about Wall Street lawyers. Wall Street (a New Yorker's provincial term for the legal elite) not only selects its young; it trains them. For those not so selected (or, similarly, privileged to serve in prosecutors' offices, other government agencies, legal aid offices, or comparable training places), the benefits of a rigorous apprenticeship, at decent pay, are likely to be unavailable. "Clerkships" of one kind or another have existed in the past, sometimes as mandatory requirements for admission to the bar. Too often, however, these forms of experience served less as educational opportunities for the young than as exploitative devices for their elders. The profession could usefully consider anew the thought of enlisting its members to share in the creation and support of fruitful internships for those who cannot now obtain them.

Without certainty as to what competence is or how it is achieved, we should continue to encourage variety and experimentation, not stifle creativity with small-minded specifications. The law schools should certainly be left free to experiment and adapt, as they have done creditably until now. If someone finds the sure route to competence, whether in pre- or post-admission devices or both, the academy will not delay long in following it. If, as I persist in believing, there is no single or final formula, the

least for the time being, the 1975 Conference on Continuing Legal Education said:

We urge the organized bar in each state to study closely the results of the mandatory programs now being initiated as well as other means by which the quality of legal services available to all can be improved. In addition to mandatory continuing legal education, conference participants were made aware of a number of additional possibilities that may serve this end: various forms of specialization arrangements for providing potential clients with additional information about lawyers and legal services; increased inducements (including improved programs) for voluntary participation in continuing legal education, perhaps combined with appropriate recognition of that participation for the benefit of potential clients; peer review, self-assessment programs, and prescribed remedial educational programs for lawyers found deficient; expanded use of disciplinary procedures; and intensified efforts to improve the quality and coverage of continuing legal education courses and materials relating to the legal problems faced by middle- and low-income persons.

values of choice and diversity ought to be left as unfettered as possible.

B. THE DEEPER CONCERN: RATIONING COMPETENCE, RATIONING JUSTICE

The debate about competence tends usually to start from seeming agreement that there is some minimal measure of effectiveness below which representation is inadequate, but above which the professional task is supposedly getting done. The premise is of doubtful validity.

We know of course that lawyers vary in competence. It is commonly believed and asserted by people in a position to know that a litigant's success is dependent upon the relative skill of his lawyer.75 It is intrinsic to our economy and our polity, subject, like everything, to exceptions, that the people with the largest bankrolls tend regularly to have the best lawyers. The best lawyers tend to go where the expected incomes are greatest. The Wall Street star, earning $200,000 or $300,000 a year (or much more, or, occasionally, less) is pitted regularly against adversaries with a modest fraction of his income. The indigent defendant in my courtroom asks from time to time to have Edward Bennett Williams as assigned counsel, but is required almost always to settle for someone less notable.76

Learned Hand said: "Thou shalt not ration justice."77 We all feel better for his having said that. But the commandment, like

75. See, e.g., Bell, Do Bar Examinations Serve a Useful Purpose?, 57 A.B.A.J. 1215, 1216 (1971):
I have been both a practicing lawyer and a trial judge and I know that it can be predicted almost without exception that in any given case, where there is a legitimate controversy, the better prepared lawyer will prevail.

See also Tauro, Graduate Law School Training in Trial Advocacy, 56 B.U.L. Rev. 635, 642-43 (1976).

There is currently one major roadblock, however, to the continued viability of public interest law: lack of adequate and stable sources of funding.

The funding of public interest law centers has increased steadily as their accomplishments have become known, growing from $25.8 million in 1972 to $40.1 million in 1975. Their resources, however, are still far from adequate—indeed, meager in comparison to those of the private bar. The $40.1 million attracted by public interest law centers in 1975, for example, is roughly equal to the annual billings of but two of the largest Wall Street corporate law firms. According to the Bureau of the Census, the gross receipts of the private bar in 1972 alone were $10.8 billion.

77. 9 LEGAL AID BRIEF CASE 5 (1951).
others, is not self-enforcing, and it has been far from uniformly heeded. We ration competence and we ration justice. We do that because the system places the administration of justice—the formulation of programs, the negotiation of contracts, the outcome of lawsuits—very largely in the hands of private advocates. Their commission is to prevail, not to seek what a detached observer might view as justice. There are, to be sure, impartial umpires (judges) for some of the competitions. But these passive arbiters receive what is given to them, neither exploring on their own nor otherwise learning what the advocates choose to withhold or fail to discover. And that, to reiterate a key point, is why it is observed that “[i]n the ideal adversary system, the least skillful antagonist is expected to lose the dispute.”

The vital role of the lawyer, at once as entrepreneur and as the lead player in the justice drama, accounts in substantial part for the fear and distrust in public attitudes toward the profession. Believing they get what they pay for (and don’t get what they can’t pay for), many clients believe that justice is denied them because their lawyers withhold it. The failings of character, the lack of full devotion, and the infidelities mentioned earlier emerge as the important qualities of “incompetence.”

The economic realities, and well-founded inferences from them, should lead us to doubt the value of all the current talk about competence. The main malady in the system may stem in the end from the fact of unequal competence; some lawyers are always sure to be better than others. Because that is so, and because its consequences are so basic, we ought probably to be concerning ourselves less with making lawyers competent, more with what they should be competent at and the kind of system they ought to be manipulating. Specifically, knowing that other ways have existed and are possible, we should be asking:

1. Should we be content with existing means of funding and distributing the services of our profession, giving more justice to people with more money as frequently as we do?

2. How far is the competition of lawyers for money com-

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78. Neef & Nagel, The Adversary Nature of the American Legal System from a Historical Perspective, 20 N.Y.L.F. 123, 126 (1974). The quoted language may be an overstatement. But if it exaggerates the reality, it nevertheless portrays a recurrent phenomenon, as all of us are enabled to attest from experience.

79. Historically, our profession has been more content than we should be proud to remember with an awareness that adequate legal services have
patible with our professed ideal of equal justice for those the lawyers serve?

(3) Have we erred in our emphasis upon the adversary game, leaving outcomes so much in the hands of paid champions, so relatively little in the hands of neutral officials?

(4) Are there means by which we could achieve the benefits of sounder decisionmaking through administrative and, yes, inquisitorial procedures while preserving the freedom and the private initiatives which are prime values of our adversary mode?

Questions of this kind are not logically inconsistent with pursuits like those of the Clare Committee, the advocates of mandatory CLE, and similar ideas. But here, as elsewhere, logic is not the controlling factor. The energies available for professional reform are limited at best; if we opt for Clare-type rules or forced CLE, the chances for other measures, especially when they touch strong habits and convictions, are much diminished. Moreover, there is even a logical sense in which there may be a need to choose. Nostrums of the kind criticized herein are offered in the belief that "competence" is acceptably defined in terms of the status quo. It is proposed, for example, that advocates should be made more competent in techniques like our unique Anglo-American methods of questioning witnesses, cross-examining, and advising clients. But if these very techniques are fundamentally suspect—if we may doubt the good health of a system of justice in which the client is guided skillfully through perjurious testimony, a hostile witness is to be destroyed when possible though he is known to be truthful, and legal advice is to be given in bland loyalty to a client who will use it to subvert the law—prescriptions for training become correspondingly questionable.

Whatever Cassius may have said about our stars and ourselves, I commend to you the thought that the competence of the system may be in more dire need of attention than the efficiency tended to be relative luxuries, available only to the relatively affluent. See J. Hurst, supra note 1, at 5-6, 306, 316-19, 325-28, 365. Recent improvements are far from sufficient for smugness.

80. See Burger, supra note 2, at 234-35.
82. "The fault, dear Brutus, is not in our stars, But in ourselves, that we are underlings."
   Julius Caesar, Act I, Scene ii (lines 139-40).
of the practitioners. Through the decades, however our competence has seemed to us to fluctuate, we have earned steadily low grades because of the belief that our wiles and our cunning have been enlisted insufficiently in the service of justice. As we continue the healthful tendency to search out our own failings, the validity of our axioms may be a topic of the highest priority. Wherever the search leads, let us be skeptical of cures too swift and forcible.