SCHOLARLY RESTRAINTS? ABA ACCREDITATION AND LEGAL EDUCATION

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ABSTRACT

This Article provides an economic and legal analysis of the American Bar Association's system for accrediting law schools. For decades, the ABA has administered the system as, in economic effect, a cartel of law school faculty members. The ABA has exerted monopoly power not only over the market for legal training, but also over three related markets: the market for the hiring of law faculty, the market for legal services, and each university's internal market for funding. Despite the selfless service of many in the system, the system has created large harms, but few benefits. Existing law faculty have gained at the expense of their students, of their universities, and of other potential faculty members. By suppressing new schools that would offer cheaper, more-efficient legal education, the system has excluded many from the legal profession, particularly the poor and minorities. The system has both raised the cost of legal services and denied legal services to whole segments of our society. The system is illegal under the antitrust laws. The Article enlarges the literature in five specific ways. It shows that many law schools are organized, in effect, as partnerships of professors. It explores the system's impacts on four related markets, rather than just one. It appraises the ABA system's main harms and possible benefits. It shows extensively the antitrust violation. And it suggests important policy choices, including abolishing the accreditation controls and markedly changing the role of the bar examination.

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INTRODUCTION

The Supreme Court has noted that "a standard-setting organization . . . can be rife with opportunities for anticompetitive activity."[1] The organization that sets the standards for law schools in the United States may be no exception. For more than half a century, and especially during the past twenty years, the American Bar Association ("ABA") has administered the accreditation system for law schools as, in economic effect, a cartel of law school faculty.

Many of the participants in the accreditation system are public-spirited and selfless. However, economic analysis leads us to conclude reluctantly that the system has imposed large harms. Existing law faculty have gained, on balance, at the expense of their students, of their universities, and of other potential faculty members to whom the system denies teaching jobs. By suppressing potential new schools that would offer cheaper, more-efficient legal education, the system has excluded many from the legal profession, particularly the poor and minorities. It has raised the cost of legal services. And it has, in effect, denied legal services to whole segments of our society.

Close and stable collusion is unusual in U.S. industrial markets, where, for a century, the Sherman Act has made collusion illegal. But the so-called "learned professions" escaped antitrust scrutiny for decades, and only since the 1970s have they begun to come under antitrust study and action.[2]

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[1] American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982).

[2] Among early criticisms of analogous monopoly elements in the medical profession, see MILTON FRIEDMAN & SIMON KUZNETS, INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE (1945); Reuben A. Kessel, *Price Discrimination in Medicine*, 1

The ABA's accreditation system is another important and unremedied case of cooperation and collusion. Earlier fine papers have addressed some aspects of ABA accreditation in the market for legal training.[3] We offer a new analysis, with new conclusions. We demonstrate that the ABA has exerted monopoly power not only over the market for legal training, but also over three related markets: the market for the hiring of law faculty, the market for legal services, and each university's internal market for funding. The ABA's accreditation system has placed the markets for law faculty, legal training, and legal services under unified control and rules. The ABA has arranged government support for its role, with the effect of designating ABA-approved law schools as the only route for entering most areas of the practice of law in the United States. Likewise, in each intra-university market for funding, the system has tended to shift resources to the law school from other parts of the university; a law school can wield an ABA threat of disaccreditation as a lever to pry additional support from the university.

The ABA describes its controls as merely enhancing the quality of legal education, thereby increasing the quality of legal services. This could be an important value in this influential market for professional services.[4] Yet such thorough quality-enhancement controls are absent from other markets in the economy. Instead, economic analysis indicates that a standard and skillful cartel is in place, involving collusion, secrecy, and an adroit use of penalties and rewards. As with other cartels, the system

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J.L. & ECON. 20 (1958). For more recent criticism, see THE CAUSES AND CONSEQUENCES OF ANTITRUST (Fred S. McChesney & William F. Shughart eds., 1995). Part VI, *infra*, describes recent decisions in which the Supreme Court has begun to impose liability on trade groups and standard-setting associations.

[3] *See* Harry First, *Competition in the Legal Education Industry (I)*, 53 N.Y.U. L. REV. 311 (1978) [hereinafter First, *Competition (I)*]; Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. REV. 1049 (1979) (describing history of ABA accreditation and analyzing accreditation as a boycott by law schools of unaccredited law schools) [hereinafter First, *Competition (II)*]; Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, LAW & CONTEMP. PROBS., Autumn 1994, at 199 (describing system as restriction on market for information about law schools); John O. McGinnis, *Legal Monopoly*, NAT'L REV., Sept. 30, 1996, at 42; Andy Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 MICH. J. LEGAL REFORM 635 (1996) (describing system as a horizontal agreement in the market for legal training). *See generally Symposium on Accreditation*, 45 J. LEGAL EDUC. 415 (1995).

[4] As Kenneth Arrow notes, a professional market such as medicine or law may involve consumers who lack knowledge and must trust their professional supplier, such as their doctor or lawyer. That permits abuses that professional training and quality screens are designed to prevent. *See* Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941 (1963).

seems to create few benefits, but causes inefficiency and unfairness. Any quality-control gains from the system would probably also be provided by free-market choice, as seems true in most other professions.

Specifically, our economic analysis shows for the first time that, in substance, the accreditation system is a cartel of law professors. Using a different label for the same economic reality, the ABA's accreditation system has become, in effect, a nationwide union for law faculty. Law faculty have gained control of all levels of the system. The system is, in effect, a cooperative organization of representatives of law faculty. Exercising their authority in the system, law faculty determine the standards for accreditation. Not surprisingly, the accreditation standards have substantially increased salaries and benefits for law faculty. But the nation's labor laws do not exempt this "union" from antitrust scrutiny. The ABA system is especially powerful because the ABA has arranged for the government to enforce its requirements.

Both existing accredited law schools and existing lawyers support the system's controls. The law schools themselves support the faculty's control of the accreditation system for two reasons. First, although the system raises law schools' costs, the system benefits law schools by precluding competition from new law schools. Because the system limits entry of new schools into the legal training market, schools can pass the increased costs from the system on to students; a school need not fear that the higher costs from the system will place the school at a competitive disadvantage.

Second, many law schools are, in effect, partnerships of professors. All ABA law schools are nonprofit organizations. No shareholders exist who would demand that the school cut unnecessary costs in order to increase profits. Instead, faculty control the law schools, and, consciously or not, they operate them to maximize benefits for faculty.

Likewise, existing lawyers benefit from faculty's capture of accreditation because the capture reduces the competition that existing lawyers must face. The efforts of faculty to benefit themselves—by increasing their compensation and so increasing the price of legal education, by limiting the number of law schools, and by limiting student-faculty ratios—also benefit existing lawyers by reducing the number of new lawyers.

Economics has long taught that cartels usually restrict output, raise prices, reduce cost-efficiency, retard innovation, and cause

unfairness.[5] The accreditation system is no exception. It has had impacts in each of the four markets for law faculty, legal training, legal services, and intra-university funding. In each of the markets, the accreditation system has restricted output, raised prices, reduced cost-efficiency, retarded innovation, and caused unfairness.

In the market for law faculty, the ABA system has won large increases in wages and benefits for existing faculty, reduction in work hours, and other amenities. However, the system has prevented establishment of many new law schools, substantially reducing the number of faculty jobs. Some of the new law schools would have competed by paying lower wages and offering lower tuition levels, thereby forcing existing law schools also to cut costs and reduce wages; competition in the law school market would have reduced the monopoly profits that existing law schools now share with their faculty.

In the legal training market, the system has restricted output and erected barriers to entry of new law schools. It has raised law schools' tuition levels, and permitted them to raise their costs to accommodate higher faculty compensation without suffering competitive harm. The system has reduced the schools' efficiency and imposed unfair burdens on students. The system may produce the worst possible outcome: lower quality at higher prices. Moreover, by raising the expense of legal training, the system restricts access to the legal profession, especially for low-income, disadvantaged, and minority students.

The ABA system not only excludes a range of diverse methods of legal education, by barring numerous actual schools. It also applies detailed controls to the inner nature of the schools that do gain approval. Innovation has been reduced, both in the programs and facilities of existing schools and by the exclusion of entire new innovative schools. High library costs also may add significantly to inefficiency. The accreditation system has imposed harms at all levels of legal education, including in top schools. However, the

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[5] *See* ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (8th ed. 1920); JOHN BATES CLARK, THE CONTROL OF TRUSTS (1912); WILLIAM FELLNER, COMPETITION AMONG THE FEW (1949); GEORGE J. STIGLER, THE ORGANIZATION OF INDUSTRY (1968); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); F.M. SCHERER & DAVID N. ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (3d ed. 1991); WILLIAM G. SHEPHERD, THE ECONOMICS OF INDUSTRIAL ORGANIZATION (4th ed. 1997). Inner tensions can lead to cheating, which can cause the collusion to collapse, at least for significant periods. *See* 2A PHILLIP E. AREEDA ET AL., ANTITRUST LAW ¶ 405b2, at 25-26 (rev. ed. 1995); ELEANOR M. FOX & LAWRENCE A. SULLIVAN, CASES AND MATERIALS ON ANTITRUST (1989).

system has created the most distortion and unfairness at mid- and lower-level schools.

Without the accreditation system, the variety of law schools and level of innovation would be greater. Entrepreneurial law schools would experiment and innovate to develop programs that would provide the most appealing combination of instruction, apprenticeship, and price to each part of the market for legal training. Some schools would continue to provide the expensive Harvard-model education. Other institutions would transform themselves to become the equivalent of trade schools, with cheap, short courses of study. Large law firms might themselves offer parts or all of such programs.

Some schools would continue with traditional classes taught by full-time instructors with much time for research. Other schools would staff classes primarily with part-time adjunct practitioners. There would be many more law schools, with a comparable enlargement of the flow of graduating students. Costs and tuition levels in many levels of the market would be substantially lower, even at top schools, but most dramatically at lower-level institutions. There would be less reliance on costly library facilities, and the use of electronic resources would be more extensive. In order to attract students, some schools would rely less on the LSAT. Other schools would offer for-credit bar review courses.

In the legal services market, the system has substantially reduced the supply of lawyers and increased the price of legal services. The system has priced much of the poor and middle class out of the market for legal services, tilting our society's playing field in favor of big business and the rich.

The accreditation system has also distorted the market for intra-university funding. The system has permitted law schools to extract more funds from other parts of their universities; a law school can wield an ABA threat of disaccreditation as a lever to pry additional support from the university.

Although the ABA system has raised wages substantially for both law faculty and lawyers, many of those who entered these professions under the system reaped no windfall. Although the system increased incomes substantially, it also increased substantially the cost of entering the professions, offsetting much or all of the increase in income. Only faculty and lawyers who entered the professions before the system tightened struck gold.

As a severe recession has recently struck the market for legal training, the accreditation system has come under challenge. From

within the system, officials of a number of leading law schools have called for changes; although, before the recession, the system benefited all ABA-accredited schools, the recession has begun now to cause the system to harm some accredited schools, especially lower-ranked schools. External challenges include antitrust suits by the Department of Justice and by a young Massachusetts law school that has been denied accreditation, as well as a review by the United States Department of Education ("DOE") of its policies that have supported the ABA's controls. Though the ABA system may eventually weaken to a degree, ABA officials have remained steadfast. A recent settlement with the Department of Justice offers certain legal adjustments, but the main policies remain.

The system is the focus of well-formed issues and evidence about its economic effects. We analyze and review those effects, comparing the monopoly losses to the quality-improving gains. We conclude that the system gives effective monopoly power, and that the system's economic costs probably greatly exceed its benefits.

On a legal plane, the system appears to violate the antitrust laws. It is probably illegal per se as a horizontal price-fixing agreement among law faculty, enforced by a boycott. Various defenses that the ABA has raised do not seem convincing.

In short, the system has been an increasingly acute intramural concern for the legal profession. Although the recession and recent challenges have weakened the system, the system still causes large harms. Indeed, the recession has worsened certain of the damages that the system causes. It is urgent to cure the system now, lest the system's dying throes inflict particularly strong damage. The system should be faced as a major antitrust issue, and the cure is, we think, simple abolition: State and federal governments should eliminate graduation from an ABA-accredited law school as a requirement for obtaining a license to practice law; the federal government should extend its subsidized loans to students at unaccredited law schools; and, instead of controlling law schools, the ABA should develop a rating and ranking system that would provide potential law students and consumers of legal services with more useful information about the schools. In addition, the role of the bar exam could be changed: Instead of operating as a barrier to entry into the profession, the exam would provide consumers with detailed information. Although elimination of the ABA system will harm existing law faculty and existing lawyers, the change will

help law students and consumers by providing them with cheaper services, delivered more efficiently.

The Article follows the natural order of the topics. Part I describes the four markets that the accreditation system influences, the relation among the markets, and the incentives of the participants in the markets. These economic incentives help us to understand both the history of law school accreditation and the ABA's current accreditation process and standards. Part II reviews the history of the law school accreditation system and of the ABA's cooperative activities. Part III describes both the accreditation process and the ABA's substantive requirements, their individual economic impacts, and the recent litigation and controversy that they have generated. Part IV discusses the system's broad impacts in the four markets on output, prices, profits, efficiency, innovation, and fairness. Then Part V considers the system's possible offsetting benefits. After Part VI offers an analysis of the legal issues raised by the system's controls, Part VII draws conclusions and recommends changes in the system.

I. THE MARKETS, THEIR RELATION, AND THE INCENTIVES OF MARKET PARTICIPANTS

To understand the ABA accreditation system, one must first define the markets in which the system functions. Such a market definition is customary and necessary for assessing market power.[6] In addition, within each market, one must understand the incentives and goals of the market's participants.

A market, as economists define it,[7] is the array of products or services that, if there were no legal constraints, consumers might substitute for each other if relative prices changed. For example, higher cola prices might cause people to drink ginger ale instead, but would not change consumption of chablis much.

The ABA system influences four main markets:

A. The first is the market for hiring *law faculty*. In this market, law teachers, including law librarians, contract with law schools to provide to the schools their teaching and scholarship, as

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[6] On market definition, see generally SHEPHERD, *supra* note 5, ch. 3; SCHERER & ROSS, *supra* note 5, at 73-79; CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY (1959); 2A AREEDA ET AL., *supra* note 5, ¶¶ 530-69, at 149-277; FOX & SULLIVAN, *supra* note 5.

[7] *See* SHEPHERD, *supra* note 5, ch. 3; SCHERER & ROSS, *supra* note 5, at 73-79. For discussions of the methods of market definition used by the two U.S. antitrust agencies, the Department of Justice and the Federal Trade Commission, since 1982, see, for example, *Special Issue: Merger Guidelines*, 8 REV. INDUS. ORG. 135 (1993).

well as the prestige of their presence; a retired Justice Rehnquist would be a valuable faculty member even if he taught and wrote nothing. In return, law schools provide each faculty member with a compensation package that includes a salary and other valuable benefits. The other valuable benefits may include a private office, low teaching load, and access to a fine library and other facilities.

In an unconstrained market, schools would experiment with various mixes of salaries and other benefits. Some schools would offer high salaries, but large teaching loads in run-down buildings. Other schools would offer lower salaries, but lighter teaching loads, pleasant offices, and large libraries. Still other schools would offer their unfortunate faculty low salaries, heavy teaching loads, and poor facilities.

B. The second market is the *legal training market*, which includes the services used in preparing skilled lawyers. This market embraces the familiar law schools as well as an assortment of alternative methods that, if the law allowed, could educate future lawyers.

C. The third market is the *legal services market*, which is now mainly supplied by members of the legal profession as they practice law, as well as by various peripheral alternatives.[8]

D. The final market is the *intra-university market for university resources*. In this market, the many units within each university compete for the university's support.

The first three markets are vertically related, in two ways. First, the market for faculty feeds instructors into the training market, which, in turn, feeds lawyers into the legal services market. Second, the range of services demanded in the legal services market helps to define the range of services needed in the legal training market, which, in turn, determines the faculty that law schools hire. In addition, in each of the three markets, the ABA-approved versions (faculty at accredited law schools, the accredited law schools themselves, and lawyers who have graduated from accredited law schools) provide much or all of the supply.

A. *The Market for Law Faculty*

The unrestrained market for law faculty would extend far beyond the confines of the present system. If there were no constraints on the market for law faculty, then teaching arrangements

[8] Examples of the alternatives include informal advice on legal matters and the use of "how-to" publications for various legal services like wills and divorce.

and compensation packages would take many forms. Law schools and faculty would have much greater choice and flexibility in their employment agreements. Some faculty would teach under arrangements similar to those in most law schools today. They would be full-time faculty with high pay, light teaching loads, and many benefits. This might be the pattern for a few elite schools.

However, if the market were not constrained, some law schools would offer much different packages than ABA-accredited schools offer now, and the schools would hire teachers with a wider variety of characteristics. Some schools would offer their full-time faculty lower pay and benefits; the schools would hope to attract students by passing along to them the savings from reduced costs. Other schools might offer more part-time contracts and low pay to practicing attorneys who would teach classes in the evening. Some law schools would hire a few top quality faculty at high salaries; the schools would have large classes taught by stars. Other schools would choose to hire a larger number of less prestigious faculty, but at lower salaries; for the same salary budget as the schools with the stars, these schools would offer lower student-faculty ratios. Other schools would choose the economy approach. They would hire only a few faculty, and all of them might be inexpensive part-time instructors teaching large classes.

The market for law faculty in California offers some indication of the diversity of arrangements that an unconstrained market would produce. In California, ABA-accredited schools provide to their faculty the traditional combination that the ABA demands of moderate work loads and high salaries and benefits. However, California's unaccredited schools offer their faculty a wide variety of employment packages. For example, some unaccredited schools hire mainly adjunct part-time faculty at low wages and with low benefits.[9]

B. *The Legal Training Market*[10]

The legal training market includes whatever services a student could conceivably use to obtain the knowledge and skills that the student needs to function successfully as a lawyer. This market

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[9] *See* Complaint and Jury Demand at 13, Massachusetts Sch. of Law v. ABA (Mass. Super. Ct. 1995) (No. 95-2117).

[10] It is tempting to call it the "law school market," but that would narrow the discussion incorrectly at the start; it would ignore the range of alternative methods of acquiring training. Hence, we will adopt the more neutral and accurate phrase "legal training market."

embraces the familiar law schools as well as an assortment of alternative methods that, if the law allowed, could educate lawyers. The present system, as controlled by the ABA in cooperation with the courts, generally requires attendance at an ABA-accredited law school for three years, and largely eliminates part-time and independent study. In almost every state, a law degree from an ABA-accredited law school is a fixed prerequisite for taking the bar examination.

Formal study at an elite-style law school is certainly one way to train lawyers. But it is not necessarily the best or most cost-effective method for all potential lawyers. Perhaps other combinations of apprenticeship, private study, and law school would also produce competent lawyers for various parts of the legal market, at cheaper prices. Some students, perhaps many of them, could study the subjects on their own, or as apprentices, or in different types of schools, and learn enough to be adequate or even brilliant lawyers.

In principle, aspiring lawyers could acquire training in many ways, including entirely independently, by reading textbooks and watching lawyers at work, and perhaps by actually working with them. The budding lawyers also could mix in formal training courses, such as those in law schools, relying on them either for part or all of the training.

Past history and current practice have involved both of these methods: both formal courses and practical experience. A century ago, young lawyers trained mainly by going to work for practicing lawyers. In this apprenticeship system, they learned their skills through actual practice, by working on legal matters under the supervision and support of experienced lawyers. Indeed, lawyers today get much of their practical skills by working as apprentices, through on-the-job experience during their first years of practice. Many lawyers believe that new lawyers are incompetent to perform unsupervised work for a year or more after entering practice, until the lawyers have learned the ropes from an apprenticeship of on-the-job experience. Only now, the ABA system requires that the apprenticeship occurs after law school, after students pass the bar, rather than before or instead of law school.

Part-time instruction also has a long pedigree: For the first thirty years of this century, a large proportion of lawyers trained part-time, at night school.

The breadth of possible skills and training methods reflects the great variety within legal practice. Lawyers' tasks and settings

vary widely, from streetwise local solo practitioners up to the sophistication of giant law firms, to public agencies and prosecutors at all levels, and to still other versions.

The market for legal training is potentially broad enough to service all of these attributes of demand. The market potentially ranges from the top law schools, to part-time study, to routine experience on the job without attending law school. It could also include more independent study, by which students could gain skills and pass the bar examinations even with little formal schooling or apprenticeship.[11] An unconstrained market would permit students to choose freely among the activities. Within this market, the ABA-accredited schools now provide only part of the possible range of supply.

Now imagine that the legal training market approaches the ideal of an economist's perfect market: It functions with no friction, and both suppliers and consumers of legal schooling are unconstrained, rational, and fully informed.[12] Then the alternative forms of learning would be freely available and highly substitutable within the market. Qualified candidates could acquire knowledge and pass the qualifying bar exams without enrolling in law school. Meanwhile, other aspiring lawyers could choose, in part or whole, to attend any among a diverse array of schools. Still other talented people could, as in older times, simply start at law firms and pick up the skills in practice. Many of these other sources of training would be cheaper than three years of law school.

The ABA has used fears of imperfections and abuses—of fly-by-night law schools cheating unwary students, and of unfit and crooked lawyers abusing hapless clients—in order to enforce a reliance on ABA-accredited law schools. The ABA suggests that accreditation protects students from enrolling at inferior law schools. In addition, degrees and law school prestige rankings are said to give consumers compact, systematic information about lawyers' qualifications.

Are most consumers of legal training and legal services actually ignorant and vulnerable, more than in other markets? That is a central issue, which we discuss below. The ABA's position may

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11 For a review of alternative methods and values in training lawyers, see Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEGAL EDUC. 469 (1993).

12 *See* GEOFFREY S. SHEPHERD, *The Perfect Market in Time, Place, and Form*, *in* MARKETING FARM PRODUCTS 18-25 (3d ed. 1955).

give an optimal outcome, in quality minimums, prices, and variety. Still, as is true in other professions, the ABA as the gatekeeper has incentives to exaggerate the degree of imperfection in both markets, so as to justify its controlling role. At issue is not a mere fine-tuning of the ABA rules, but rather whether a major reduction in controls and an increase in acceptable variety would fit market realities.

C. *The Market for Legal Services*

Legal services include, among other things, legal advice, execution of documents and actions, and representation in negotiations and trials. These services vary widely, under infinitely many settings that reflect the untold variety of human situations: by the types of customers and their allies and adversaries; by the types of legal matters (e.g., from advising on a huge bankruptcy to divorce, criminal prosecution, mergers, wills, etc.); by the varied settings and dollar stakes, from small, local claims to the claims of the largest global corporations; by the variety among counseling and formal litigation situations; and so on. The ABA-sanctioned versions of lawyers comprise only one section within the whole potential market for advice and assistance on law-related matters. Not only is the potential market diverse, there are ranges of potential prices.

In an unfettered market, people who needed legal services would choose among all these varieties of skilled lawyers, just as they select among varieties in any other market. Clients needing rarified advice would employ erudite lawyers trained at the loftiest schools, while clients needing street-level help could go to practical, and cheaper, lawyers. A wide diversity of services would fit the great diversity of needs. The degrees of substitutability among the various forms of legal services suppliers will vary, depending on the kind of services and the setting. Efficient prices will vary with the diverse services, as in other well-functioning markets. Imperfections may be significant but within the normal range for all markets.

As in every professional market, there are interested groups that contend for control.[13] The ABA is one such group, and it, together with the courts and state legislatures, enforces credentials,

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[13] For example, medical doctors have a long history of seeking to exclude osteopaths, chiropractors, skilled nurses, and others from competing in the wider market for health treatment. ABA-sanctioned lawyers are in the same position of seeking to exclude competition from alternative providers of service. *See* FRIEDMAN & KUZNETS, *supra* note 2, ch. 4; Kessel, *supra* note 2, pt. II.

so that, in most states, only official ABA-approved lawyers are used. For many matters, that may be efficient; in a completely competitive legal services market, all providers of legal services might voluntarily obtain ABA-approved educations in order to demonstrate the quality of their services. However, it is more likely that some lawyers would forego ABA-approved educations, and would instead choose other signals of quality. In addition, an unconstrained market would produce a greater diversity of legal services. The supremacy of ABA-credentialed lawyers in the current system reflects the ABA's success at extending its controls from the market for legal training into the market for legal services. Likewise, lawyers have convinced governments to reduce competition from nonlawyers. Compared to many other societies, in the United States, the range of tasks that only lawyers can legally perform is wide.[14]

D. *The Intra-University Market for University Resources*

The many units within each university compete for the university's support, as in a market. To support its units, a university has several sources of funds. The sources include the university's endowment, tuition income, research grants, and alumni contributions. A university's central administration has broad discretion in the level of support that the administration will provide to each of the university's various units. The amount of support for each unit can be either positive or negative. The university could subsidize a department by providing it with a free building and maintenance as well as a large cash subsidy. Instead of providing a subsidy, the university might extract funds from a professional school; viewing the professional school as a cash cow, the university might require that the professional school make payments to the university that far exceed the university's overhead costs for the school's building and upkeep. Some universities treat their law schools in this manner, using revenue from law school students and alumni to subsidize the university's other programs.[15] The university also might provide no subsidy to a unit that has no independent revenue. For example, the university might shut down a music school or ro-

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[14] For a history of bar associations' successful attempts over the last 100 years to obtain legislation that defines broadly the tasks that only lawyers can perform, see RICHARD L. ABEL, AMERICAN LAWYERS ch. 5 (1989).

[15] Several of the ABA's accreditation standards are specifically designed to deter universities from transferring money from their law schools in this manner. *See infra* text accompanying notes 191-92.

mance languages department.

A university unit competes successfully in this intra-university market by providing goods and services that university leaders value. For example, leaders value excellence in any department; the prestige from an excellent department helps the remainder of the university to attract good students, good faculty, more grant funding, and additional alumni contributions. Thus, an English department that becomes prestigious may win additional funds from the university; by providing the department with additional funding, the university rewards and encourages excellence that benefits the entire university.

In addition, the university values money: The university will reward units that provide it with student tuition payments, research grants, and alumni contributions. For example, the university will support a business school that charges high tuition and offers lucrative executive training seminars, if the business school shares a portion of the profits with the university.

In contrast, a university unit that provides the university with neither prestige nor money will earn little support from the university. For example, a university will provide little support for, and may even close, a struggling dental school that is expensive to run, earns inadequate tuition income, and is less prestigious than the rest of the university.

E. *Relations Among the Markets*

The first three markets are vertically related. The market for law faculty and administrators feeds faculty as an input into the legal training market. In turn, the legal training market feeds trained lawyers as an input into the legal services market.[16]

Conditions in each market influence conditions in the others. The range of services that consumers demand in the legal services market controls the range of services that law students seek in the legal training market, which, in turn, determines which faculty law schools will hire. In a well-functioning market, the skills that clients need in the legal services market determine the suitable legal training for lawyers in the legal training market. In turn, the

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[16] Vertical relationships are a standard, diverse topic in economics and in business experience. Examples include the iron ore market, which feeds into the steel market, which feeds into the steel products market, etc. *See* FRANKLIN R. WARREN-BOULTON, VERTICAL CONTROL OF MARKETS ch. 2 (1978); SCHERER & ROSS, *supra* note 5, chs. 14, 15; DAVID L. KASERMAN & JOHN W. MAYO, GOVERNMENT AND BUSINESS chs. 9, 10 (1995).

training that is necessary in the legal education market determines the type and number of faculty and administrators that law schools hire, as well as the compensation arrangements that the law schools offer them. For example, if clients suddenly demand many lawyers, at low prices, to construct custody agreements for pet iguanas, then a well-functioning market should create price signals that lead all of the markets to adjust to satisfy the demand. The higher demand for iguana-custody lawyers will increase those lawyers' wages. Increased wages will lead more law students to choose law schools that offer courses in iguana-custody law. Hoping to attract these students, law schools will hire as faculty more experts on iguana law. The university will respond as well. Recognizing that expertise in the hot area of iguana law will lend prestige to the entire university, the university's administration will agree to the law school's request to provide additional money from the university endowment to fund the Lazard R. Slimey chaired professorship in lizard law.

The intra-university market for university resources operates at the same level as the market for legal training. A law school can succeed in two ways. First, it can compete successfully in the legal training market by offering a prestigious product that will attract the best students and command large tuition payments.[17] Second, the school can compete successfully in the intra-university market by obtaining additional resources from its university. For example, a law school can obtain additional resources not only by improving its curriculum, raising tuition, and attracting additional students. The school also can obtain additional resources by convincing its university to give the law school the resources—perhaps transferring the resources from the English department to the law school.

As we will see, the ABA accreditation system, which represents the interests of law faculty, has gained almost complete control of the supply for the market for legal services; in almost all states, only graduates of schools that the ABA has accredited may practice law. The law faculty have been able to extend their control in one market, the upstream market for law faculty, into control over the downstream markets for legal training and legal services, as well as over the market for university resources.

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[17] Certain schools may pursue other goals, such as serving as many students as possible at low tuition rates. Some state schools are examples.

F. *The Goals and Incentives of the Market Participants*

In order to understand both the markets and the impact of the accreditation process on them, we examine the goals and incentives of the main market participants.

1. *Law Faculty*

As in other labor markets, law faculty seek to obtain the maximum possible salary and benefits, plus light work burdens. Faculty may also have other goals. However, other things being equal, a law professor would prefer to earn more, have a nicer office and bigger library, and face an easy and enjoyable teaching load.

2. *Law Schools*

Because all ABA-accredited schools are nonprofit organizations, their objectives are not as clear as if they were explicitly seeking to maximize profits.

a. Tuition Levels

A school may pursue any of three strategies in setting tuition levels. First, some law schools may seek to make law school affordable to as many students as possible, and so may charge low tuition to everyone. Second, other schools may seek to make law school affordable for many by giving discounts to those who could not afford the law school's full price; in the legal training market, discounts are called "financial aid" or "scholarships." However, the school will not give discounts to those who can afford to pay full price.

Third, law schools may seek to obtain from law students the maximum possible tuition that still permits the school to attract excellent students. These law schools will charge what the market can bear. Wealthy students will pay full price; poor ones will receive discounts. Especially desirable students, with choices at other schools, will get large discounts—that is, merit scholarships.

Some state schools pursue the first objective. They charge low tuition to all in-state residents, regardless of ability to pay. Other state schools and most private schools appear to pursue a combination of the second and third objectives. They "price discriminate," as economists term it, based on the ability to pay, with the less wealthy receiving greater discounts. This behavior is consistent both with law schools' seeking to help the needy and with law schools' seeking to maximize revenue. That law schools also

offer merit discounts suggests that law schools, at least in part, are maximizing revenue and prestige, rather than just being kind to students with few assets.[18]

b. Faculty Compensation, the Proprietary Model, and the Partnership Model

The objectives of law schools in determining the compensation that they will provide to law faculty can vary between two extremes.

The proprietary model. At one extreme are proprietary law schools.[19] An entrepreneur operates these law schools in order to maximize profit—that is, to maximize the difference between gross income and costs. In order to minimize costs, the entrepreneur will offer the minimum faculty salaries and benefits that are necessary to retain the faculty and keep them productive and happy. Just as the entrepreneur will not pay more than is necessary for other inputs such as landscaping, catering, or secretaries, the entrepreneur will not pay more than is necessary for teaching services The excess salary could instead go to the entrepreneur and the law school's investors as profits. Similarly, the entrepreneur will not offer unnecessarily lavish perquisites, such as nice offices, easy workloads, or long vacations. Unnecessary perquisites cost money that the entrepreneur could retain.

A proprietary law school mirrors a law firm in which a lawyer, with no partners, hires associate lawyers on a contract basis. The lawyer pays the associates the minimum that is necessary, and then pockets the difference between the law firm's income and its costs, which include the associates' salaries.

The partnership model. At the other extreme are what we call "partnership law schools," because they resemble partnerships. No entrepreneur organizes these law schools in order to minimize costs and maximize profits. Instead, such a law school is, in effect, a partnership of law professors who combine to offer legal education. The goal of this form of law school is to maximize benefits not for the entrepreneur, but for the faculty. Any excess of income over costs goes not to an entrepreneur, but to the faculty; the

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[18] For a discussion of both the objectives of nonprofit educational institutions and price discrimination in tuition charges, see Donald R. Carlson & George B. Shepherd, *Cartel on Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing*, 71 OR. L. REV. 563 (1992).

[19] The ABA has never accredited a proprietary school. The only proprietary law schools are unaccredited schools in states such as Massachusetts and California.

faculty, not shareholders nor an entrepreneur, are the residual claimants to any profits from the law school's operations.

In contrast to faculty at proprietary law schools, faculty at a successful partnership law school will receive compensation and perquisites that exceed the minimum that is necessary to retain them. Indeed, such a law school's goal is to maximize the benefits for its faculty, as well as for its administrators and librarians. Accordingly, a successful partnership school will tend to provide its faculty with high salaries, light teaching loads, fine offices, long vacations, and excellent buildings and libraries. In this form of law school, the benefits of success flow not to an entrepreneur or investors, but to the faculty.

This organization resembles a law firm partnership. There, like law faculty, lawyers join together to provide services, and they agree to split any profits. The law firm's goal is to maximize the lawyers' profits. A successful law firm will have high salaries for lawyers, nice offices, and agreeable working conditions. Just as anything that benefits a partnership law school benefits the faculty, anything that benefits a law firm partnership benefits its partners.[20]

Most ABA-accredited law schools are similar to the partnership law school model. In the typical ABA school, no entrepreneur manages the school and reaps the profits. No entrepreneur attempts to whittle down high compensation for faculty. Instead, the faculty control conditions in the law school, including their own compensation and perquisites. Accordingly, the Supreme Court has classified all university faculty as managers of the university, rather than as workers who enjoy the protections of federal labor laws; a university's faculty effectively controls much of the institution.[21] As the Supreme Court noted, "To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served."[22]

Indeed, the ABA's accreditation standards require that accredited law schools be organized in conformity with the partnership model, rather than the proprietary model. For years, ABA standards prohibited proprietary law schools; to obtain accreditation, a law school had to organize itself as a nonprofit educational

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20 Partnership law schools also resemble worker-owned, worker-managed enterprises and collectives. Examples are worker-owned companies in the former Yugoslavia and an Israeli kibbutz.

21 *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 686-88 (1980).

22 *Id.* at 686.

institution.[23] In response to a litigation challenge, the ABA officially eliminated this prohibition of for-profit law schools. However, the ABA has never accredited a proprietary school. Whether formally or de facto, the ABA system has prevented the existence of an entrepreneur or investor who would have an incentive to reduce faculty compensation.

In addition, the ABA's standards require that faculty have complete control over all aspects of a law school's operation. Standard 205 provides that "the dean and faculty of the law school shall have the responsibility for formulating and administering the program of the school, including such matters as faculty selection, retention, promotion and tenure; curriculum; methods of instruction; admission policies; and academic standards for retention, advancement, and graduation of students."[24] The dean serves as the agent of the faculty, and is often a faculty member herself. The ABA standards provide that the faculty control who is appointed dean: No dean may be appointed, or reappointed, without the faculty's agreement.[25] The faculty will fire a dean who fails to promote the faculty's interests.

Given complete control of a law school, the faculty will tend to exercise their authority in ways that benefit them. Exceptions will exist; some selfless faculty may sacrifice additional salary and benefits for the good of students or for the broader university. But in general, as in other parts of the economy, faculty will exercise their power to further their own interests.

The partnership model explains why law schools might acquiesce in, or even encourage, agreements that raise the cost of their faculty inputs; for partnership law schools, the objective is to increase as much as possible the compensation that faculty receive.

The compensation packages for ABA-accredited law schools conform to the partnership model. Faculty compensation is as high as possible, given the law school's resources. Salaries are high compared to salaries in other academic fields, and the ABA standards ensure that they are higher than would be necessary to retain the faculty.[26] Paid sabbatical leaves are common. Teaching

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[23] *See* STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS std. 202 (1994) [hereinafter ABA STANDARDS].

[24] *Id.* std. 205. The law school must have a "governing board," which has responsibility for the law school's "general policies." *Id.* std. 204. However, the faculty and dean have responsibility for the law school's actual operations. *See id.* std. 205. In practice, the dean and faculty of a law school run the law school, and make all important decisions.

[25] *See id.* std. 205, interp. 5.

[26] *See infra* text accompanying notes 147-55.

loads are low. The faculty gets the summer off. Faculty members are not required to teach material for the bar exam. They are not required to obtain outside grants and funding. Offices, buildings, and libraries are generally excellent. Many law schools could easily become profitable businesses, if the ABA permitted it; faculty pay and benefits could be reduced substantially without losing faculty members or harming the quality of instruction. However, the law schools are organized as partnerships so that the profits go to the faculty, rather than to owners or shareholders.

c. Funding from the University

A law school will generally attempt to compete successfully in the intra-university market for funding so as to obtain as much support as possible from its university; in general, a law school will not voluntarily sacrifice its interests for the interests of the university's English department.

3. *Law Students*

Students seek to attend a law school with low tuition, excellent instruction, and high prestige—the prestige of a Harvard degree opens doors regardless of the quality of Harvard's instruction. Law students then sell their services to the bidder in the market for legal services who offers the best combination of salary and other benefits, including geographical location and nature of the employment.

4. *Existing Lawyers*

Existing lawyers will generally benefit from reducing the number of new lawyers; fewer lawyers means less competition in the marker for legal services and higher incomes for existing lawyers. Accordingly, lawyers have often sought to increase their incomes by limiting entry into the professions.[27] However, it is possible that some law firms will have a potentially conflicting incentive. Unlike for solo practitioners, large numbers of new lawyers may provide some benefit to some law firms by pushing down the salaries that law firms pay associates.

5. *Consumers of Legal Services*

The public seeks quality legal services at the lowest possible price. This Article focuses on whether the ABA system promotes

[27] *See infra* Part II.A.

this goal.

II. THE HISTORY OF LAW SCHOOL ACCREDITATION

The present accreditation system arose out of successful efforts during the Great Depression by a combination of elite law professors, elite law schools, and elite lawyers to limit competition in each of the three related markets for law faculty, legal training, and legal services. Elite lawyers, represented by the ABA, sought to reduce the number of new lawyers. Elite law faculties and law schools, represented by the Association of American Law Schools ("AALS"), sought to reduce the number of competing law faculties and schools. Towards these complementary ends, the ABA and AALS together sought to prevent from receiving licenses to practice law both students from non-elite schools and people who had trained only in law offices. In addition, the ABA and AALS sought to require all candidates for the bar to have attended college.

The efforts, once they were successful, reduced competition in the markets for legal training and for law faculty. By eliminating competition both from part-time and for-profit law schools and from apprenticeship training, the elite law schools could maintain high prices, passing profits on to their faculties.

In addition, the efforts of the ABA and AALS reduced competition in the market for legal services by reducing the supply of new lawyers in two ways. First, the efforts directly reduced the supply of lawyers by reducing the number of slots in law schools; new legal requirements shut down part-time and proprietary law schools. Second, by both increasing the costs of legal training and requiring expensive undergraduate study, the efforts deterred some people from choosing a legal career. Furthermore, the efforts of the ABA and AALS created substantial opportunity costs for students. Students had to forego the wages that they otherwise would have earned during the six or seven years of full-time study at college and law school that was now required.

A. *The Rise of ABA Authority*

The imposition of uniformity of training for the bar was relatively recent and quite dramatic. Until 1927, no state required an applicant to the bar to have attended any law school at all. Indeed, in that year, forty-one states required no formal education whatsoever beyond high school; thirty-two states did not even require a

high school diploma.[28] In every state, a person could become a licensed lawyer through apprenticeship alone: by clerking for a specified period in a law firm, and then passing the bar exam. Bar exams were easy to pass.[29] If one chose to learn the law by going to law school, admissions offices at law schools were not selective. Until 1928, anyone who could pay the tuition could study at any law school, including Harvard and Yale.[30]

During the period after 1900, however, the elite bar, as well as faculty at elite law schools, began to observe a threat to their livelihoods. From 1890 to 1930, the number of law schools tripled, and the number of law students increased more than eightfold.[31] Most of the new law schools were for-profit night schools; in 1928, two-thirds of law students studied part-time, up from one-third in 1889.[32] Many of the new schools offered cheap courses of study of fewer than three years.[33] Most of the new students were from large cities, and many were immigrants. The new law schools, which were extremely profitable, produced waves of new lawyers who competed with established lawyers.[34]

Moreover, the new law schools and their faculties competed vigorously with the established law schools and faculties. For example, Harvard Law School sought, but failed, to prevent for-profit Suffolk Law School from opening nearby. Suffolk soon became the world's largest law school, with over 4000 students in 1928.[35]

The ABA recognized the economic threat that the new proprietary schools posed to existing practicing lawyers and existing law schools. The ABA's committee on legal education noted:

> Since the desire on the part of young men to study law has become so great, . . . teaching law has become a thriving and profitable industry. . . . [T]he competition of such [graduates of the new proprietary law schools] between themselves and others of their own age better equipped has a tendency to lower the compensation for professional labor and decrease the earning

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28 *See* ROBERT STEVENS, LAW SCHOOL 24-25 (1983); *see also* ABEL, *supra* note 14, at 62-68.

29 *See* STEVENS, *supra* note 28, at 24-25.

30 *See* ABEL, *supra* note 14, at 59; STEVENS, *supra* note 28, at 160-61. Elite schools weeded out students after matriculation, rather than before; Harvard failed more than half of its students. *See id.* at 160; *see also* ABEL, *supra* note 14, at 259.

31 *See* ABEL, *supra* note 14, at 53, 277 tbl.21.

32 *See id.* at 57.

33 *See id.* at 53-54.

34 *See* First, *Competition (I)*, *supra* note 3, at 348, 364.

35 *See* ABEL, *supra* note 14, at 54.

of all of them.[36]

Responding to this threat, the AALS, which in 1922 counted as members approximately one-half of law schools—generally, the elite one-half—began in that year to refuse membership to proprietary schools.[37]

During the first part of the twentieth century, the market for legal services offered more levels of service than it does today, with greater variety in pricing. An elite group of lawyers trained at schools such as Harvard Law School. However, for a large segment of lawyers, the law was a modest trade with modest pay.[38] One trade school offered a choice of instruction in mechanical drawing, stenography, auto mechanics, or law.[39] Another offered a choice between degree programs in law and embalming.[40]

In the second decade of the century, the ABA, an elite organization that in 1920 included as members only 9% of practicing lawyers,[41] began to complain that the new lawyers from the new proprietary schools were causing "overcrowding" in the market for legal services.[42] In 1916, the ABA's president complained that the group of new lawyers "has crowded the Bar with more lawyers than are necessary to do the business."[43] At an ABA conference in 1922, Supreme Court Chief Justice Howard Taft exhorted the ABA delegates that "we have all the lawyers we need now, and there is likely to be no dearth of them, however thorough the preparation insisted upon."[44] A law professor then noted: "[W]hat the Chief Justice has said as to the surplus of production of lawyers under our present system of legal education and admission to the bar . . . has not been sufficiently emphasized."[45]

Deans of elite law schools, whose trade organization was the AALS, created an alliance with the ABA, and joined the complaining chorus; efforts to reduce the number of new lawyers by shutting down the new law schools would benefit both existing

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36 26 A.B.A. REP. 399, 401 (1903), *quoted in* First, *Competition (I)*, *supra* note 3, at 352 (footnotes and internal quotation marks omitted).

37 *See* First, *Competition I*, *supra* note 3, at 346.

38 *See* STEVENS, *supra* note 28, at 92.

39 *See id.* at 81.

40 *See id.* at 195.

41 *See id.* at 97.

42 *See* First, *Competition (I)*, *supra* note 3, at 358 & n.274.

43 *Id.* at 358 n.274.

44 *Id.* at 358 (quoting SPECIAL SESSION ON LEGAL EDUCATION OF THE CONFERENCE OF BAR ASSOCIATION DELEGATES 29 (1922) [hereinafter SPECIAL SESSION]).

45 *Id.* (quoting SPECIAL SESSION, *supra* note 44, at 41).

lawyers and the elite AALS law schools and faculty.[46] The elite schools recognized that the only means to combat the new schools was to convince state legislatures and supreme courts to specify graduation from an ABA-approved law school as a requirement for obtaining a license to practice law. Thus, the ABA and elite law schools sought to deny licenses to practice law both to people who had trained only in law offices and to students from the new proprietary schools. For example, at a 1926 AALS meeting, the dean of Wisconsin Law School argued, "The only way to stop these schools, I take it, is for the members of this Association to busy themselves in pushing with courts and legislatures the standards advocated by the American Bar Association."[47] The members busied themselves, lobbying for legislation that would grant licenses to practice law only to graduates from law schools that the ABA accredited. These were solely full-time, elite, nonproprietary schools.

The elite bar's complaints about overcrowding increased as the Depression struck; as the amount of available work fell, lawyers fought more fiercely to exclude new competitors.[48] For example, at the AALS Annual Meeting in 1936, the AALS President, in his presidential address, indicated that the AALS was working "in harmonious cooperation" with the ABA to limit entry to the profession. He stated: "Personally, I have no doubt that the legal profession is over-crowded, at least in the cities. Nine lawyers out of ten will assert that the bar is overcrowded." He suggested, "We are acting unethically in admitting over 40,000 students to our law schools and in adding 9,000 members to the legal profession each year."[49] Similarly, in a 1937 article, the dean of Columbia Law School sought the elimination of all for-profit law schools, noting:

> During the last ten years, more than 20,000 young men have been admitted to the bar in the city of Greater New York alone which is at least twice as many as the bar of this city has been able to absorb. This group represents 58% of the entire bar of the state of New York. The consequences have been not only disastrous to thousands of the young men, but they also have created a serious menace to the community.[50]

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46 *See id.* at 352-54.

47 *Id.* at 361 (quoting 1926 AALS PROC. 32 (statement of Harry Richards of Wisconsin)).

48 *See* ABEL, *supra* note 14, at 47.

49 First, *Competition (I)*, *supra* note 3, at 376 (quoting 1939 AALS PROC. 19).

50 ABEL, *supra* note 14, at 47 (quoting Young B. Smith, *Take the Profit out of Legal Education*, 6 BAR EXAMINERS 57 (1937)).

The dean of the University of Chicago Law School wrote that a requirement of two years of college would be "a rational, beneficent measure of reducing hereafter the spawning mass of promiscuous semi-intelligence which now enters the bar."[51]

The complaints of overcrowding continued after World War II, with elite lawyers and law faculty suggesting that some law schools be eliminated and that no further schools be admitted for approval. For example, at a 1945 meeting of the AALS, a member of the AALS Committee on Aims and Objectives asserted:

> I assume that the background of this is the general feeling that we do have too many law schools, some of which are clearly unnecessary .... If the legal education necessities of the area could be taken care of by schools already admitted, then there would be no further admissions in that area. The general background, I suppose, is to facilitate the elimination of some of the smaller schools.[52]

Bigotry also may have played a part in the attempt by the ABA and AALS to limit the number of new applicants to the bar. During 1900-1920, the number of foreign-born lawyers increased at double the growth rate of the profession in general. The new schools helped the increase to occur; approximately three-fourths of the students in the new part-time law schools were recent immigrants,[53] who viewed the law as a profession of opportunity. Existing lawyers viewed the new lawyers as an economic threat, and expressed their economic fears as racial epithets. For example, one ABA official indicated in an ABA Report that many of the lawyers who came before the local bar grievance committees were "Russian Jew Boys."[54] The ABA official recommended that a college education be required for all bar applicants; that way, the immigrants could "absorb American ideals."[55] Another ABA leader recommended that applicants for the bar be required to attend college; this would require them to mix with "the young American boys and girls."[56] Likewise, the dean of the Wisconsin Law School told participants at the annual AALS meeting:

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51 *Id.*

52 First, *Competition (I)*, *supra* note 3, at 390 (quoting 1945 AALS PROC. 72-73 (statement of Dean Gavit of Indiana University Law School) (footnote and internal quotation marks omitted)).

53 *See* WILLIAM R. JOHNSON, SCHOOLED LAWYERS 155 (1978).

54 STEVENS, *supra* note 28, at 176.

55 *Id.*; First, *Competition (I)*, *supra* note 3, at 363 (quoting 54 A.B.A. REP. 624 (statement of Henry Drinker)).

56 First, *Competition (I)*, *supra* note 3, at 376 (quoting SPECIAL SESSION, *supra* note 44, at 22 (statement of Elihu Root)).

> If you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. Emigrants and sons of emigrants remembering the respectable standing of the advocate in their own home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble.[57]

The elite bar appears to have created the term "ambulance chaser" at approximately this time to describe the conduct of these new lawyers;[58] by "ambulance chasing," elite lawyers usually meant vigorous competition in the legal market by foreign-born lawyers. One leader of the bar indicated that the Jewish applicants for the bar were "without the incalculable advantage of having been brought up in the American family life," and therefore they "can hardly be taught the ethics of the profession as adequately as we desire."[59] Likewise, the Yale Law School was concerned about the "Jewish Problem." Indeed, the Yale Law School's dean argued against using applicants' grades to limit enrollment at law school. Basing admission on grades would increase the number of students with "foreign" backgrounds rather than "old American" ancestry, producing at Yale an "inferior student body ethically and socially."[60]

The ABA, together with the AALS, had hoped to follow the lead of the medical profession. At the turn of the century, the number of medical schools had grown substantially. The American Medical Association ("AMA") issued a report that listed many of them as unacceptable.[61] This "Flexner Report" led to the failure of many of the new medical schools. By 1920, the number of medical schools had fallen to half the number that had existed in 1900. The ABA and AALS hoped to do the same thing for the law industry. In 1915, the president of the AALS praised the AMA's approach. The reduction in the number of medical schools was due "in large part to the campaign of the American Medical

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57 STEVENS, *supra* note 28, at 109 n.67 (quoting then-Dean of Wisconsin Law School Harry S. Richards); *see also* JOHNSON, *supra* note 53, at 150.

58 JOHNSON, *supra* note 53, at 151.

59 *Id.* at 150.

60 John Henry Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFF. L. REV. 459, 472 n.69 (1980).

61 *See* ABRAHAM FLEXNER, MEDICAL EDUCATION IN THE UNITED STATES AND CANADA (1910).

Association for higher standards.... The result has been the weeding out of the weaker schools."[62] In contrast, a "large section" of the bar had exhibited "indifference or actual hostility... toward higher standards in legal education."[63] This large group included lawyers who had either graduated from night schools or had not attended law school at all. The AALS president concluded, "[T]his Association has not pursued an aggressive policy.... We must make an aggressive and sustained effort to bring about a uniform standard for admission to the bar throughout the United States."[64] Similarly, another leader in the AALS and ABA indicated, "I do not know whether we can accomplish in the next few years, working with the American Bar Association, what the American Medical Association has accomplished for the medical profession and medical schools, but I think we can go a very long way."[65] Making lawyers especially envious were doctors' increasing incomes; shortly after 1929, doctors' incomes began to exceed the incomes of lawyers.[66]

Beginning in the 1920s, the ABA and AALS had published lists of law schools that satisfied their criteria. The criteria had little impact; students from unapproved schools could still take the bar. The ABA and AALS recognized that they needed to enlist state legislatures and supreme courts to enforce reductions in the number of law schools and law students. In 1936, the president of the AALS proposed that states establish quotas for both admissions to the bar and enrollments in law schools: "Admitting that restriction of law school attendance as a whole would be a difficult problem, we could make some progress in that direction by working for bar admission quotas and for reduction agreements between law schools, state by state."[67]

However, states were slow to enforce higher standards for law schools. State legislatures were filled with graduates of the night law schools that the ABA and AALS hoped to eliminate. For example, during the 1920s, an average of twenty-five graduates of Suffolk Law School served in the Massachusetts legislature.[68] The

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62 First, *Competition (I)*, *supra* note 3, at 353 (quoting 1915 AALS PROC. 62 (address of then-AALS President Harry S. Richards)).

63 *Id.* (quoting 1915 AALS PROC. 62) (alteration in original).

64 *Id.* (quoting 1915 AALS PROC. 76).

65 *Id.* (quoting 1915 AALS PROC. 28 (statement of then-University of Pennsylvania Professor William Draper Lewis)).

66 *See* ABEL, *supra* note 14, at 48.

67 First, *Competition (I)*, *supra* note 3, at 376 (quoting 1936 AALS PROC. 16).

68 *See* ABEL, *supra* note 14, at 54.

legislators still remembered Abraham Lincoln, who had not attended law school. They believed that law schools should remain open to the "poor and worthy."[69] In Wisconsin, a lawyer opposed a requirement of a law school diploma, noting "that the boy who struggles on the farm, or struggles in the lumber woods and aspires to become a lawyer, and studies with sufficient persistence and diligence . . . ought not to have any more barriers thrown in his way."[70] The deans of the new law schools understood that the elite law schools, most of which were associated with colleges, were attempting to eliminate the new schools by convincing state legislatures not to license students from the new schools. For example, at the 1929 ABA meetings, the dean of Suffolk Law school, in an address entitled "Facts and Implications of College Monopoly of Legal Education," noted that the ABA and AALS had hired a lobbyist "at a $10,000 a year salary as field agent to capture the various states of the Union for the college monopoly."[71]

During the Depression, the ABA, AALS, and state bar associations called with still greater urgency for protection from competition. Lawyers' groups in California, Tennessee, Ohio, and Texas mounted campaigns to convince state legislatures to make unapproved schools illegal.[72] For example, in 1933, a committee of the State Bar of California issued a report that included the following:

> Three questions arise: First, can the bar of California absorb this yearly influx [of 600 new lawyers]? . . .
>
> As to whether the bar of California is overcrowded, every lawyer knows the answer. . . . For every one who gives up a place in the profession there are always two crowding forward to take his place. . . .
>
> It is evident that as long as 20 schools operate in the state without restrictions, California will continue to be overcrowded with lawyers . . . . [I]t seems apparent that some of these 20 schools have but little excuse for existing.[73]

State and federal governments gradually began to respond to these arguments, and permitted the ABA and the elite bar to prevail. One factor that helped the ABA to succeed was that, although the ABA's membership rolls continued to include only a

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69 JOHNSON, *supra* note 53, at 121.

70 *Id.* at 153.

71 STEVENS, *supra* note 28, at 175.

72 *See* ABEL, *supra* note 14, at 54-55.

73 *Id.* at 55 (alterations in original).

minority of practicing lawyers, there was no substantial rival lawyers' group.[74] Therefore, the ABA was able to purport to represent the whole of the legal profession. In 1927, no state required graduation from law school at all for admission to the bar, much less from an ABA-accredited school. By 1935, nine states required graduation from an ABA-accredited school; by 1937, twenty states required this; by 1938, twenty-three states required an ABA-approved degree; by 1941, forty-one states required one.[75] Today, all but three states require graduation from an accredited law school.[76] In all but these three states, graduates of unaccredited schools are excluded from practice in both state and federal courts within the states. Federal courts in a state uniformly restrict admission to lawyers who have qualified for admission to the state's courts.[77]

The ABA also succeeded in convincing states to require substantial education before law school. In 1927, only one state required any college; after 1929, states increasingly began to require two years of college; by 1942, nearly all states required at least two years of college.[78] During the Depression, the ABA happily noted that the new requirement in many states of two years of college as a prerequisite for law school had caused a drop in the number of law students, and had led to the failure of several nonelite law schools. In 1936, the ABA noted: "This decline is likely to continue as the effect of the adoption of the two-year college requirements in Massachusetts, California, and the District of Columbia, as well as in other states, continues to be felt."[79]

Commentators denounced these new requirements, arguing

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74 Although the fraction of United States lawyers who are members of the ABA has grown beyond the 9% it was in 1920, even today, only 37% of lawyers are members. *See* M.A. Stapleton, *To Get Bigger, ABA Looks to "Small Market"*, CHICAGO DAILY L. BULL., Apr. 27, 1996, at 23.

75 *See* ABEL, *supra* note 14, at 55.

76 *See* ABA SEC. LEGAL EDUC. & ADMISSIONS TO BAR, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS, 1996-97, at 16-17 [hereinafter COMPREHENSIVE GUIDE]. In 1998, Georgia will begin requiring a diploma from an ABA-accredited school. *See id.*

77 *See* Earl C. Dudley, Jr., *Federalism and Federal Rule of Evidence 501: Privilege and Vertical Choice of Law*, 82 GEO. L.J. 1781, 1833 n.245 (1994) (stating that although federal courts have traditionally maintained their own rolls of admitted attorneys, "admission to practice before a federal court for the most part flows automatically from admission to a state bar"); *see also* FED. R. APP. P. 46(a).

78 *See* ABEL, *supra* note 14, at 49. Until 1950, because of lawyers who had been educated under the previous system, more than half of practicing lawyers had not attended college at all. *See* STEVENS, *supra* note 28, at 209.

79 ABA, 1936 ANNUAL REVIEW OF LEGAL EDUCATION 35.

that they were elitist; they unfairly excluded those who either could not gain admission to an elite school or lacked sufficient wealth to support themselves during the many required years of college and law school study. One scholar noted that the "proposition is undemocratic and tends to create by law a favored class of professional aristocracy to consist alone of those who have the good luck to be born well off financially, or who have rich friends who will let them have the means to take up these long years of study."[80] The trade association for the new proprietary law schools argued that success in the law should not depend on which law school a lawyer had attended, but on the lawyer's "reputation, knowledge and experience as a lawyer."[81] Likewise, Karl Llewellyn pointed out that the bar was not overcrowded. Instead, all lawyers were instead attempting to serve only rich clients, while ignoring the less wealthy section of the market. The country needed not fewer ambulance chasers, as the bar argued, but more of them: "I say that the honest ambulance chaser does what the 'better' bar does not do. He brings legal services to the man who needs legal services a lot more than the blue stocking man does."[82]

Several states attacked the so-called oversupply of lawyers more directly, by quotas. For example, in 1935, Pennsylvania authorized county bar associations to limit the number of new lawyers each year; counties often limited the number of new lawyers to the number of lawyers that had died or retired.[83] In addition, the bar reduced the supply of lawyers by decreasing the passing rate on bar exams—as the ABA had sought for many years.[84] In earlier decades, the bar exam had frequently been little more than a perfunctory formality; in the nineteenth century, it was often a five-minute oral discussion with a judge.[85] This changed during the Depression. The pass rates on most states' exams declined steeply after 1929.[86] As before, pass rates were lower in areas with large immigrant communities.[87] As Yale Law School's dean noted during the Depression, "Obviously the bar examiners are applying some sort of quota now as they certainly

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80 George H. Ethridge, *Unjust Standards for Law Practice*, 2 MISS. L.J. 276, 284 (1929), *quoted in* STEVENS, *supra* note 28, at 188 n.59.

81 STEVENS, *supra* note 28, at 188 n.59.

82 *Id.* at 189 n.70.

83 *See* ABEL, *supra* note 14, at 47.

84 *See* STEVENS, *supra* note 28, at 173.

85 *See id.* at 25, 105 n.21; ABEL, *supra* note 14, at 63.

86 *See* ABEL, *supra* note 14, at 63-64, 75.

87 *See id.*

should and must."[88] In 1932, a California state bar committee was appointed to investigate the sudden plunge in the pass rate. The committee concluded:

> The grading seems to have been more strict than in previous examinations, influenced perhaps by the fact that at the preceding annual meeting of the State Bar there had been a great deal of talk about overcrowding of the bar, which had produced a considerable sentiment for limitation of numbers.[89]

As an additional way to eliminate unaccredited law schools, the established bar convinced the federal government to offer benefits under the G.I. Bill to returning soldiers for law school only at ABA-accredited institutions.[90] Similarly, in 1952, the United States Commissioner of Education began offering government-subsidized loans only to students at ABA-approved schools.[91] The DOE continues this practice today.

Although the Depression devastated the nation, it was, for the elite law schools, a gift of gold: The Depression convinced practicing lawyers to cooperate with elite law schools to eliminate the new law schools that both competed with elite law schools and produced new lawyers who competed with existing lawyers. The combination of state legislation that allowed only students from ABA-accredited schools to take the bar and federal legislation that provided subsidized loans only to students from ABA-accredited schools killed off almost all unaccredited schools. Between 1930 and 1949 alone, seventy-one law schools closed; sixty-nine of them were unaccredited.[92] Although unaccredited schools exist in three states, the only state with a large number of unaccredited schools is California: as of 1979, 70% of the nation's students in unaccredited schools were in California schools.[93] The established bar has attempted to stifle even these schools. In 1937, responding to the bar's complaints about an oversupply of lawyers, the California legislature granted the state bar association authority to throw a barrier in front of students from unaccredited schools; since 1937, the state bar has required all students from unaccredited law schools to pass a preliminary exam before being

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88 *Id.* at 65.

89 *Id.*

90 *See id.* at 55.

91 *See* Letter from Robert A. Stein, Chairperson, ABA Council of the Section of Legal Education and Admissions to the Bar, to Karen W. Kershenstein, Director, Accreditation and State Liaison Division, U.S. Dep't of Educ. (Feb. 25, 1994) (on file with author).

92 *See* ABEL, *supra* note 14, at 55.

93 *See id.* at 56.

allowed to take the bar exam.[94] Each year approximately one-half of the students who take this "baby bar" fail.[95]

Although the ABA's efforts have helped the elite bar, they have especially harmed minorities, women, and the poor. A number of law schools had been founded in the first decades of the century specifically to serve these groups.[96] The schools thrived through the 1920s. However, the restrictions that the ABA obtained in the next decade eliminated almost all of these schools, and closed the path into the legal profession that these schools had opened for disadvantaged groups.[97] Just as the AMA's restrictive efforts had caused the number of black physicians to decline from 1900 to 1950,[98] the ABA's efforts, which consciously mimicked the AMA's strategy, inflicted disproportionate harm on minorities and the disadvantaged. This result conformed perfectly with the ABA's intention to exclude from the law those whom the ABA believed to be genetically inferior. In 1958, Dean Erwin Griswold of Harvard justified the ABA's elitist approach: "[I]t might be that we should eventually conclude that those who are not endowed by nature with a reasonably high quantum of intellectual ability should not be given the facilities to study law."[99]

B. *The Boom in Legal Education*

During the 1950s, the market for legal education remained relatively stable. The near monopoly that state legislatures had granted the ABA permitted it to drive out or absorb most unaccredited rivals.[100] However, little demand existed either for additional places in law school or for new law schools; total enrollment remained relatively constant or even declined, as did the number of applicants.[101] During this decade, law schools generally accepted approximately four-fifths of their applicants; Harvard accepted about one-half; Stanford accepted two-thirds.[102] Existing law

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94 *See id.*

95 *See id.*

96 *See* STEVENS, *supra* note 28, at 74.

97 *See id.* at 194-95.

98 *See id.* at 218 n.13.

99 *Id.* at 208.

100 In 1949, 19% of law students attended law schools that lacked ABA accreditation. In 1958, only 8% did. *See id.* at 207.

101 Enrollments in law school actually declined from 57,579 in 1949, a number that returning warriors increased, to 42,646 in 1958. *See id.* at 207. Between 1952 and 1962, total law school enrollment fluctuated between 39,339 and 48,663. *See* First, *Competition (II)*, *supra* note 3, at 1053 n.20.

102 *See* ABEL, *supra* note 14, at 60.

schools accommodated almost everyone who desired a legal education.

Starting in the 1960s, the near-monopoly that ABA-accredited schools had developed began to constrain competition profoundly and to limit output substantially. During the 1960s and early 1970s, the number of applications to law schools exploded. The number taking the Law School Aptitude Test ("LSAT") increased from 20,903 in 1959 to a peak of 136,106 in 1973.[103] However, ABA accreditors ensured that both the number of law schools and their capacity did not keep pace with the new demand for legal education. The ratio of those taking the LSAT to those enrolling the next year increased from 1.0 in 1958-1959 to 3.3 in 1973-1974.[104] By the end of the 1960s, Harvard accepted only 25% of applicants, down from 50% in 1960.[105] Average LSAT scores for those admitted shot up: In 1975, the ninety most competitive ABA-approved schools were all at least as selective as the eighth-ranked school had been in 1961.[106]

Without the ABA controls, new law schools would have opened to satisfy the new demand for legal education; law school capacity would have increased by a factor of more than five.[107] Instead, the ABA controls limited the increase to a factor of two. In absolute numbers, the ABA's limits denied a law school education to more than 90,000 people in 1973 alone.[108]

In addition, the ABA ensured that the benefits of the increased capacity that did occur went to existing ABA-approved schools and their faculties, not to new schools. For example, enrollments increased over 50% from 1967 to 1972. But previously established ABA schools absorbed 94% of this increase, by increasing the numbers that the schools admitted.[109]

During this period, the ABA's accreditation of even a few new law schools provoked opposition from faculties at existing schools. In 1969, Columbia Law School's Professor Walter Gellhorn complained to the AALS that "the A.B.A. and the A.A.L.S. should somehow or other . . . enforce some system of birth control on American education institutions. They should be allowed to beget new law schools only if they can clearly show readiness to

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103 *See id.* at 253 tbl.4.

104 *See id.*

105 *See id.* at 60.

106 *See id.*

107 *See id* at 253 tbl.4.

108 *See id.*

109 First, *Competition (II)*, *supra* note 3, at 1053.

support their child in the style in which that child should be supported."[110]

Responding to Gellhorn's call, the ABA used two prophylactics to prevent the spawning of further unwanted law schools. First, in 1973, the ABA adopted a strict new set of Standards and Rules of Procedure for the Approval of Law Schools.[111] Second, in 1974, the ABA appointed James P. White as its Consultant on Legal Education ("Consultant").[112] White, whose responsibilities include administering the accreditation process, has continued to serve as Consultant for more than twenty years.

The combination of increasing demand for legal training and the tight ABA system of restraints had the predicted impact. Salaries and benefits for law school faculty increased substantially, growing much faster than salaries of faculty in other disciplines.[113]

III. THE ACCREDITATION PROCESS, THE ABA'S SUBSTANTIVE REQUIREMENTS, AND RECENT DEVELOPMENTS

The economic impacts of law school accreditation are shaped by both the accreditation process and by the ABA's substantive standards. The process and standards may, or may not, increase the quality of legal education.[114] However, a main impact of the process and standards is to increase salaries and benefits for existing law school faculty. The process and requirements provide benefits to faculty directly; they directly require high salaries, short working hours, and ample benefits. In addition, the process and requirements provide benefits indirectly, by erecting daunting barriers to entry for new law schools and faculties, and so reducing competitive pressures.

We now discuss the nature and economic impacts of both the accreditation process and the individual substantive standards. We then describe recent controversy surrounding accreditation, which has led to modest modifications.

The ABA has offered various policy-based justifications for the procedural and substantive requirements. The following discussion suggests that many of the justifications, although sincere,

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110 *Id.* at 1057.

111 *See* ABA STANDARDS, *supra* note 23; *see also* REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 10 (1995) [hereinafter COMMISSION REPORT].

112 *See* COMMISSION REPORT, *supra* note 111, at 10.

113 *See infra* Part IV.A.

114 *See infra* Part V.A.

are inadequate.[115] Furthermore, in a later Part, we show that the justifications are also legally irrelevant; regardless of any policy-based justifications, the requirements are illegal because they restrain competition.[116]

A. *The Process for Accreditation*

The process for gaining and retaining accreditation creates a substantial barrier to entry because it is time-consuming and expensive. The responsibility for making accreditation decisions is, in theory, dispersed among four groups in the ABA. The ABA House of Delegates has ultimate authority over accreditation.[117] Reporting to the House of Delegates is the Council of the Section of Legal Education and Admission to the Bar ("Council"). In turn, reporting to the Council is the Council's Accreditation Committee. At ground level is the ABA Consultant on Legal Education, who the ABA appoints both to organize the mechanics of the process and to serve as the ABA's direct contact with law schools. In practice, Consultant James White enjoys by far the most practical authority over whether a school obtains accreditation.[118]

An entrepreneur who is considering starting a law school faces disheartening barriers. In addition to the normal difficulties and expense of starting any business, the new law school must jump through many expensive ABA hoops; in forty-seven states, unless the new law school receives ABA accreditation, its graduates cannot practice law.[119] The ABA has designed a process that is, for the school, expensive, time-consuming, and full of risk. This is not surprising. The new law schools and the new lawyers that the schools would produce would compete with the law schools and established lawyers who control the ABA accreditation process.

The hoops that the ABA has set for new law schools are both procedural and substantive. We discuss the procedural requirements here, and the substantive requirements in the next section.

Procedurally, in order to obtain provisional accreditation, the ABA requires the law school to assemble several extensive re-

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115 *See infra* this Part.

116 *See infra* Part VI.B.

117 *See* RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS BY THE AMERICAN BAR ASSOCIATION r. 11 (1994) [hereinafter ABA PROCEDURAL RULES].

118 For extensive discussion of White's role, see Ken Myers, *Jim Who?*, NAT'L L.J., Nov. 22, 1993, at 16.

119 *See supra* note 76 and accompanying text.

ports. The new school must conduct a "comprehensive feasibility study," and it must hire an outside advisor to help with the process.[120] Often, the outside advisor is a legal academic who has worked in the past for the ABA in the accreditation process. Accordingly, many schools hire former associates of the ABA's Consultant.[121] In addition, the new school must complete a comprehensive "self-study" of the nature of the new law school's educational program and its goals,[122] an extensive "site evaluation questionnaire," and an annual questionnaire."[123] Next, the school must provide financial operating statements for the last three years.[124] Finally, the school must pay a substantial application fee.[125]

Creating additional risk for the entrepreneur is the ABA's requirement that bars the school from even applying for accreditation until it has completed at least one academic year of operation.[126] This is a major deterrent to entry. An entrepreneur cannot file a proposal with the ABA and then invest in creating a school only if the ABA approves the proposal. Instead, the entrepreneur must start a law school and convince students to attend it with no assurance that the students will ever obtain licenses to practice law. Students who accept this gamble often lose. For example, one of the schools that the ABA rejected for accreditation in 1987 was Nevada's only law school. It closed soon after the rejection, although thirty-eight of its seventy-five graduates had already passed the Nevada bar exam and been provisionally admitted to practice law. The ABA's denial of accreditation to their law school caused Nevada to revoke the graduates' licenses.[127]

Nor can the law school start small, and incur large expenses only if it receives accreditation; the ABA denies accreditation unless the law school first demonstrates that it has spent the large

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120 ABA PROCEDURAL RULES, *supra* note 117, rr. 5(a)-(b), 6(a).

121 However, a person must wait two years after ending service for the ABA in the accreditation process before accepting employment as a consultant to a law school that seeks accreditation. *See* POLICIES OF THE COUNCIL OF THE SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR AND OF THE ACCREDITATION COMMITTEE ¶ 3(B), at 2 (1994) [hereinafter ABA POLICIES].

122 ABA PROCEDURAL RULES, *supra* note 117, r. 6(b).

123 *Id.* r. 7(b).

124 *See id.* r. 7(b)(6). If the school has existed for fewer than three years, financial statements must be produced for the entire period of the school's existence. *See id.*

125 *See id.* r. 7(b)(9).

126 *See id.* r. 7.

127 *See* Edward A. Adams, *ABA Denies Accreditation to Three: Western States, Nevada, St. Thomas*, NAT'L L.J., July 20, 1987, at 4, *cited in* ABEL, *supra* note 14, at 49.

sums that are necessary to comply with the ABA's expensive substantive standards. For example, a law school cannot invest in a large library only after it receives accreditation; it must have a full library before the ABA will even consider it for accreditation. Moreover, the system creates a catch-22 with respect to students. A school will not receive accreditation unless it has students; but few qualified students are willing to attend a school that lacks accreditation—in forty-seven states, the diploma would be useless.

Once the law school begins operation, the Consultant arranges for a site evaluation. A team of five to seven evaluators, who the Consultant chooses, visits the school for three days during the term at the law school's expense. They sit in on classes, tour the facilities, and interview faculty, staff, and students. Again, this imposes a substantial expense on the law school—some members of site teams view the site visit as an opportunity to splurge at the school's expense.[128] The visit consumes much staff and faculty time and can disrupt the school.

The site team makes a report, which, after the Consultant edits it, the school then receives.[129] Accompanied by the school's comments, the report then goes to the Accreditation Committee. At a hearing, the Accreditation Committee hears presentations by both the law school and a representative of the site team—the law school must pay the expenses of the representative to attend the hearing.[130] Approval by the Accreditation Committee is then reviewed by the Council and the House of Delegates.[131] If the Accreditation Committee denies provisional approval, the law school can either appeal or reapply.[132]

Law school faculty have captured all of these levels of authority. The site inspection teams are almost always completely composed of law school faculty and staff. The Consultant has traditionally been a legal educator; James White is a law school faculty member and former dean. Approximately 90% of the members of the ABA Section on Legal Education are legal educators, as are a majority of the Accreditation Committee. All members of the Standards Review Committee, which determines the substantive standards that the ABA will require for accreditation, are le-

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128 This recurring comment comes from people who were involved with the accreditation process at several law schools. They asked not to be named in this Article.

129 *See* ABA PROCEDURAL RULES, *supra* note 117, r. 8(d).

130 *See id.* r. 9(c).

131 *See id.* rr. 10, 11.

132 *See id.* rr. 12, 15.

gal educators.[133]

For the last seventy years, the history of accreditation has been shaped by two groups with complementary objectives.[134] On one hand, existing law school faculty have sought to reduce competition and increase their benefits. On the other hand, existing lawyers have desired to reduce the supply of new lawyers by limiting law school enrollments and increasing the costs of legal education. Most of the ABA procedures and standards satisfy the objectives of both groups; they limit new law schools, increase benefits for law faculty, and increase the costs of legal education. This explains the willingness of practicing lawyers to permit law school faculty to capture the process.

Provisional approval of a law school for accreditation does not end the expense for the law school. The law school must go through the entire site evaluation process each year for at least two more years before the ABA will even consider the school for full approval. During each of the additional years, the school must again assemble all of the reports and endure an expensive and disruptive site evaluation, and must both pay a site evaluation fee and reimburse the site team's expenses.[135]

The total expense of this process to the law school is large. For each of the minimum of three initial inspections, direct costs, including the ABA's inspection fee and the expenses of the travel team, can exceed $50,000.[136] Indirect costs, including the value of staff time, faculty time, and dean's time, can easily exceed $300,000 for each of the three years. Adding direct and indirect costs for all three years, the total cost of obtaining full accreditation often exceeds $1 million.[137]

There is no guarantee that the money will actually lead to accreditation. After starting a law school, convincing students to attend it, and spending $1 million on the accreditation process, the ABA may still deny accreditation, which often kills the law school. The ABA frequently denies accreditation to new law schools, as it

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133 *See* Plaintiff's Competitive Impact Statement at 4-5, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211); *see also* Complaint at 19, Massachusetts Sch. of Law v. ABA (Mass. Sup. Ct. 1996) (No. 95-2117). Although the House of Delegates includes many who are not legal educators, the House of Delegates almost always defers to the captured groups' recommendations.

134 *See supra* Part II.A.

135 *See* ABA PROCEDURAL RULES, *supra* note 117, rr. 16(a), 17(a).

136 *See* COMMISSION REPORT, *supra* note 111, at 50-51. The Commission Report includes a study of the costs of accreditation. *See id.*

137 *See id.*

did for all three schools that applied in 1987.[138]

After a school obtains full accreditation, the accreditation process continues on. The ABA subjects each school to the site visitation process, including the long reports and inspections, during the third and seventh years after the school first receives full accreditation.[139] From then on, inspections generally occur every seven years—so-called "sabbatical site evaluations."[140]

If, at any post-accreditation inspection, the ABA inspectors find flaws in a law school's performance, then the Consultant will send the law school an "action letter" that lists the defects.[141] The ABA Rules specify that failure to fix a defect can result in disaccreditation.[142] As we discuss below, a law school can use the action letter as a tool to pry additional funds from its university.[143]

As might be expected of a system that is run by faculty from existing accredited law schools, the system promotes the interests of these faculty. The system aggressively enforces its requirements against potential new competitors both of existing law schools and of existing law schools' faculties, and it deters many potential entrants from even attempting to compete. But the system does not enforce accreditation requirements against existing law schools and their faculties; here, the ABA maintains only a false appearance of enforcement. The ABA has never disaccredited a school that has obtained full accreditation, although it often threatens to do so. Thus, existing schools and their faculties can choose, when convenient, to use the threat of enforcement to pry money from their universities and alumni. At other times, the accredited schools can simply ignore the ABA's action letters.

The ABA imposes especially large costs on semester-abroad and summer-abroad programs. Suppose that an accredited U.S. law school wishes to permit its law students to study for a semester or summer at an established law school in another country. The ABA requires an initial site visit in the first year of the program, and then a site visit every three years for semester programs and every five years for summer programs—compared to every seven years for programs in the U.S.[144] As with site visits in the U.S., the

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138 *See* ABEL, *supra* note 14, at 57.

139 *See* ABA PROCEDURAL RULES, *supra* note 117, r. 26(a).

140 ABA POLICIES, *supra* note 121, pol'y 10, at 11.

141 *See* ABA PROCEDURAL RULES, *supra* note 117, r. 27(a).

142 *See id.* r. 27(b).

143 *See infra* Part IV.D.

144 *See* CRITERIA FOR APPROVAL OF SEMESTER ABROAD PROGRAMS FOR CREDIT GRANTING FOREIGN SEGMENT OF APPROVED J.D. PROGRAM pts. IX(A)(1), (B)(3)

law school must pay the expenses of the site team's five to seven members. For a site visit to a foreign program, these expenses can be large. More than one law school dean has indicated privately that these costs have caused cancellation of foreign programs. More than one law school official has also noted privately that the ABA Consultant induces loyalty among those in the accreditation process by assigning expense-paid site visits to exotic foreign lands to those who support him.[145]

B. *The ABA's Substantive Accreditation Standards*

Although the costs of the accreditation process itself are large, and are a deterrent to entry, the substantive requirements for accreditation impose an even greater cost. They erect an even higher barrier to competition from new law schools and new faculties, and impose even higher costs on law students and the public.

In order to obtain accreditation, a law school must satisfy the many detailed substantive standards[146] that the ABA established in 1973. Some of the standards may be intended to increase the quality of legal education. However, most of them do not promote this purported goal effectively. Instead, the standards' primary objectives are suggested by their three main impacts.

First, the standards increase benefits for existing law faculties and law schools in both the market for law school faculty and the market for legal training. The many substantive standards require expensive conformity among law schools. That law faculty have captured the accreditation system explains the standards' consistent pattern: Almost all of the standards benefit faculty at accredited law schools by requiring increased pay and benefits, improved working conditions, and decreased workload. The benefits to existing law faculty are often at the expense of the faculty's students,

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(1994); CRITERIA FOR APPROVAL OF FOREIGN SUMMER PROGRAMS OF ABA APPROVED LAW SCHOOLS pts. VIII(A)(1), (B)(3) (1994).

145 The AALS conducts its own evaluation process to determine AALS membership. However, the AALS process is integrated with the ABA process. Since the late 1960s, AALS site inspections occur simultaneously with ABA inspections, a single AALS representative tags along with the ABA site team, and ABA site inspectors frequently change hats and conduct other inspections for the AALS. *See* COMMISSION REPORT, *supra* note 111, at 10. In addition, the AALS requirements for membership are generally similar to the ABA standards. *See generally* ASSOCIATION OF AM. LAW SCHS., 1997 HANDBOOK (1997). Unlike the ABA's accreditation decision, the AALS's membership decision does not directly determine whether a school's graduates can receive licenses to practice law. Accordingly, this Article focuses on only the ABA accreditation process. However, lessons about the ABA process also apply to the AALS process.

146 *See* ABA STANDARDS, *supra* note 23.

of other departments in the university, and of the public.

Second, the standards benefit existing lawyers in the market for legal services because the standards increase the costs for students to become lawyers. Many of the standards that increase costs to students provide corresponding benefits to law school faculty. However, a few other standards increase costs to students without offering any direct benefit to law schools' faculty or staff.

All of the standards that increase costs to law students benefit existing lawyers, whether or not the standards also benefit faculty. By raising the costs of obtaining legal education, the standards deter or prevent some people from becoming lawyers, reducing competition for existing lawyers. For example, the standard that requires applicants to law school to have completed three years of college study increases the opportunity cost of attending law school, and decreases competition in the market for legal services. The benefits that the standards provide to practicing lawyers create the continuing incentive for lawyers to support faculty's capture of the accreditation system.

Third, the standards benefit law faculty and law schools by permitting them greater power and autonomy within their universities in the market for intra-university funding. The standards directly require that law schools have power and autonomy. In addition, the standards create an indirect mechanism for law schools to obtain additional university funds. A law school can invite the ABA to write a negative report on an area of the law school that the law school would like to improve—for example, the school's library. The law school can then demand money for the improvement from the university; the law school's dean will argue that, without the funds, the law school will lose its accreditation.

In sum, the accreditation standards are a powerful lever for law schools and law faculties to obtain additional money and benefits. Indeed, the standards are a wish list of benefits for faculty. Existing lawyers support the standards and help law schools and law faculties to enforce them because the standards limit the number of new lawyers. However, paying for the benefits are actual and potential law school students, other areas of the university, and the public.

The ABA imposes the following specific standards. We discuss the standards in two groups, according to whether they both benefit law faculty and increase expenses for students and universities or whether they only increase these expenses.

1. *Standards That Benefit Faculty but Increase Costs for Students and Universities*

The ABA accreditation standards that we list below benefit law schools' faculty, while they harm the law students and other university programs that must pay for the benefits. The standards increase faculty compensation in three ways. First, some of the standards increase faculty wages directly. Second, others reduce the faculty workload. A reduction in workload is identical in economic effect to an increase in the hourly wage. The faculty members can enjoy the additional free time as leisure, or they can use it to earn money in other ways. Third, other standards require increased nonmoney benefits for faculty. Again, increased benefits are analogous to a pay raise; the increased pay is in the form of valuable benefits rather than money.

Fixing faculty salaries at high levels. The standards require that a law school's faculty salaries be at least equal to the salaries at the law school's competitors: "The compensation paid faculty members at a school seeking approval should be comparable with that paid faculty members at similar approved law schools in the same general geographical area."[147] Necessarily, half of all schools are always in violation of this standard.

The controls are detailed.[148] Each law school is required to raise the salaries of the various ranks of faculty in line with the national average, as well as with other law schools in the region and with "other law schools with which this school would *now* like to be compared."[149] At a minimum, across-the-board salary increases must at least match increases in the cost of living, and merit salary increases must be available.[150] Sometimes the controls involve accreditors in negotiations with the school over numerous specific faculty members' pay.

The ABA has construed the pay requirements strictly, repeatedly sending action letters that threaten disaccreditation unless schools raise salaries for faculty, deans, and librarians. Action let-

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147 *See* ABA STANDARDS, *supra* note 23, std. 405(a).

148 *See* Steven Smith, *Accreditation Revisited: ABA Reexamination of Approved Law Schools*, 27 WAYNE L. REV. 95, 105 (1980).

149 Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 89, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206). Faculty salaries are calculated by faculty rank, and they can then be compared with salaries at other schools, including "schools with which this school would like to be compared in five years." *Id.*

150 *See* ABA STANDARDS, *supra* note 23, std. 405, interp. 4.

ters routinely included comments such as "[f]aculty salaries remain low on both a national and regional basis";[151] "[s]alaries for full-time library professional staff are low";[152] "[t]he full-time law faculty at Antioch is inadequately compensated";[153] "faculty and Dean salaries are notably low";[154] and "faculty salaries and fringe benefits are not adequate."[155]

This standard is wasteful and unfair, and it demonstrates the strength of the ABA system. It does not increase the quality of legal training, and instead raises costs unnecessarily. It requires law schools to pay their faculty more than is necessary to retain them; it requires a law school to raise the salaries of even its existing faculty who would continue to offer their services even without the windfall.

Under the standard, law faculty benefit; students and universities suffer. The standard forces law schools to choose between two unattractive alternatives. Some law schools may pass the increased costs on to students through higher tuition charges. Other schools may seek additional funding from their universities, at the expense of other programs and departments within the university. The standard transfers funds to law faculty from students and from other parts of the university. In addition, the standard prices some law students out of the market for legal training altogether. The increased tuition charges from the standard will exceed the means of many potential students.

Furthermore, the standard both bars many law schools from entering the market and eliminates jobs for law faculty. Absent the standard, law schools with low costs and low prices would enter the market, hiring law professors at wages that were below the ABA levels. The new law schools would serve the students who could not afford law schools that offered ABA wage levels. The standard eliminates these potential law schools, destroys jobs for law professors, and eliminates the inexpensive legal training that the schools would have offered.

Limits on the amount of work for faculty. One ABA standard prohibits a law school from requiring a faculty member to teach more than an average of eight class hours per week, or ten hours

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151 Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 92, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206) (alteration in original).

152 *Id.* at 94.

153 *Id.* at 95 (alteration in original).

154 *Id.* at 96.

155 *Id.*

per week if a class is repeated.[156] Another standard entitles faculty to "reasonable opportunity" for sabbatical leaves and scholarly research.[157] In some instances, this standard has been applied in practice to require paid sabbaticals, summer stipends, and other forms of research compensation.[158]

The requirements benefit faculty in three ways. First, they allow a larger volume of free time, which might lead faculty members to provide higher levels of teaching or research effort. Doubtless some faculty do work harder, but others may pursue other interests or leisure activities. For many professors at accredited schools, the standards are equivalent to a raise in the hourly wage; the professor's salary now requires fewer hours of work.

The easy workload that the standards demand for faculty frees time not only for leisure, but also for other income-producing activity. Many law professors devote much time to consulting, giving bar review lectures, conducting professional seminars, and performing arbitrations; a few have what in effect are full legal practices.[159]

Law schools do not impose extraordinary responsibilities in other areas that might justify the light teaching loads. Compared to academics in other fields, law faculty have little responsibility. They usually are not expected to obtain grant funding, and standards for quantity of scholarship are decidedly lower than in other disciplines.[160] Indeed, a study revealed that 44% of all tenured law faculty at accredited law schools published no scholarship whatever during the study's three-year period.[161] A story circulates of the academic who secretly held two full-time faculty positions concurrently at law schools in different states.

Second, the standards are an employment act for full-time

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156 ABA STANDARDS, *supra* note 23, std. 404(a).

157 *Id.* std. 405(b).

158 *See* Plaintiff's Competitive Impact Statement at 8, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211). In a recent consent decree, filed after a legal challenge by the United States Department of Justice, the ABA agreed to eliminate this requirement beginning in 1996. *See* Report of the ABA Board of Governors at 21, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211) [hereinafter Revised Consent Decree]; *see also infra* text accompanying notes 237-42.

159 ABA STANDARDS, *supra* note 23, std. 402(b), interp. 2, indicates the circumstances under which a faculty member may even have an ongoing relationship with a law firm, appear on the law firm's letterhead, or have a professional telephone listing.

160 *See infra* Part V.A.

161 *See* Michael I. Swygert & Nathaniel E. Gozansky, *Senior Law Faculty Publication Study: Comparisons of Law School Productivity*, 35 J. LEGAL EDUC. 373, 381 tbl.1 (1985).

faculty. In addition to reducing teaching loads for existing full-time faculty, the standards' effect is to require hiring of additional full-time faculty. The standards require that classes be staffed with many teachers with lighter work loads rather than fewer teachers with heavier workloads.

Third, the standards protect unproductive faculty. Without the standards, a clever dean could shift additional teaching responsibility to faculty who produced little scholarship; productive faculty would teach fewer classes. With the standards, tenured deadwood can show up one day each week for their eight hours of classes—perhaps using teaching notes that they have not altered in thirty years—and take the remaining six days of the week off. Students' tuition, and funds from the rest of the university, must pay for these weekly six-day vacations.

The economic impact of the limit on teaching hours is identical to the impact of the standard that directly increases faculty salaries. Although it benefits existing faculty, it increases law schools' costs, increases tuition levels, harms the rest of the university, and eliminates some new low-priced schools.

Requiring higher numbers of full-time faculty, rather than part-time faculty. ABA schools must hire at least one full-time, tenure-track faculty member for every thirty students.[162] A school must have at least six full-time faculty members, a full-time dean, and a full-time law librarian.[163] The law librarian must be tenured.[164] Substantially all first year instruction must be by full-time faculty.[165] Adjunct professors do not count at all[166] toward the required numbers of full-time faculty members, nor do administrative personnel, deans, or other staff.[167] In addition, the standards prohibit schools from compensating for fewer faculty by having the dean or other staff teach additional classes.[168]

These standards benefit faculty. To comply with the standards, a law school must either hire more professors or reduce the number of students. Either approach reduces the amount of work—counseling, grading papers—for existing faculty.

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162 *See* ABA STANDARDS, *supra* note 23, std. 201, interp. B(2).

163 *See id.* stds. 402, 605.

164 *See id.* std. 205, interp. 7.

165 *See id.* std. 403(a).

166 The consent decree now requires that, beginning on June 25, 1996, the ABA will count adjunct faculty "at a fraction less than one" of a full-time faculty member. *See* Revised Consent Decree, *supra* note 158, at 36.

167 *See* ABA STANDARDS, *supra* note 23, std. 201, interp. A; *id.* std. 402(B).

168 *See id.* std. 201 & interps. A(1), B(3); *id.* std. 402 & interp.

However, the standards may harm students. By not counting adjunct instructors in the student-faculty ratios, the standards penalize and deter the hiring of adjuncts. Adjuncts are usually elite practicing lawyers who are eager to teach for fun and prestige—being an adjunct professor at a prestigious law school can attract clients—even at relatively low wages. These rules deter law schools from drawing on the ranks of talented part-time teachers to improve teaching and to pare the costs of faculty; the cost to hire a capable adjunct to teach a class is a small fraction of the cost for a full-time faculty member.[169] Instead, the rules induce schools to hire high-salaried, full-time tenured, or tenure-track faculty members, who generally lack substantial experience in practicing law. The rules condemn students to being taught by expensive instructors with little practical legal experience, rather than by less expensive, seasoned practitioners.[170] And because full-time instructors are more expensive than adjuncts, tuition rises.

The standards do not address actual class size; a law school with a low student-faculty ratio will nonetheless have only large classes if the faculty members teach few courses.[171] The standards merely require that law schools hire many full-time faculty members, regardless of whether the faculty members teach any classes.

The standards raise costs and reduce competition in two ways. First, they prevent new law schools from competing by offering programs with fewer faculty and larger classes, while charging lower tuition prices. Until the late 1960s, the ABA standards permitted student-faculty ratios of seventy-five-to-one.[172] Indeed, as seen in the movie and TV series *The Paper Chase*, the old classrooms at Harvard, adorned with oil paintings of stern old men, hold what was the standard class size until the 1970s: one instructor and more than 150 students. Perhaps some students would prefer cheaper schools with larger classes, as in this earlier purported golden age of legal education. Second, the standards prevent schools from replacing full-time faculty with part-time faculty,

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169 Emory University School of Law can hire an adjunct for approximately one-fifth the per-class cost of a full-time assistant professor, and approximately one-seventh the cost of a full professor. Interview with Nathaniel E. Gozansky, Associate Dean, Emory University School of Law, in Atlanta, Ga. (May 5, 1998).

170 There appear to be exceptions, illustrated by such Harvard faculty celebrities as Alan Dershowitz, Laurence Tribe, and Arthur Miller, who do extensive outside work.

171 The standards' only reference to class size is a requirement that an accredited law school provide small classes "for at least some portion of the total instructional program." ABA STANDARDS, *supra* note 23, std. 303(a)(ii).

172 *See* STEVENS, *supra* note 28, at 218 n.22.

such as adjuncts and part-time librarians, and offering lower prices.

Requiring at least three years of law school. A school must require at least three years of study for a law degree.[173] The standard benefits law schools, faculty, and staff by requiring students to purchase more years of training. However, it increases greatly the direct costs and opportunity costs of law school; students must pay more tuition and forego more years of paid work. Law school becomes more expensive for all students. The standard completely prevents some students from attending.

Experts have suggested that shorter formal legal training, such as two years in law school plus a paid apprenticeship, might be as effective as the present three-year program, while being much cheaper for students.[174] However, this standard protects the status quo by preventing new law schools from competing by offering shorter, cheaper programs.

Expensive law school facilities. The ABA requires that each law school have an "adequate" physical plant.[175] The ABA interprets this requirement to require excellence in law school facilities. In the past twenty years, nearly all ABA-approved schools have occupied new or renovated facilities. Nonetheless, in 1994, the ABA Accreditation Committee placed more than one-third of ABA-approved schools on report for "inadequate facilities," including many of recognized distinction.[176]

This standard benefits law faculty by requiring better facilities for them. However, it also increases law schools' costs, and it leads to increased tuition. It also serves as a barrier to entry—few law school entrepreneurs can afford the necessary expensive buildings—and reduces consumer choice. A law school cannot compete by offering instruction in modest facilities at a lower price.

The standard permits a law school to use ABA threats of disaccreditation to obtain additional funding from the university for deluxe facilities—"Mr. President, the law school will be disaccredited unless we get a new building." Often, the standard causes the

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173 *See* ABA STANDARDS, *supra* note 23, std. 305(a).

174 *See* DEREK C. BOK, HIGHER LEARNING (1986); DEREK C. BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY (1982).

175 *See* ABA STANDARDS, *supra* note 23, std. 701.

176 *See* Plaintiff's Competitive Impact Statement at 8, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211); *see also* SUPPLEMENTARY REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 10 (1995) [hereinafter SUPPLEMENTARY REPORT]. In addition, an accredited law school must own its facilities; it may not rent them. *See* ABA STANDARDS, *supra* note 23, std. 701, interp. 1.

law school to be the finest building on campus. However, law students pay higher tuition, and the university's other programs suffer.

Expensive library collections and library buildings. Law librarians are well-represented at all levels of the accreditation hierarchy. For example, each site inspection team generally includes at least one librarian.[177] The ABA's library standards, in addition to reflecting the interests of law school faculty in enjoying a fine library, reflect law librarians' influence. In addition to requiring that the law librarian be tenured, the ABA requires that a law school's library contain a specified long list of books, all in hard copy;[178] electronic access or access to other nearby libraries does not satisfy the standard.[179] Moreover, the university must grant autonomy to the law school library; the law school will get an action letter if the university attempts unduly to influence the library.[180] Furthermore, the library must be a large structure; it must contain study areas for at least 50% of the law school's entire student body.[181]

The ABA interprets the library standards strictly.[182] The law school may use ABA criticism of the school's library, and the ABA's threat of disaccreditation, to obtain more library funds from the university. Accordingly, it is not uncommon for a law school's library to be the university's newest and highest-quality facility, even grander than the law school itself.

Ironically, after 1973, the ABA appears to have tightened its enforcement of the requirements of large library seating capacities and large numbers of bound reference volumes. This occurred just as the rise of electronic substitutes had been making those facilities less essential. It is true that there is some value in having these facilities, in student convenience and law school prestige. Yet they are partly luxuries, which some efficient schools and students might not need to such full extent. The extra costs have been significant, as virtually all law schools have been required to incur high costs since 1973 to enlarge their libraries.[183]

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177 COMMISSION REPORT, *supra* note 111, at 15.

178 *See* ABA STANDARDS, *supra* note 23, std. 602(a).

179 *See id.* std. 601, interp. 3.

180 *See id.* std. 604.

181 *See id.* std. 704(b).

182 *See* Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 112, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206). Private conversations with several law school deans confirmed this interpretation.

183 *See* Complaint at 6, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-

Requiring large clinical programs. A law school must offer clinical training.[184] Full-time clinical faculty must have both tenure and the same authority in law school decisions as other faculty.[185] That the standards promote clinical training is not surprising. Like law librarians, those who conduct clinical training are well-represented in the accreditation process. For example, each site visit team generally includes one member who specializes in clinical training.[186] These requirements prevent a law school from reducing costs and tuition by providing no clinical programs, and arranging instead for students to get practical experiences as paid apprentices.

Requiring substantial law school resources. Law school resources must be "adequate" to sustain the school's program.[187] As with other standards, the Accreditation Committee interprets the requirement strictly. In 1994, approximately fifty law schools were on report for allocating inadequate resources to their law school programs.[188]

As with the other standards, this standard increases law schools' bargaining power in their intra-university markets for funding. A law school may use the ABA's criticism of the law school's resources to obtain additional funding from the school's university—"Mr. President, we need $1 million more per year from the university or the law school will be disaccredited."

Law school operational autonomy from the university. Authority over the law school must reside in the law school's dean and faculty, not the university.[189] For example, the university may not participate directly in law school tenure decisions, and law faculty must have veto power over the appointment of a new dean.[190]

This standard is crucial for preserving many law schools' partnership organization. The standard ensures that a law school's faculty can choose a dean who will promote the interests of the faculty. It prevents a university's president from appointing a dean who will increase both efficiency and the law school's competitive position by lowering faculty salaries, reducing faculty benefits, and

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1211).

184 *See* ABA STANDARDS, *supra* note 23, std. 302(a)(iii) & interp. 2.

185 *See id.* std. 405(e) & interp.; *id.* interp. std. 205; *id.* interp. std. 403.

186 *See* COMMISSION REPORT, *supra* note 111, at 15.

187 *See* ABA STANDARDS, *supra* note 23, std. 201, interp. 3; *id.* std. 209.

188 *See* Plaintiff's Competitive Impact Statement at 9, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211).

189 *See* ABA STANDARDS, *supra* note 23, std. 205.

190 *See id.* std. 205, interps. 5, 6.

increasing faculty workloads.

Protecting law school money from the university. Universities often view their law schools as potential cash machines for funding other university operations; law schools often have large profits—that is, excesses of tuition revenues over costs. However, the ABA prohibits the law school's university from skimming off "excessive" amounts of the law school's revenues.[191] Indeed, funds that the law school generates "should be fully available" to the law school.[192] A law school can demand that a university keep its hands off of the law school's money, lest the law school lose its accreditation. In the intra-university market for funding, the standard protects the law school from the university's use of law school funds for other university programs.

Faculty leaves of absence. Faculty members have been entitled to leaves of absence.[193] It appears that, at times, the ABA has interpreted this requirement to require paid leaves, including paid sabbaticals.[194] Again, this is equivalent to an increase in faculty's hourly pay; leaves permit faculty to work fewer hours for their salaries.

Other benefits for faculty. Each full-time faculty member must have a private office,[195] access to electronic research systems,[196] paid research assistants, secretarial assistance, and a travel budget.[197] The requirements raise costs, and transfer funds to faculty both from law students and from other parts of the university.

Sharing among law schools of information about salaries and other costs. Until recently, the ABA standards required approved law schools to provide detailed information about their salaries and other costs.[198] The Consultant distributed this information to all deans of approved law schools, but not to the public.[199] The statistical reports that all deans received included the salaries that

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191 *See id.* interp. std. 210; *id.* std. 209, interp. 2.

192 *See id.* interp. stds. 105, 210.

193 *See id.* std. 405(b). As part of the recent consent decree, the ABA has agreed to eliminate the requirement for leaves of absence. *See* Revised Consent Decree, *supra* note 158, at 21.

194 Letter from Lawrence R. Velvel, Dean, Massachusetts School of Law, to Richard Riley, Secretary, U.S. Department of Education 11 (Jan. 5, 1994) (on file with author) [hereinafter Velvel Letter].

195 *See* ABA STANDARDS, *supra* note 23, std. 703.

196 *See id.* std. 405(b), interp. 3.

197 *See id.* std. 405, interp. 6.

198 *See* ABA PROCEDURAL RULES, *supra* note 117, r. 38(a). In the recent consent decree, the ABA agreed to cease collecting or disseminating salary information. *See* United States v. ABA, 934 F. Supp. 435, 436 (D.D.C. 1996).

199 *See* ABA PROCEDURAL RULES, *supra* note 117, r. 38(c).

each level of faculty—assistant professor, associate professor, and full professor—received at each law school, as well as the salaries of competitors' deans and librarians.[200] For example, the report for 1994-1995 indicates that law faculty at Fordham University earned the nation's highest salaries: Full professors received on average $142,688 per year, with Harvard a close second place at $137,129.[201]

Economic theory and empirical experience both indicate that such information sharing can help members of a price-fixing agreement to ensure that no one defects from the agreement. "Secret price cutting, whether pursued to the point of complete breakdown in industry discipline or merely to across-the-board list price reductions, interferes with the maximization of collective profits. Recognizing this, oligopolists have tried to nip the problem in the bud by making it difficult to conceal concessions."[202] A classic method to enforce a price-fixing agreement and to eliminate secret price cutting is by establishing a trade association, such as the ABA, that collects information on the prices that members charge:

> In the typical case, an industry trade association is authorized to collect detailed information on the transactions executed by each member. To ensure full compliance, the association or an independent auditing firm is sometimes empowered to audit company records, and fines may be levied for failure to report sales quickly or accurately. The association then publishes at frequent intervals (for example, weekly) a report describing each transaction, including the name of the seller, the buyer, the quantity sold, and the price. Thus, each member knows shortly after the fact who has been shading prices for whom and can take appropriate retaliatory action. The potential price-cutting firm recognizes in turn that it will be found out quickly, so the incentive for offering concessions in the hope of deferring retaliation through secrecy fades.[203]

Law faculty have used precisely this method to enforce their

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200 See the depositions of various law school deans in Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 84-88, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206). A 50-page example of the salary information that all deans receive became part of the public record in *Massachusetts School of Law v. ABA*. *See* Supplemental Affidavit of Alison S. Berger in Opposition to Defendants' Motions for Summary Judgment exhs.H-M, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

201 *See* Supplemental Affidavit exhs.H-M.

202 SCHERER & ROSS, *supra* note 5, at 310.

203 *See id.* (endnote omitted). For a summary of several case studies, see G.W. Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities*, 21 U. CHI. L. REV. 527 (1954).

horizontal pricing agreement. Unemployed law faculty have an incentive to compete with employed faculty by secretly offering to accept salaries and benefits that are below the ABA minimums. The law schools that are not organized on the partnership model have an incentive to accept the secret offers; this would reduce the law schools' costs, and free funds for other purposes.

However, if this price competition occurred, salaries and benefits for existing law faculty would fall. In addition, support among ABA law schools for the accreditation system would erode. Law schools currently support the ABA system for two reasons. First, the system almost completely eliminates competition from non-ABA schools; under the accreditation system, students from unaccredited schools cannot receive licenses to practice law. Second, the accreditation system prevents a law school's competitors from gaining an advantage by cutting faculty costs. Although the system increases the compensation that a law school must pay its faculty, the system increases the costs of the law school's competitors identically. The accreditation system ensures that a law school's faculty can enjoy high salaries without worry that competitors will reduce salaries and costs in order to steal the law school's students. For example, although the system increases costs for the New England School of Law ("NESL"), the school has an incentive to support the system; the system suppresses competition from unaccredited Massachusetts School of Law, and increases costs for NESL's accredited competitors identically. Indeed, standard 405 explicitly prohibits the competitors of NESL from lowering salaries and gaining a cost advantage.

In order to ensure continued high salaries and continued support among law schools for what, in effect, is a cartel, the faculty members who control the accreditation system have established rules and processes that deter member schools and unemployed faculty from cheating on the cartel; the system deters schools and faculty from secretly arranging for salaries and benefits that are less than the cartel levels. Like oligopolists in other industries, law faculty have established a trade association—the ABA accreditation system—to enforce the cartel. One of the accreditation system's functions is the classic function for an oligopoly's trade association: to collect and distribute detailed information on the prices—that is, the faculty salaries—that the cartel's faculty members charge. In addition, as with other oligopoly trade associations, the accreditation system has authority to audit the information that members provide, to ensure that it is correct. As part of

each school's recurring accreditation inspections, accreditors inspect the school's books and interview the school's staff and faculty.

Secrecy of much of the accreditation process, including price fixing. The ABA has kept its accrediting deliberations almost entirely secret. For example, the ABA concealed from the public both the shared salary data and the extent of the enforcement of salary levels. ABA rules permitted only law school deans to receive the information on competitors' salary structures. At the same time that they were enforcing salary minimums in private, the Consultant and other ABA officials suggested in public that they were not doing so.[204] In addition, the ABA sometimes uses evaluation criteria that are unwritten or different from its official standards.[205]

Such secrecy is common in cartels and helps to maintain the cartels, for two reasons.[206] First, it conceals unlawful anticompetitive conduct from both competitors and public enforcement authorities. Second, it leaves the controllers free to take specific strict actions or, alternatively, to make necessary exceptions in order to keep the collusion stable.

Prohibition of for-credit bar preparation courses. A law school may not offer "instruction that is designed as a bar examination review course" for credit, or require such a course for graduation.[207] Standing alone, this is a puzzling requirement; it would seem that, if a professional school were to teach anything, it would be the core material that the student must know to gain her professional license. Doctors would not accept a system that would deter medical schools from teaching the material on the Medical Board examinations. Plumbers would not approve a system in which the trade school would not teach students the material on the licensing test. A law school that offered such training would save students both the cost of a bar review course and the foregone income from the months of study after law school that bar review study usually consumes. The requirement harms students who must devote additional time and money to legal training

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204 See excerpts of deposition testimony in Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 90, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

205 *See* Velvel Letter, *supra* note 194.

206 *See generally* FELLNER, *supra* note 5; George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1964), *reprinted in* STIGLER, *supra* note 5, at 39; SCHERER & ROSS, *supra* note 5, chs. 6-8.

207 ABA STANDARDS, *supra* note 23, std. 302(b).

that their three years of law school should have offered.

Although the system harms students, the standard serves the interests both of law faculty and of private bar review courses. Law faculty benefit from the standard because they are relieved of teaching large bodies of material, thereby increasing their effective hourly wages. In addition, many law school faculty are employed by private bar review firms. Because the standard prohibits law schools from teaching the material that students must learn for the bar exam, the students must pay law faculty extra to teach the material—this time law school faculty who are moonlighting at bar review courses. Likewise, the standard benefits private bar review courses, which receive millions of dollars per year from students for instruction that the standard prohibits law schools from offering.

Law faculty and private bar review courses have great influence in obtaining ABA standards that benefit them. Law faculty, many of whom work for bar review courses, control all levels of the ABA accreditation apparatus. In addition, for a substantial period, one of the faculty members on the ABA Accreditation Committee was also an owner of one of the private bar review courses.[208]

By prohibiting law schools from offering bar review courses for credit, the ABA is eliminating services for which students have high demand. That is shown by simple logic: If the bar exams validly test legal knowledge and skill, then the schools should be teaching that knowledge and skill. Specific indicators of high demand are: the large fees that bar review courses command; the fact that virtually all bar exam candidates take the courses; and the fact that students must delay the taking of bar exams for months after graduating from law school because they could not take the review course while in school.[209]

Prohibition of proprietary law schools. The standards earlier prohibited for-profit schools from receiving accreditation.[210] In response to legal challenge, the ABA in 1977 issued an interpretation that indicated that it would begin to consider applications for

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208 While a member of the ABA Accreditation Committee, Frederick Hart was a co-owner of the SMH Bar Review. *See* sources cited *infra* note 228; *see also* Complaint at 5, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

209 A few schools and states permit students to take the bar exam during their third year. *See* COMPREHENSIVE GUIDE, *supra* note 76, at 4-5. Because they must take private bar review courses during the law school semester, the standard compels students to ignore their law school courses during this period.

210 *See* ABA STANDARDS, *supra* note 23, stds. 202, 203.

accreditation by proprietary law schools.[211] However, despite the interpretation, the ABA has never accredited a for-profit law school. Moreover, the ABA imposes additional requirements on schools that are not affiliated with a university, as all proprietary schools would be. For example, an unaffiliated school must have a larger library than an affiliated school.[212]

Exclusion of proprietary schools protects existing schools and their faculties. The existing nonprofit schools generally promote the interests of faculty more than would for-profit schools. The existing nonprofit schools need not please owners by producing profits. The schools' deans can permit costs, including faculty salaries, to rise without fear of being fired. Indeed, for the many schools that follow the partnership model, increasing faculty's salaries and benefits becomes the objective.[213] In contrast, in proprietary schools, owners receive the profits. Thus, a proprietary law school would seek to reduce salaries to the lowest possible level that would retain competent faculty, in order to maximize profits for the owners. Proprietary law schools would maximize benefits not for faculty, but for the school's owners.

The stifling of proprietary schools shelters existing law schools from the vigorous competition that disciplines competitors in other markets. The prohibition reduces the number of new competing schools. Without the possibility of obtaining a profit, few entrepreneurs will subject themselves to the expense and risk of establishing a new law school. Moreover, the new law schools that do enter the market are nonprofit schools that do not compete vigorously on price. The elimination of vigorous competitors reduces pressure for existing schools to cut costs and reduce prices; it permits existing law schools to increase faculty compensation without fear that hungry proprietary schools will cut costs and attract the existing schools' students with lower prices. No longer must nonprofit schools in most states fear proprietary schools such as Suffolk Law School, which, in this century's early years, became the country's largest law school.[214]

California's experience with proprietary schools suggests why it is in the interest of law faculty to suppress proprietary schools. In California, which permits graduates of unaccredited schools to practice law, many unaccredited proprietary schools compete with

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211 *See id.* interp. std. 202.

212 *See id.* std. 210(b).

213 *See supra* text accompanying notes 20-26.

214 *See supra* text accompanying note 35.

accredited schools. Indeed, for many years, an unaccredited California law school, Western State University College of Law, has had the nation's largest enrollment.[215] These proprietary schools demonstrate the degree to which accredited law schools are inefficient and overpriced. Unaccredited schools in California often charge less than one-half the tuition of accredited schools.[216] Still, the unaccredited schools are very profitable.

Prohibition of correspondence programs.[217] This standard eliminates low-cost, low-price competition for existing law schools. Without the requirement, a law school could offer legal instruction without incurring the expense of a substantial law school building, and could offer lower prices. In addition, students could reduce their opportunity costs of legal instruction. They would not need to endure disruptive moves to the site of a law school; they could study at home. Students would also be able to study at times that were convenient to them; for example, they would be able to retain their day jobs while studying at their convenience in the evening. Advances in computers, communications, and the internet have recently made such programs even more possible.[218]

In addition to eliminating low-cost competition for existing law schools and law faculties, the standard prevents existing accredited law schools from invading each other's local markets. Many accredited law schools enjoy some market power in their local markets. A person who lives in Ithaca, New York, and has family obligations that require that he remain there has a choice of a single law school: Cornell. Because it is a monopolist for some of its students, Cornell can raise its price above competitive levels.

Prohibiting correspondence schools has anticompetitive impacts in three ways. First, the prohibition protects ABA schools at the low end of the prestige hierarchy from competition from new correspondence schools. Second, the prohibition shelters elite schools from competition from other elite schools outside their geographic market. Without the prohibition, Harvard or Stanford could offer the Ithaca student a correspondence course that would compete with the Cornell training. This possibility could force Cornell to reduce its price. Indeed, permitting schools to compete on a national scale by means of correspondence courses would im-

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215 *See* First, *Competition (II)*, *supra* note 3, at 1085 & n.222.

216 *See* Ken Hoover, *Wilson Vetoes Bill to Abolish Law Examination*, S.F. CHRON., Oct. 13, 1995, at A23.

217 *See* ABA STANDARDS, *supra* note 23, std. 303(b).

218 *See* Steven Keeva, *Stars of the Classroom*, A.B.A. J., Dec. 1997, at 18.

pose substantial downward pressure on all schools' tuition prices. Third, the prohibition on correspondence courses increases the costs of legal training and deters some from becoming lawyers. The prohibition protects existing lawyers from competition, but at the cost of making legal services more expensive.

The ABA's prohibition on correspondence courses has a similar anticompetitive economic impact as an agreement among producers of any good to split geographic markets: the same impact as Coke and Pepsi agreeing that Pepsi would sell only to the east of the Mississippi, and Coke would sell only to the west. Such an agreement creates a monopoly in each region over consumers who are unwilling or unable to travel.[219]

Law schools are required to exclude some from admission. A law school is prohibited from offering open admissions to anyone who applies; the school must exclude those with lower LSAT scores and grade averages.[220] This is a barrier to entry. It is often impossible for a school to attract students with excellent credentials before the school receives accreditation; a student with other choices in law schools would not attend a law school where a good chance existed that the law school would fail to gain accreditation, so that the student's diploma would be useless. Again, the ABA rules create a catch-22: The ABA will not grant accreditation unless the law school has students with excellent credentials, but the school cannot attract credentialed students without accreditation.

This barrier to entry increases cost and reduces choice in the legal education market, and reduces competition in the market for legal services. Most directly, the standard contributes to excluding much of the population from the legal profession; it excludes from admission to law school those who lack high test scores and grades. Often these are minorities, the poor, and the underprivileged.

A student may not receive payment for any activity that receives academic credit.[221] This standard harms students by decreasing their earnings during law school. It prevents law schools from competing with other law schools by offering law firm apprenticeships that earn both law school credit and a wage. The standard benefits law faculty by protecting their jobs; a school cannot replace classes taught by faculty with paid apprenticeships.

In addition, the standard benefits existing lawyers and law

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219 *See, e.g.*, United States v. Topco Assocs., 405 U.S. 596 (1972) (holding competitors' territorial division of market per se illegal).

220 *See* ABA STANDARDS, *supra* note 23, interps. std. 501.

221 *See id.* std. 306(a), interp. 1.

firms. The standard requires that, for any clinical placement in any organization, the organization will receive the law student's services without charge. For example, suppose that a law school's for-credit clinical program offers students semester-long placements in law firms; during the period, the students will be apprentice attorneys. Although the student will provide value to the firm—at least as great value as a beginning paralegal—the standard prevents the firm from paying the student. Instead, the student pays for the placement, as part of her tuition payments.

Boycotts of unapproved law schools. The ABA prohibits schools from accepting transfer credits from unapproved schools.[222] In addition, an approved school may accept for its advanced degree program, such as an LL.M. program, only applicants who have graduated from ABA-approved schools.[223] Again, the standards benefit accredited schools, by deterring students from attending competing unaccredited schools. The standards harm unapproved schools, and the standards deter new law schools from entering into the market for legal training. For example, the standards prevent a student who hopes eventually to obtain an LL.M. degree from an accredited school from attending an unaccredited school for a J.D. degree. In addition, the standards reduce choices for law students, increase the cost of legal training, and increase the cost of legal services.

2. *Standards That Increase Costs for Law Students, with No Faculty Benefits*

The following standards increase costs to students without any corresponding benefits to law schools' faculty. However, the standards benefit existing lawyers by reducing competition in the market for legal services: By raising the costs of obtaining legal education, the standards deter some people from entering the legal profession and competing with existing lawyers.

Applicants must complete three years of college study. A student cannot attend an ABA-accredited law school unless the student has completed at least three years of undergraduate education toward a bachelor's degree.[224] Study at a trade school does not qualify.[225] This requirement increases substantially the costs of legal training: To become a lawyer, a student must sacrifice at least

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222 *See id.* std. 308, interp. 2; *id.* std. 305, interp. 3.
223 *See id.* std. 307, interp. 3.
224 *See id.* std. 502(a).
225 *See id.* std. 502(b).

three additional years of income, in addition to the income that the student could have earned during the three years of law school. The requirements of three years of undergraduate education and three years of law school make law a career for the affluent; a student cannot become a lawyer unless she can afford to take six years off from work. For many with little wealth and large family obligations, this is impossible, even with loans.

Limiting students' paid work. A full-time law student may not work for pay for more than twenty hours per week, whether inside or outside the law school.[226] The requirement increases the opportunity cost of attending law school by reducing the amount that a student can earn during law school. The rule excludes a pool of nonaffluent candidates.

The standard appears to be intended to increase students' costs, not to protect their academic performance; it does not limit students' volunteer work or time spent on hobbies. No standard prevents a student from playing pinball for forty hours per week. Instead, the standard excludes the student from employment in the law that would contribute to her legal training.

The standard's impact is to protect existing paralegals and lawyers. It increases the costs of obtaining a legal license, and it deters some from entering the profession. In addition, the standard protects existing paralegals and lawyers from competing for work with law students, who will generally work for low wages. The standard prevents law firms from replacing paralegals and younger lawyers with cheap law students.

Requiring the LSAT. A law school must require that applicants for admission take an "acceptable" aptitude test; the LSAT is the single test that the standards specifically name as acceptable.[227] The requirement increases costs for students, who must devote time and money to studying for the test and taking it. Tests such as the LSAT are controversial; they may test only a narrow range of test-taking skills. Alternatives are available for assessing applicants' qualities and prospects. Yet the ABA has enforced a requirement that all applicants take the LSAT.

That the standards contain this requirement is not surprising. Two members of the ABA Accreditation Committee are also officers or former presidents of the Law School Admission Council ("LSAC"), the organization that offers the LSAT.[228]

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226 *See id.* std. 305(c).

227 *See id.* std. 503.

228 For a long period, Frederick Hart was both a director and a trustee of LSAC, and a

C. *A Recession and Challenges to the System*

In the early 1990s, the boom times in legal teaching ended suddenly. Demand for new attorneys declined in the downstream market for legal services as the legal industry suffered a recession. Confronted with poor employment prospects in the market for legal services, potential applicants to law school instead chose other careers. The recession in the market for legal services caused a severe recession in the market for legal training, a recession that has continued even though the market for legal services has substantially recovered. Between 1990 and 1996, applications to ABA-approved law schools declined 26%, and they are expected to fall 20% further in the next four years.[229]

The 1990s also brought attacks by a legal gadfly. The Massachusetts School of Law offers legal education that differs substantially from the education that the ABA requires. For example, contrary to ABA standards,[230] MSL has few full-time faculty, a Spartan building, and a small library. Instead, the school relies on part-time instructors who also practice law, and on electronic access to information. The tuition for MSL is less than $9000, approximately one-half the tuition for private ABA-accredited schools.[231] Massachusetts has granted MSL state accreditation, so that students from MSL may take the bar exam and practice in Massachusetts. However, because of most other states' requirements of attendance at or graduation from an ABA-approved law school,[232] the only other state in which MSL's students may practice, in state or federal court, is California.[233]

In 1993, after the ABA denied MSL's application for ABA

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member of the ABA Accreditation Committee. *See* LAW SCHOOL ADMISSIONS COUNCIL, 1990-1991 ANNUAL REPORT 35-36 [hereinafter LSAC ANNUAL REPORT]; 1990-1991 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 105 (1991) [hereinafter ABA ANNUAL REPORT]. Claude R. Sowle, who is Chairman of the ABA's Accreditation Committee, is a past president of LSAC. *See* LSAC ANNUAL REPORT, *supra*, at 35-36; ABA ANNUAL REPORT, *supra*, at 100; ABA SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR: A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES at vi (1995). Another former LSAC president was appointed a member of the site inspection team for the Massachusetts School of Law ("MSL"), a new law school that refuses to use the LSAT. *See* Velvel Letter, *supra* note 194, at 22 (describing placement of former LSAC president Peter Winograd on the ABA site team that inspected MSL).

229 *See* Christine Riedel, *The Big Squeeze*, NAT'L JURIST, Sept. 1996, at 20-22.

230 *See supra* Part III.B.

231 *See* Dick Dahl, *A Maverick Law School's Maverick Pitch*, MASS. LAW. WKLY., Jan. 18, 1993, at B33.

232 *See* COMPREHENSIVE GUIDE, *supra* note 76, at 16-17.

233 *See id.*

accreditation, MSL filed suit in federal court in Philadelphia, claiming antitrust violations.[234] At the same time that it filed suit, MSL petitioned the Department of Education to cease relying on ABA accreditors for determining which students could receive subsidized federal loans; DOE regulations specify that only students from ABA-accredited schools may receive federal loans.[235] The DOE has not yet acted on MSL's petition.

Spurred by MSL's lawsuit, the United States Department of Justice ("DOJ") conducted a yearlong investigation of the ABA accreditation process. MSL's lawsuit and the DOJ's investigation also induced the ABA to appoint a commission to examine the accreditation process: the "Wahl Commission,"[236] named for its chairperson.

After negotiations with the ABA, the DOJ filed concurrently a lawsuit and a proposed consent decree that would settle the lawsuit.[237] The consent decree would require changes in only three of the accreditation standards. The ABA could no longer set levels of faculty salaries; it could not prohibit for-profit schools; and it could not preclude accredited schools from accepting course credits from students who transfer from unaccredited schools.[238] The consent decree mentions six other standards, but merely orders the ABA itself to establish a commission to consider changes to those standards.[239] The district judge in the DOJ's suit, Charles R. Richey, would then review any additional proposed changes.[240]

After the ABA added the investigation that the consent de-

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234 *See* Complaint, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206). MSL's litigation strategy has been questionable. It filed a caustic recusal motion that challenged United States District Judge J. William Ditter's integrity. Ditter denied the motion in an 80-page opinion. *See* Massachusetts Sch. of Law v. ABA, 872 F. Supp. 1346 (E.D. Pa. 1994). And MSL's stonewalling on discovery and defiance of Judge Ditter's discovery orders led to an award of substantial money sanctions against MSL's lawyer. *See* Massachusetts Sch. of Law v. ABA, 914 F. Supp. 1172 (E.D. Pa. 1996). Understandably, MSL hired new lawyers to respond to the ABA's summary judgment motion. Perhaps because it felt that it was getting nowhere before Judge Ditter, MSL filed a suit in Massachusetts state court, asserting various state law claims. *See* Complaint and Jury Demand, Massachusetts Sch. of Law v. ABA (Mass. Sup. Ct. 1995) (No. 95-2117). This suit fared no better. After the defendants removed the suit to federal court, the district court dismissed the suit, and the dismissal was affirmed on appeal. *See* Massachusetts Sch. of Law v. ABA, 1998 U.S. App. LEXIS 8076 (1st Cir. Apr. 24, 1998).

235 *See* Velvel Letter, *supra* note 194.

236 *See* COMMISSION REPORT, *supra* note 111.

237 *See* Draft Final Judgment, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211).

238 *See id.* at 3-4

239 *See id.* at 7.

240 *See id.* at 12.

cree required to the Wahl Commission's tasks, the Wahl Commission proposed various additional changes.[241] The ABA's Board of Governors accepted some of the recommendations, and modified others.[242] Judge Richey then approved the Board of Governors' recommendations.[243]

The additional changes to which the ABA agreed include: eliminating the limit of eight or ten hours on a faculty member's weekly teaching load; eliminating a requirement of faculty leaves of absence; and allowing some counting of part-time faculty toward the required student-faculty ratios.[244] In addition, the ABA agreed to minor changes in the language of the standards that prohibited for-credit bar review courses and regulated the quality of law school facilities and the allocation of resources between the law school and its university.[245]

The consent decree has been controversial. Various members of the ABA accreditation system resigned in protest of what they perceived as a fundamental affront to the system.[246] In contrast, MSL attacked the consent decree as an ineffectual slap on the wrist.[247]

During the litigation, a growing group of law school deans joined the fray. The "rogue deans," who now number more than 100, wrote several letters that criticized the ABA accreditation process. The first letter indicated that the process was "overly intrusive, inflexible, concerned with details not relevant to school quality . . . , and terribly costly in administrative time as well as actual dollar costs to schools."[248] The event that triggered the deans' defection may have been the ABA's "MacCrate Report," which proposed that ABA accreditation standards be revised to require additional expensive clinical programs.[249] In addition, the rogue deans may have sought relief from the accreditation requirements

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241 *See* SUPPLEMENTARY REPORT, *supra* note 176.

242 *See* Revised Consent Decree, *supra* note 158.

243 *See* Order, June 25, 1996, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211).

244 *See* Revised Consent Decree, *supra* note 158, at 19-21, 35-36.

245 *See id.* at 21-23, 26.

246 *See* Ken Myers, *Official Quits over ABA Pact*, NAT'L L.J., July 17, 1995, at A6.

247 *See* Comments of the Massachusetts School of Law on the Consent Decree and the Competitive Impact Statement at 1-2, United States v. ABA, 934 F. Supp. 435 (D.D.C. 1996) (No. 95-1211).

248 *See* John A. Sebert, *Introduction*, 45 J. LEGAL EDUC. 415, 415 (1995) (alteration in original). The first letters were dated April, 1994 and May, 1995.

249 *See* REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION; NARROWING THE GAP, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT (1992).

in order to respond more nimbly to aggressive new competition; several schools were beginning to bend the accreditation requirements and gain students, resources, and prestige at the expense of the rogue deans' schools.[250]

In response to the legal challenges, the ABA has said that it is merely an impartial observer that contributes unbiased information—its "educated opinion"—about law schools' characteristics to consumers.[251] It asserts that it has no animus against unaccredited law schools. According to the ABA, that unaccredited law schools cannot exist in most states is due not to the ABA, but to the states' independent decision to prohibit graduates of unaccredited law schools from receiving licenses to practice law.[252]

However, at least in some cases, the ABA has not been merely an uninterested provider of information. Instead, ABA accreditors have, on occasion, attempted to ruin unaccredited law schools that competed with accredited schools. For example, MSL opened in 1988, obtained state accreditation so that its students could practice in Massachusetts, and immediately began competing for students most directly with the New England School of Law, a lower-tier Boston law school that had received ABA accreditation. Several years before MSL applied for ABA accreditation, officers of NESL complained repeatedly to ABA Consultant James White about MSL, which was then called the Commonwealth-Massachusetts School of Law.[253] White did not respond by saying that the ABA was merely an impartial source of information about law schools. Instead, he suggested that the ABA-accredited law schools in Massachusetts should join together to destroy MSL by asking the state supreme court to revoke MSL's state accreditation. In a letter to the chairman of NESL's board of trustees, White wrote on ABA stationery:

> I appreciate your ongoing clipping service about the Commonwealth/Massachusetts School of Law at Lowell. What do you think the possibility would be for the ABA approved Massachusetts law schools to petition the Massachusetts Supreme Judicial Court to amend its rules to require graduation from an ABA approved law school as a requirement for sitting for the Massachusetts bar examination? I would be grateful for your

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250 *See infra* text accompanying notes 331-39.

251 *See, e.g.*, Defendant ABA's Motion for Summary Judgment at 11-16, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

252 *See id.*

253 Complaint and Jury Demand exhs.D-E, Massachusetts Sch. of Law v. ABA (Mass. Super. Ct. 1995) (No. 95-2117).

thoughts and advice on this matter.[254]

In 1996, the judge in MSL's federal case against the ABA granted summary judgment against all of MSL's claims.[255] The decision reasoned that the states that adopted the ABA's standards, not the ABA, caused MSL any injury.[256] The United States Court of Appeals for the Third Circuit then affirmed the decision, and the Supreme Court denied certiorari.[257]

IV. IMPACTS OF THE ABA SYSTEM

In terms of both its personnel and its impact, the ABA accreditation system is a cartel of law professors. Using other labels that describe the same economic reality, the ABA system is a union for law professors, an exclusive guild, or a trade association. Like other cartels, unions, and guilds, the ABA system promotes the interests of those whom it represents: faculty members at ABA-approved law schools.

The ABA system does not primarily represent the interests of law schools. Instead, the procedures and standards of the accreditation system primarily benefit the faculty who control all levels of the system.[258] As the Supreme Court noted in holding that an engineering trade association, the American Association of Mechanical Engineers ("ASME"), violated the antitrust laws because its members manipulated product standards to benefit the corporations that employed them, "Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers."[259]

The standards that the ABA system sets are, both in fact and in effect, horizontal agreements among the representatives of law faculty to fix the prices—the pay and benefits—that faculty will charge law schools for their services. For example, until recent antitrust challenges ended the practice, the system set minimum salary levels—prices—that all faculty would demand. Through their representatives in the system, the faculty established rules, such as ABA Standard 405, that prohibited their members from working

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254 *Id.* exh.F.

255 *See* Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996).

256 *See id.* at 439.

257 *See* Massachusetts Sch. of Law v. ABA, 107 F.3d 1026 (3d Cir. 1997), *cert. denied*, 118 S. Ct. 264 (1997).

258 *See supra* Part III.

259 American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel, 456 U.S. 556, 571 (1982).

for less.

Similarly, the faculty agreed to require a wide range of other benefits. In addition to high salaries, faculty agreed to require: low work loads, implemented by requirements for low student-faculty ratios and low teaching loads; high numbers of administrators and full-time faculty, rather than part-time faculty; three years of study for a law degree; expensive law school facilities; expensive library facilities; large clinical programs; substantial law school resources; law school operational autonomy from universities; prevention of universities from removing substantial funds from law schools; and faculty leaves of absence.[260]

All of these requirements, not just the requirements that dealt specifically with salaries, were elements of price-fixing. The requirements that reduced a faculty member's workload raised her effective hourly wage; a given salary was now divided by fewer hours of work, leaving more time for leisure and other income-producing activity. Requirements that increased benefits for faculty, such as requirements for expensive buildings, offices, and libraries, were a similar payment in kind that augmented a faculty member's dollar salary.

Absent the ABA system, faculty would have been free to compete with each other for employment at ABA schools by offering to work for lower pay and fewer benefits. For example, a member of the faculty at the 150th ranked ABA law school might have attempted to move up the ranks to the 100th ranked law school by offering to accept a lower salary and fewer benefits than the existing faculty at the 100th ranked law school received; perhaps she would offer to accept a higher teaching load, no research assistants, a shared office, and no leaves of absence. As in other markets, price competition would have tended to depress salaries and benefits for faculty. The ABA system prohibited this competition, and so raised salaries and benefits for faculty.

The system enforced its agreement by boycotting any faculty that agreed to lower salaries and fewer benefits. If any faculty member agreed to salaries and benefits that were below the system minimums, then the ABA would act to eliminate the faculty member's job: The ABA would threaten to disaccredit the faculty member's law school, thereby putting it out of business. Likewise, the ABA system was able to limit entry to the market for faculty: Because of the system's restrictions, people could not enter the

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260 *See supra* Part III.B.

market and compete by offering to teach for lower wages and fewer benefits than the system's levels. If a group of lawyers who hoped to teach law attempted to compete with faculty at ABA-accredited schools by accepting lower wages from a new law school, then the ABA would attempt to destroy the new law school and the new jobs; based on the new law school's failure to offer the system-level salaries and benefits, the ABA system would deny the new law school accreditation. The ABA's decision to deny accreditation would generally destroy the school.

The ABA system would react so vehemently against law faculties that offered to work for less for the same reasons that a union reacts sharply against "scab" workers who agree to work for less than the union demands. Both scab workers and scab faculties threaten the unions' ability to require higher wages.

Indeed, the ABA system is, in function and effect, an especially powerful union for law faculty, although the nation's labor laws do not protect it from antitrust liability.[261] In other industries, workers, through their unions, agree to demand from their employers a certain level of wages and benefits, and agree to withhold their services unless the employers meet the workers' demands. Workers who work for lower wages are called scabs. Similarly, in the ABA system, law faculty, through their ABA accreditation union, agree to demand from their employers a certain level of wages and benefits, and agree not to work for less; they agree that, if a professor receives from a law school less than the fixed level, then the law school cannot be accredited, the law school probably fails, and the professor loses her job.

Moreover, the faculty union is more powerful than most other unions. The ABA has convinced state governments to enforce the ABA's attempts to suppress scab law professors; most states withhold legal licenses from students who graduate from law schools that employ scab faculty at less than the ABA's union-scale wage and benefit levels. If a law school refuses the union's demands, then the state refuses to license the school's students, destroying the school in most cases.

That ABA accreditors act as a union for faculty is no secret to deans of law schools. One law school dean described the normal ABA site visit: "Sometimes, one gets the impression that a labor union for faculty members and law librarians has entered the building to negotiate salary increases, additional staff and bene-

261 *See infra* Part VI.C.6.

fits."[262] The dean of another law school indicated that the ABA's "approach [is] essentially as one might expect from a labor organization, that they essentially viewed their role with respect to . . . law school teacher issues, as being a collective bargaining agent."[263]

That the ABA accreditation standards effectively establish a union for law faculty was not lost on those who enacted the standards in 1973. For example, in the 1973 debates in the ABA House of Delegates over the passage of ABA standard 405, which sets minimum faculty salaries, a future president of the ABA noted:

> [I]f we enact these things as a requirement for accreditation, we have sort of set ourselves up as a collective bargaining agent for law professors against the various boards of regents and other educational bodies of the state they control. I think the general principle of 405 is enough and do not think that we should lay down standards which may rise to haunt us and, as I say, become a collective bargaining agent for the law professors and this looks very much like a labor contract drawn by a law professor to me.[264]

The system is able to retain especially powerful controls, and to win large increases in compensation for existing faculty, because both the ABA-accredited law schools and existing lawyers support the system, and cooperate in enforcing it. That the law schools would support the system might seem counterintuitive; the system raises the law schools' costs. However, the ABA law schools support the system for two reasons.

First, although the ABA system raises costs for the ABA law schools, the system provides benefits that usually outweigh the additional costs: The system permits the ABA law schools to monopolize the market for legal training by precluding competition from new law schools. The accreditation system prevented establishment of many law schools. Some of the new law schools would

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262 Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 115, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206) (quoting Letter from Patrick Hetrick, Dean, Norman Adrian Wiggins School of Law, to Judge Rosalie E. Wahl 2 (Sept. 14, 1994)).

263 *Id.* at 12 (quoting deposition testimony of Thomas E. Brennan, President and former Dean of Cooley Law School); *see also* Ronald A. Cass, *The How and Why of Law School Education*, 45 J. LEGAL EDUC. 418, 424 (1995) (stating that ABA accreditation moves resources to law schools from other parts of the university because "we have a better, more potent union than the English department or the fine arts school").

264 Plaintiff's Response to Defendant ABA's Motion for Summary Judgment at 13, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206) (quoting testimony of William B. Spann, Jr., before ABA House of Delegates).

have competed by paying lower wages and offering lower tuition levels, thereby forcing existing law schools also to cut costs and reduce wages. Competition in the law school market would reduce the monopoly profits that existing law schools now share with their faculty. However, because the system limits entry of new schools into the law school market, schools can raise prices more than enough to pass the increased costs of the system on to students.

Second, the ABA schools support the system because all ABA law schools are nonprofit organizations. The schools have no shareholders who would demand that the school cut unnecessary costs in order to increase profits. Instead, many law schools are effectively partnerships of faculty. These law schools' objective is to maximize benefits for faculty.[265]

Likewise, existing lawyers benefit from the capture of accreditation by faculty because the capture reduces the competition that existing lawyers must face. When faculty help themselves by increasing the price of legal education, by limiting the number of law schools, and by limiting student-faculty ratios, their efforts benefit existing lawyers by reducing the number of new lawyers. The number of new lawyers declines both because of the limits on law school enrollments and because of the increased cost of becoming a lawyer. In addition, ABA standards and procedures that do not benefit faculty provide important benefits to existing lawyers. For example, ABA standards that require graduation from college as a prerequisite for law school benefit existing lawyers by increasing the cost of becoming a lawyer. The increased cost creates a barrier to entry into the legal profession, and deters some from becoming lawyers and competing with existing lawyers.

Certainly, not all faculty, law schools, and practicing lawyers intentionally exploit the accreditation system selfishly to promote their own self-interests. Indeed, many of these colleagues generously pursue policies that they believe to be in the interests of their students and institutions. In addition, others may pursue accreditation policies that promote their own interests only subconsciously, without realizing that they are doing it.

However, others seem to have been less public spirited. The history of accreditation suggests that law faculty, law schools, and lawyers often have intentionally manipulated the accreditation system to promote their own interests.[266] Moreover, regardless of whether intentions for the system were benign or malignant, the

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265 *See supra* text accompanying notes 20-26.

266 *See supra* Part II.

system has produced waste, inefficiency, and unfairness.

Among the 176 accredited law schools—ranging from the smallest to the largest, the modest to the richest and most prestigious—there is a conspicuous diversity of interests in responding to the ABA system. Some law faculties readily comply with the standards; the standards help such faculties both to reduce competition from existing and new faculties and to gain larger funds from their universities. Other law schools find the rules unduly costly, raising their costs and tuition too much; or too rigid, barring their efforts to innovate.

Therefore, in order to keep the system together, the controls are often applied to existing law schools with much variation, negotiation, and adroit flexibility.[267] The key manager for applying and enforcing the standards, and so assuring continued cooperation, is ABA Consultant James P. White, who, for decades, has exercised broad discretion in enforcing the ABA's policies and standards.[268] Rather than indicating weakness, the system's flexibility with respect to existing members of the system is a clear indicator of a strong and successful cartel. That is reflected in the experience of effective cartels in the past.[269] Varied incentives require varied controls. Not only must the rules be designed to allow for variations among the participants, but there must also be individual exceptions and a bending of the rules in specific cases. Without the flexibility, the cartel would collapse.

However, as economics would predict, the controls are applied firmly and inflexibly on new entrants who are seeking accreditation to enter the market. The system's economic interest is to limit the number of new entrants.

We now consider the ABA system's large impacts in each of the markets for law faculty, legal training, legal services, and intra-university funding. In addition, we note both the system's extensive market power, which reinforces its impacts, and the system's impacts during the recent recession in the market for legal training.

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[267] *See* Richard A. Matasar, *Perspectives on the Accreditation Process: Views from a Nontraditional School*, 45 J. LEGAL EDUC. 426 (1995).

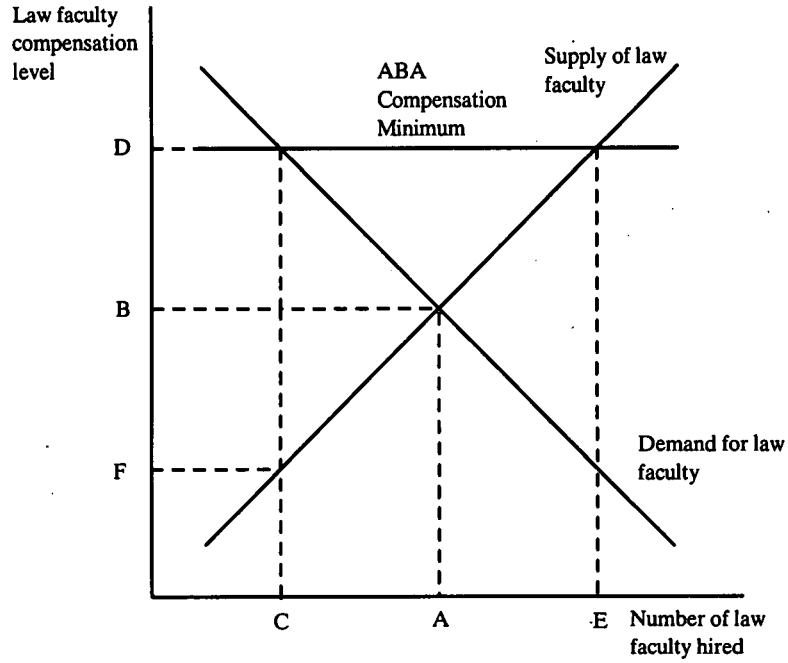
[268] For a discussion of White's decisive role in managing the process of collusion and enforcement throughout the period since 1973, see Myers, *supra* note 118.

[269] *See generally* GEORGE W. STOCKING & MYRON W. WATKINS, CARTELS OR COMPETITION? (1946); FELLNER, *supra* note 5; FRITZ MACHLUP, THE POLITICAL ECONOMY OF MONOPOLY (1952).

A. *Impacts in the Market for Law Faculty*

Demonstrating the economic laws of supply and demand, the ABA system's price-fixing and boycott raised the price of law faculty and limited their supply. Figure 1 illustrates this. On the vertical axis is the level of total expected lifetime salary and benefits for law faculty.[270] Lifetime salary and benefits will be proportional to annual compensation; the higher the annual compensation, the higher the lifetime compensation. The horizontal axis indicates the number of faculty that law schools hire.

Figure 1. Impacts in the market for law faculty



Descending from upper left to lower right is the industry demand curve for law faculty. The curve indicates that the lower that salaries for faculty become, the more law faculty that the nation's law schools will hire. For example, a new law school might be able to open and attract nonaffluent students if faculty salaries were $30,000 per year. However, the nonaffluent students that the new school might attract would be unable to pay enough to permit the school to earn a profit if faculty cost $120,000 per year.

Ascending from lower left to upper right is the supply curve

for law school faculty. The higher are salaries for law school faculty, the greater the number of people who will seek faculty positions. For example, if faculty salaries were higher, then more practicing lawyers would switch to careers in law teaching. With higher faculty salaries, a lawyer could enjoy the benefits and light workload of a faculty position and still make the payments on her BMW. Equivalently, the supply curve indicates the cost of becoming a law professor for each person who is considering a career in academia, including opportunity costs and training costs. People with the lowest costs are to the left; those with higher costs are to the right.[271]

Without the ABA system, the interaction of supply and demand would lead to an equilibrium where the supply and demand curves intersect. Faculty salaries would be at a level corresponding to B. The number of faculty that the law schools would hire would be at level A. At this level, no new law schools could be profit-

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271 The total cost of becoming an academic is the sum of two parts. First, the cost includes the opportunity cost of leaving or forgoing another career. For example, the opportunity cost of an academic career would be high for a partner at a blue-chip law firm, or for an excellent student at a top law school who could have expected to become a partner; to become an academic, the partner would have to sacrifice a large salary. The opportunity cost would be lower for a mediocre student at a low-ranked law school. In Figure 1, other costs being equal, the law firm partner would be at a point such as E, with a high cost of becoming an academic D. The mediocre student, with less lucrative alternatives, is at a point such as C, with a lower cost of becoming an academic F.

Second, the cost of becoming a law professor includes the cost of obtaining the qualifications that law schools require of applicants for their faculties. These costs will differ among people. A brilliant person with a knack for doing well on law school exams will gain the necessary qualifications relatively cheaply. A genius will excel at law school, become a member of the law review, obtain a prestigious clerkship with a Supreme Court Justice, and be hired almost immediately at a prestigious law firm. In contrast, less talented students will embark on a more expensive, more time-consuming route to an academic career. For example, such a student, after failing to make the law review, might qualify for a faculty position at a prestigious law school only after devoting five or more years to obtaining an additional degree beyond the law degree, such as a Ph.D. For others, the cost of obtaining the necessary qualifications will be infinite; they lack the ability, intelligence, or test scores to be admitted to the elite law schools and Ph.D. programs that usually are a prerequisite to a career in teaching at top law schools. In Figure 1, assuming that opportunity costs are equal, the genius with low cost of qualifying for a law school position would be at a point such as C. The normal student with higher cost of qualifications would be to the right, at a point such as E.

Any given person's total cost of becoming a law professor, as reflected on the supply curve, is the sum of the person's opportunity cost of becoming an academic and the person's cost of obtaining the necessary qualifications. These two costs will generally tend to be inversely related. A brilliant person with a low cost of obtaining the necessary qualifications will tend to have a high opportunity cost; the person could probably obtain a lucrative job outside academia. In contrast, a less brilliant person with a high cost of obtaining qualifications will have a lower opportunity cost; the person's nonacademic alternative would be less well-paying.

able; to attract faculty, a new law school would need to pay the faculty higher salaries than would permit the law school to earn a profit. No faculty would be hired beyond level A because, for faculty beyond level A, law schools are not willing to pay an amount that covers or exceeds the faculty's cost of becoming a law professor, as represented by the supply curve; a law school that is willing to pay a salary of level F would not succeed in attracting a person for whom it would cost a far greater amount D to become a law professor.

The ABA system artificially increases the minimum compensation level for law faculty. The ABA standards require high salary levels and high levels of expensive benefits. In addition, the standards require light teaching loads, free summers, and, until recently, leaves of absence, thereby increasing faculty members' effective hourly wage. The system is able to enforce the fixed compensation minimums strictly. Law schools that fail to offer their faculty the required compensation levels would be denied accreditation, so that their students could not receive licenses to practice law. In Figure 1, the ABA's fixed system compensation level is illustrated by level D.

The system causes the law schools to pay more for their faculty than is necessary to attract and retain the faculty. Figure 1 indicates that the system forces law schools to provide compensation of level D for faculty who would have been willing to work for compensation of level F or less. At least initially, the lucky few who obtain faculty jobs earn incomes that far exceed their costs of obtaining the jobs.[272] For example, the person at C receives lifetime compensation of D, but incurs costs of only F in order to obtain the necessary qualifications. For the faculty to the left of C whose costs of obtaining the necessary qualifications were even lower, excess profits are still greater.

Although the system provides riches for a few, the system eliminates faculty jobs for many others. The ABA standards substantially reduce the number of jobs for law school faculty. The system causes the price of faculty to rise; predictably, law schools respond by hiring fewer faculty. As with any cartel, the system increases compensation for the fortunate few who obtain jobs. In Figure 1, compensation for faculty at ABA schools increased from

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272 In economic terms, the faculty obtain large "rents," which is income that exceeds the opportunity cost of the worker's labor. Some or all of the rents may disappear after the lucrative law school teaching jobs begin to induce those seeking the jobs to invest in more expensive credentials in order to win the jobs. *See infra* text accompanying notes 274-75.

B to D. However, the system denies jobs to many who would have been willing to teach for smaller compensation than the system's levels. In Figure 1, an unconstrained, competitive market would have led to the employment of faculty at level A. With the ABA controls, hiring of faculty falls to level C. This is the essence of a cartel. A cartel increases the selling price for the cartel's members only by reducing supply. The system's price-fixing and barring from the market of law schools that refused to offer faculty the required prices are two sides of the same economic coin. As the Supreme Court recently noted, "This constriction of supply is the essence of 'price-fixing,' whether it be accomplished by agreeing upon a price, which will decrease the quantity demanded, or by agreeing upon an output, which will increase the price offered."[273]

At the higher system compensation levels, a large excess supply of qualified people seeking faculty positions exists—the number of people seeking faculty positions rises from level A to level E. However, the system compensation levels reduce faculty hiring to level C. Of the E applicants for faculty positions, only C obtain jobs.

Because those with faculty jobs receive excess profits, an incentive exists for the otherwise-qualified people from C to E to augment their qualifications still further to differentiate themselves. For example, candidates from lower-ranked law schools might obtain additional Ph.D. degrees. This competition would, in turn, create pressure for candidates from higher-ranked law schools also to obtain Ph.D.s. Costs for all faculty candidates would increase, shifting the supply curve up and to the left. Indeed, it is possible that, in the long run, this qualifications spiral would eliminate much or all of the excess profits, at least for some candidates; because a faculty position pays amount D, a candidate would be willing to spend up to that amount to obtain the position. In order to obtain a lucrative faculty position, a candidate would spend so much on obtaining additional qualifications that the position would no longer be so lucrative, if the costs of obtaining the position are considered. Brilliant candidates would still earn large profits, just as, even absent the ABA system, person C's compensation B would greatly exceed his qualifications cost F.[274] But

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[273] FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990) (holding lawyers' association's agreement to demand a certain wage and to boycott employer who refused to offer wage illegal per se).

[274] In economics terminology, even in competitive markets, unusually productive labor or capital receives rents.

some faculty members' large salaries would be consumed completely by the large costs of obtaining the qualifications to win employment.

In the long run, although the ABA system hurts many by increasing the cost of legal education and legal services, the system provides few benefits even for faculty members. The system is a tight cartel that raises prices substantially. However, because market forces inevitably cause the system's faculty members to incur increased costs, the cartel, in the long run, offers many of its members no benefits.

Although the system provided few benefits to those who became law faculty after the system imposed its strict restraints, the system has provided large benefits to those who were already faculty members when the system became strict. Before the 1970s, candidates incurred relatively low costs to become faculty members. Faculty salaries were relatively low, and had not yet risen and loosed competitive pressures that forced those seeking faculty positions to obtain additional expensive degrees and qualifications. One could obtain a faculty position even without being editor of a prestigious law school's law review and without a Ph.D. When, in the 1970s, the system restricted supply and caused salaries to increase, incumbent faculty reaped pure profits. They entered the academy when salaries were relatively low and the academy's price of admission was cheap. They remained there even after salaries rose, and after the price of admission for new faculty members rose steeply. Thus, at many law schools, senior faculty members' credentials are more humble than credentials for junior faculty members; junior faculty are the summa cum laudes, the Supreme Court clerks, and the Ph.D.s. Today's senior faculty benefit from the system's restraints, but without having had to incur the current entry costs.

Elimination of the ABA system would eliminate the excess profits that those who became faculty before the system became strict now earn. Salaries would fall to lower levels that correspond to these older faculty members' original lower investments in qualifications to obtain their jobs. These faculty would earn a reasonable return on their investments in their human capital, but no longer an unusually high return.

In contrast, the system's elimination would devastate many of those who became faculty after the system was in place. Even under the system, these faculty earned only modest returns on the large costs that they incurred to qualify for faculty positions. If the

system were eliminated, then these faculty would earn far below a normal return on their investments in qualifications. In Figure 1, these faculty would have invested up to amount D to obtain faculty positions that earned D. If the system were eliminated and the market reverted to paying faculty amount B, then those who had invested D to become faculty under the system would receive income that fell far short of their investment. The faculty would have earned greater net compensation, including the cost of obtaining necessary qualifications, in other careers. The law professor, with a law degree and a Ph.D., would earn no more than an elementary school teacher with a master's degree.[275]

The actual behavior of salaries of law faculty conforms with the analysis in Figure 1: The system has been highly successful in raising faculty salaries above competitive levels. Since the early 1970s, when the system's controls tightened, law faculty pay has risen at the same time that faculty work loads have declined. In 1976, shortly after the system began to tighten its grip, the average full professor at a state law school earned $30,873.[276] By 1993, the law professor's average salary had almost tripled, to $89,777, rising at almost twice the rate of inflation.[277] Salaries at private law schools were still higher. During 1994-1995, average law school salaries for full professors were $130,836 at Hofstra University; $121,034 at Yeshiva University; $137,129 at Harvard; $118,878 at St. John's University; and $142,688 at Fordham University.[278] These salaries were for positions that required teaching only thirty weeks per year.

During the 1970s and 1980s, salaries for law professors increased much faster than the salaries of professors in almost all

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275 Elimination of the ABA system would involve the same losses for existing faculty and existing lawyers as the losses that a regulated monopoly utility suffers when deregulation opens the utility's market to competition. *See* J. Gregory Sidak & Daniel F. Spulber, *Deregulatory Takings and Breach of the Regulatory Contract*, 71 N.Y.U. L. REV. 851 (1996) (discussing how deregulation causes formerly-regulated utility's shareholders to receive below-market return on investment).

276 *See* W. Lee Hansen, *Surprises and Uncertainties*, ACADEME, July-Aug. 1982, at 3, 8.

277 *See id.*; *see also* Janet Novack, *Let Them Eat Loans*, FORBES, Apr. 22, 1996, at 45, 46.

278 The information is from one of the yearly memoranda that the ABA's Consultant prepared for confidential distribution to deans of all ABA-approved law schools listing each law school's average salary level for each faculty rank. The memoranda summarized information that the accreditation system required all ABA law schools to prepare. This salary information became part of the public record in MSL's suit against the ABA. *See* Supplemental Affidavit of Alison S. Berger in Opposition to Defendants' Motions for Summary Judgment exhs.H-M, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

other fields. A great divide grew between the salaries of law professors and the salaries of faculty in most other departments. For example, in 1976, full professors at law schools earned 24% more than full professors in the social sciences; by 1993, the gap had increased to 43%.[279] In 1994, the average university professor earned less in real terms, accounting for inflation, than the professor did in 1973. The average law professor earned far more.[280]

In addition, experience demonstrates even more directly that the ABA system has compelled law schools to pay far more to retain their faculty than would be necessary in a free market. Many law schools have had the following experience. For many years, the law school has been paying faculty a certain salary level and retaining its faculty. Perhaps it can retain its faculty with salaries that are low compared to its competitors because of the low cost of living in the area, pleasant working conditions, or desirable physical surroundings; for example, a Seattle law school might be able to retain faculty with lower salaries than a Manhattan law school would need to pay. Then the ABA, on threat of removing the school's accreditation, would compel the school to raise salary levels—perhaps to match its Manhattan competitor. Because of the ABA, the school now pays its faculty more than would be necessary to retain them.

Data on faculty hiring also conform to predictions from theory about the impact of the ABA system. According to Figure 1, if the system succeeded in fixing faculty salaries at levels that exceeded the level that would have occurred without collusion, then there would be an excess of applicants for faculty positions. This is exactly what has occurred. There are more than three times as many job seekers as faculty job openings, maybe far more applicants.[281] The Association of American Law Schools each year administers a hiring conference for law school faculty. Over the last five years, 5642 people have applied through the AALS recruiting process for faculty positions at law schools. Only 638, or 11.3%, of them got jobs.[282] Many of these people might be willing to work

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279 *See* Daniel S. Hamermesh, *Plus Ça Change: The Annual Report on the Economic Status of the Profession, 1993-94*, ACADEME, Mar.-Apr. 1994, at 7, 11; Hansen, *supra* note 276, at 3, 9; *see also* Novack, *supra* note 277, at 45.

280 *See* Hamermesh, *supra* note 279, at 7, 11.

281 *See* Ken Myers, *Law Profs: Poor No More, Pay Is Up*, NAT'L L.J., Oct. 18, 1993, at 1.

282 Statistics are published on the AALS web page, tbl.7(A). *See* http://www.aals.org (visited June 12, 1998). In 1994-95, only 144 of 1200 applicants through the AALS process were hired. *See id.* However, some faculty are hired outside of the AALS process. *See*

for less than those who already have jobs. As members of recruiting committees often note, many of the unsuccessful applicants are more qualified than existing faculty, with degrees from more prestigious institutions, better law school grades, and more publications.

An additional reserve army of potential faculty includes many practicing lawyers who would love to teach occasional law courses, for experience and prestige. Any teaching experience on a practicing lawyer's resume can be a powerful marketing tool. Accordingly, the adjunct teachers from prestigious law firms are often delighted to teach courses for a fraction of the salary of a full-time faculty member. Generally, a practitioner, who is often a leader in the local bar, will teach a course for less than $5000. In contrast, a full-time faculty member's salary per course, including benefits, is more than $25,000, even for a first-year faculty member. That the ABA counts only full-time faculty members for determining whether law schools comply with the required student-faculty ratio tends to exclude this potential low-price alternative.

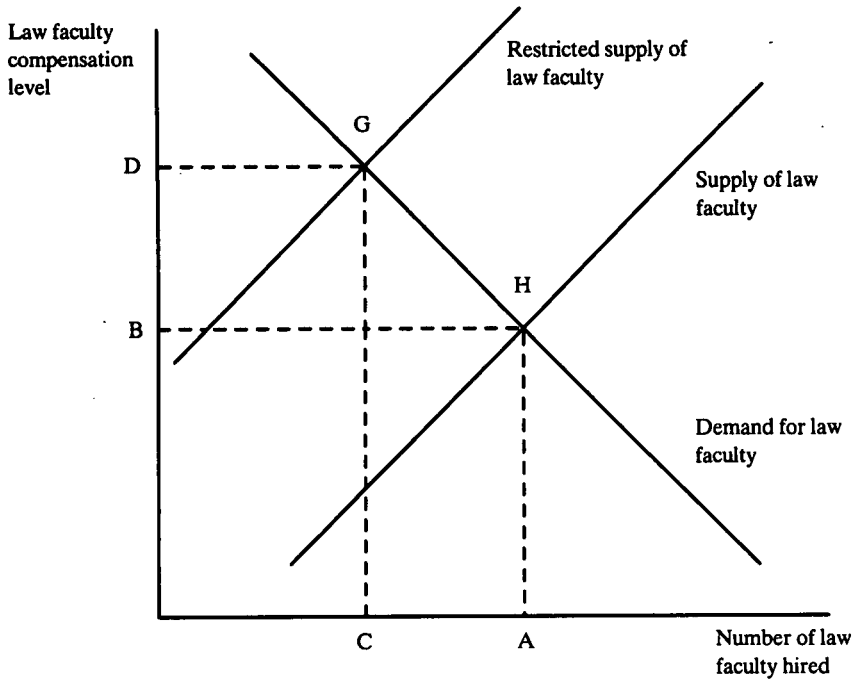
At first glance, it might appear that the sole cause of high salaries for law faculty is that high salaries are necessary to lure law professors away from lucrative jobs in law firms; tending to increase the salaries that lawyers would earn in a free market is, at least to some extent, the opportunity cost for skilled faculty members in alternative work such as legal practice. Indeed, as time has passed, faculty salaries have tended to rise and fall along with salaries at law firms.[283]

The implications of this argument can be seen in Figure 2. Rising salaries in law firms would cause the supply curve for law faculty to shift to the northwest; given the temptation of higher law firm salaries, each possible salary level for law faculty would bring forth a smaller supply of applicants for law school positions than before. The market outcome would be the same as in Figure 1, with salary level D, and with law schools hiring C faculty. However, the increase in faculty salaries is explained as the effect in a competitive market of increasing salaries in law firms, rather than explained by the ABA system's collusion.

Myers, *supra* note 281, at 1.

283 *See* Sherwin Rosen, *The Market for Lawyers*, 35 J.L. & ECON. 215, 245 fig.A1 (1992).

Figure 2. A potential linkage of salaries for lawyers and faculty



However, were increases in faculty salaries caused solely by increases in salaries for practicing lawyers, then no excess supply of applicants for law school positions would exist. In response to rising salaries in law firms, law school salaries would rise just sufficiently to ensure that the number of applicants for faculty positions would not decline. Both before and after the change in law firm salaries, the market for law faculty would achieve equilibrium. At point H, before the increase in law firm salaries, the number of qualified applicants and job openings has reached equilibrium. When the law firm salaries increase, the market is initially out of equilibrium; now that law firm salaries have risen, too few applicants exist under law schools' existing salary structure to supply law schools' hiring needs. Accordingly, the market causes law school salaries to increase until we reach a new equilibrium at point G, in which the number of applicants and job openings are in balance.

The evidence shows that the explanation in Figure 2 is wrong; increases in law school salaries cannot be explained solely, or even mainly, by increases in salaries at law firms. After law school salaries increased substantially over the last decade, the number of ap-

plicants for law school positions did not decline or remain steady, as would be the case were increases in law firm salaries alone causing the increase in salaries at law schools. Instead, the number of applicants for law faculty positions increased substantially. "[U]nlike several years ago, lawyers seem to be busting down the doors just to get jobs in law schools."[284] During the first years of the 1980s, approximately 700 people per year applied for law faculty positions through the AALS recruiting process. After law faculty salaries had increased steadily for a decade, the number of faculty applicants had increased substantially. In 1994-1995, 1200 people sought law faculty positions.

Thus, the data reject the hypothesis the law school salaries increased solely to keep pace with salaries at law firms. Instead, the data indicate that the system has forced faculty salaries above their competitive level, and probably well above it. The increases in law school salaries brought forth more job applicants than ever before. The increases in law school salaries were probably much greater than were needed to attract a qualified pool of job applicants. Indeed, it is possible that even without any increase in law school salaries, the number of excess applicants for faculty law school positions would have grown. This is because many lawyers have felt that, at the same time that salaries at law firms were increasing, law firm work was becoming less enjoyable and the demands of the job were increasing. The joke that circulated around law schools was that, although the starting salary for first-year associates at leading law firms had recently increased to $86,000, the United States Department of Labor had recently ruled that the salary was below the minimum wage.

In contrast, the required workload for law professors is relatively moderate; the ABA controls limit the hours that a faculty member can be required to teach, and provide the faculty member with summers off from teaching. Furthermore, many view academic work as quite fun compared to private practice; apart from teaching, faculty members choose their own research projects and work at their own pace.

That salaries at law schools and law firms tend to move together is not due mainly to any pressure that the law firm market places on the market for law faculty. Instead, causation runs in the opposite direction, from the law school labor market to the law firm labor market. The accreditation system raises salaries in the

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[284] Myers, *supra* note 281, at 1.

law faculty market, which, as Figure 1 shows, in turn reduces the number of law faculty and law schools. The reduction in the number of positions in law schools in turn reduces the number of lawyers, which in turn increases salaries for lawyers. That the accreditation system forces salaries for law faculty upward is fully consistent with the pattern that we observe: Salaries for law faculty and lawyers move together. However, the increases in law school salaries from the system primarily *cause* the increases in lawyers' salaries; the increases in lawyers' salaries do not cause faculty salaries to increase.

B. *Impacts in the Legal Training Market*

The ABA system presses heavily on the market for legal training, in seven ways.

1. *Restricting Output*

The system decreases output by reducing the total number of places available to law students—industry output—in two ways. First, the system restrains the number of law schools; the ABA has raised absolute barriers (where it chooses) against entry by new law schools. Second, the system restrains each law school's capacity. For example, the ABA standards limit student-faculty ratios, which, in turn, limits the number of students that a school with a given number of faculty members can admit. As the following evidence suggests, the restrictive effect of the accreditation standards and procedures is large.

Exclusion of schools. The ABA's exclusions directly reduce capacity and output when they eliminate schools that would otherwise be economically viable economic units, able to cover their costs with revenues. The ABA has eliminated many schools in this way. For example, many schools have started successfully; they have obtained facilities, hired faculty, and admitted full classes of paying students. However, most of those to which the ABA denied accreditation quickly failed.

Some evidence of the degree to which the ABA has directly reduced output is the experience in California. In California, which permits students from unaccredited schools to practice law, many law schools have been established that do not meet the ABA standards, but which are filled with students and are successful financially—including the nation's largest law school.[285] But for the

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[285] *See supra* text accompanying note 215.

ABA system, similar law schools would exist in other states.

Restraints on each school's capacity. The standards limit the capacity of each accredited law school in four ways. First, the standards' limits on teachers' teaching loads cause productivity—that is, output per worker—to decline, and cost per student to increase. This tends to reduce each law school's output—that is, the number of students that law schools train; the ABA restrictions prevent each law school's existing faculty from teaching more students. Second, the rules limit schools' capacity by requiring employment of expensive full-time, tenure-track teachers. The rules deter schools from using experienced but cheaper part-time, adjunct, or other non-tenure-track faculty. Efficiency and output decline; schools can admit and train fewer students than they otherwise would.

Third, the standards' restrictions on student-faculty ratios limit capacity. As applied by the ABA, the ratios cause a given volume of teachers to produce one-third, or even fewer students, than they produced earlier.[286] Fourth, the standards require law school libraries to have seats for half of the student body.[287] Schools have a choice. They can increase the size of the library. However, this route is expensive, and can lead to increases in tuition. Instead, a school may limit enrollment to the number half of which will fit in the existing library, thereby decreasing the number of students that the school can admit.

The existence of excess demand. Further evidence that the system restricts output is the existence of excess demand. Perhaps the best indicator of excess demand is the existence of a continuing excess of total applications to law schools. In a training market that cartels did not distort, the number of excess applicants would, in the long run, be zero. Entrepreneurs would have an incentive to provide training to all of those who were willing to pay for it.

However, even with the recent declines in the numbers of applicants, applicants to ABA-accredited schools are about double the number of students that the schools admit each year—although applications to lower-ranked schools are not as numerous as before.[288] The excess demand may be even greater than this, for two reasons. First, the number of people taking the LSAT is almost three times as large as the number of new first-year students actu-

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286 *See supra* text accompanying notes 162-72.

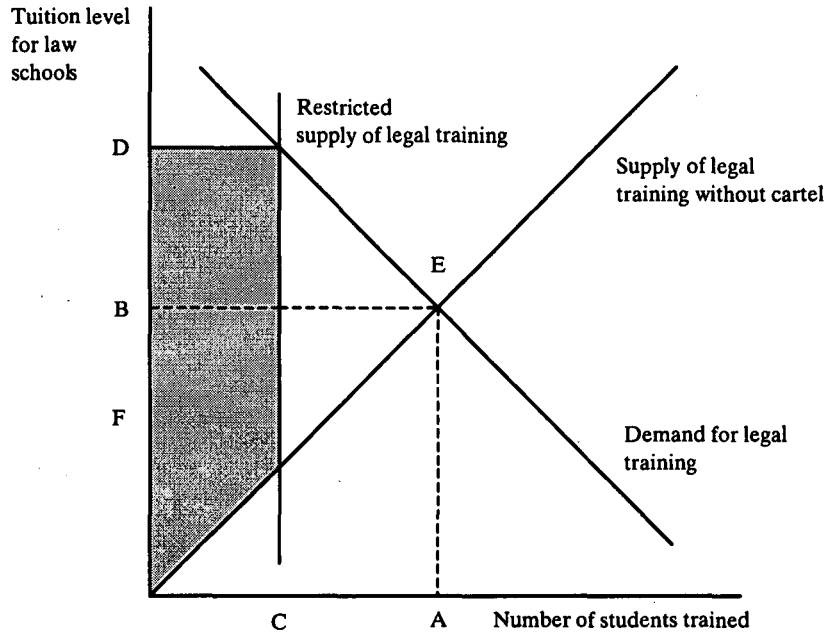
287 *See* ABA STANDARDS, *supra* note 23, std. 704(b).

288 *See* Cass, *supra* note 263, at 423 n.16 (reviewing statistics from the Law School Admission Council).

ally enrolled.[289] This suggests that the one-third of LSAT-takers who receive the lowest scores become discouraged and do not even apply to law school; their chances of admission are so small that the time and expense of application are not worthwhile. That is, a significant volume of potential applicants may not apply because the chances of acceptance are kept artificially low by the ABA restrictions.

Second, the accreditation process and standards raise the cost of legal education, deterring many from even taking the LSAT or applying to law school. The increased costs have the most direct impact on nonaffluent applicants; the poor are particularly discouraged from applying. Those who know that they cannot afford the high law school prices that the accreditation system creates—including the large opportunity cost of lost wages during the ABA-required three or four years of study—will not even take the LSAT, and may not even attend college; the system deters them from even beginning the process toward becoming a lawyer.

Figure 3. The market for legal training



289 *See* AMERICAN BAR ASSOCIATION, SECTION OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES, FALL 1995, at 67 (1995).

Figure 3 demonstrates the system's impacts in restricting supply in the market for legal training. Without the system, the supply and demand for legal training would reach equilibrium at point E, with law schools training A students. The system's impact is to restrict the supply of legal training to level C.

2. *Raising Prices*

The accreditation system's price-raising effects are closely related to the output restraints; economics teaches that, in general, decreases in output cause increases in prices.[290] By restricting output in the training market, the ABA causes the price of legal training—tuition—to be higher.

In Figure 3, the ABA system's restriction on supply permits law schools to raise prices from level B all the way to D, if the law schools choose to do so. If the system had not also altered the law schools' costs, and if the law schools had raised their prices to the maximum possible, then the law schools would have earned large profits, equal to the shaded area.[291] In economic terms, the shaded area is the law schools' producer surplus. However, because law schools are nonprofit institutions, they may not have raised their prices to the full profit-maximizing level D. For example, law schools may initially have set their prices at a lower level such as F. At tuition level F, the schools are earning excess profits, but not the maximum profits that they could have earned if they chose to squeeze their students completely, by charging D.

The system does increase law schools' costs, by requiring higher salaries and benefits for law faculty. If faculty salaries and benefits increase above the level that the competitive supply curve represents, then the shaded area goes not to the law school itself, but instead to the law school's faculty, in the higher salaries and benefits. An increased cost to the law school is increased income for faculty.

Because the system limits entry of new law schools into the market for legal training, the law school can, if it chooses, pass most of these cost increases along to students. That is, as faculty

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290 According to the law of demand, quantity is always related to price. The only exceptions are when demand is infinitely elastic or inelastic. Those conditions are not applicable to this market, where students' demand for legal training appears definitely to be related to the prices that they must pay.

291 Standard economic principles teach that the supply curve is also law schools' marginal cost curve. Thus, in Figure 3, the law schools' profit, also called producer surplus, is the distance between the tuition level, D, and the law schools' marginal cost curve. That is, the profit is the shaded area.

compensation rises, the law schools can impose corresponding tuition increases, moving from level F toward level D. The Figure shows that price increases up to level D will cause no decrease in enrollment. By passing along to students the cost of increased faculty compensation, the law school ensures that faculty receive all of the producer surplus that the cartel creates. Faculty, who control the law schools, will ensure that their benefits will increase to consume much of the profits. Because the faculty are the residual beneficiaries, the profits from the cartel flow to them.[292]

In accord with this analysis, law school tuitions have risen largely in line with costs, in these mainly not-for-profit entities. Although some schools may raise prices even higher so as to increase excess profits, many or most schools use rising costs as their general reason for raising tuition.

In sum, the ABA system is a major cause of increases in student tuition. The system both creates the large additional costs for law schools, such as increased faculty salaries and benefits, and permits the law schools to pass them on to students without fear of competitive disadvantage. Thus, faculty salaries and benefits now exceed the free-market levels that faculty salaries would have achieved without the ABA controls.

Altogether, the ABA system has probably raised average costs for law school, including tuition and other direct and indirect costs, by as much as one-third or even more.[293] This is suggested by the amount that tuition has risen, generally rising at double the rate of inflation.[294] In general, tuition has risen in line with costs; many ABA law schools add up their costs and charge that in tuition. Another indication of the system's impact on costs is that tuition at non-ABA schools, such as MSL, is approximately one-half the tuition at most ABA schools that are not state-subsidized. Although further research would need to consider various technical refinements in reaching a final estimate of the system's impact on costs, the main dimensions seem reasonably clear. The increased costs from the system are not entirely wasted; students benefit to some extent from the fine libraries and unhurried faculty. However, in a free market, many students would choose cheaper law schools with fewer amenities instead of deluxe schools and significant loans.

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292 *See supra* text accompanying notes 20-26.

293 *See generally* Hoover, *supra* note 216; Dahl, *supra* note 231.

294 *See* John R. Kramer, *Will Legal Education Remain Affordable, By Whom, and How?*, 1987 DUKE L.J. 240, 240.

Law schools may not always pass all of their cost increases on to their students. The ABA system gives law schools power to pass on at least some cost increases instead to their universities.[295] Funds to pay for the cost of higher salaries for law school faculty may come not only from law students, but also from the English and history departments, and from the medical school.

In addition to increasing tuition, the ABA system has increased the price of becoming a lawyer in four ways. First, the ABA standards require each applicant to law school to take an expensive admission test.[296] Almost all law schools choose the expensive LSAT. Students not only pay fees for taking the test, but they also devote time and resources to studying for the test; students often study for the LSAT for months and pay large fees for commercial preparation courses. Second, the standards prevent a law school from offering a bar review course for credit.[297] The price of becoming a lawyer increases by both the approximate $1000 expense of a private bar review course and the opportunity cost of the wages that the student could have earned during the month or two of full-time studying after law school that the private courses usually require.

Third, the ABA standards require that a law school program consume at least three years. Schools cannot offer cheaper one- or two-year programs, with correspondingly lower opportunity costs of lost wages. Fourth, the ABA standards prohibit a law school from accepting students who have completed fewer than three years of college. This requirement increases the effective price of becoming a lawyer by compelling all potential lawyers to pay at least three years of college tuition and forego three years of wages.

Many people considering a legal career may lack the resources to pay the large costs that the ABA system has imposed. Examples of those whom the system might exclude from legal careers are those with families to support, or those who would like to pursue a low-paying legal career, such as in public-interest law, that would not pay enough to repay a large educational debt.

In addition to increasing the prices that law students pay, the ABA system has completely prevented some students from obtaining legal education; for many, the system has increased the price of a legal education to infinity. By constraining the number of law schools and imposing maximum student-faculty ratios, the

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295 *See infra* Part IV.D.

296 *See* ABA STANDARDS, *supra* note 23, std. 503.

297 *See id.* std. 302(b).

system constrains the number of positions at law schools. For many students with moderate grades or LSAT scores who cannot gain admission, legal education has been unavailable at any price.[298]

3. *Profits*

For most accredited schools, accreditation provides great benefits. It permits them to raise tuition above competitive levels—all the way to level D in Figure 3—and to earn excess profits equal to the Figure's shaded area. Some of the excess profits flow to faculty as higher salaries, lower workloads, and other amenities; increases in faculty compensation may consume much of Figure 3's shaded area. Some law schools return a portion of profits to their universities; a law school is sometimes a cash cow for its university. However, ABA standards keep these transfers to the university to a minimum.[299]

There are two other important aspects of profits. First, the ABA officials who actually control and administer accreditation have gained significant rewards in money, status, and power. Their salaries and fees are high, and they enjoy favorable travel and meeting conditions. They have authority over whether some law schools live or die and whether some faculty keep their jobs. They can threaten deans and faculty from law schools that rank much higher than their own institutions, and they can make the deans and faculty grovel.

Second, the system may not benefit all accredited schools equally. It is even conceivable that, under some circumstances, the ABA-enforced extra costs may squeeze the lower-ranking schools' finances, making the schools less profitable. The system might prevent some relatively low-ranked ABA-approved schools from competing as effectively as they would like with unaccredited schools, at least in the states that permit unaccredited schools. That is, the ABA system might sometimes harm lower-ranked ABA schools by increasing their costs so much that they perceive that they cannot compete with cheaper unaccredited schools. Given their high costs, the ABA schools may be unable to compete with unaccredited schools without lowering their tuition rates to unprofitable levels. We see this dynamic in the attempts of the

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298 For a discussion of the large excess demand for legal education, see *supra* text accompanying notes 288-89.

299 *See* ABA STANDARDS, *supra* note 23, std. 201, interp. 2.

NESL to stifle its unaccredited competitor MSL.[300]

Likewise, the extra costs from the ABA system may sometimes make the lower-ranked schools uncompetitive with training for other careers; students may choose a cheap course of study for a carpenter's license rather than an expensive legal degree from accredited Mediocre School of Law.

Especially in a period of falling demand for legal education, such as the country recently entered, the system may harm some schools. That the system now offers fewer benefits, at least for some schools, is suggested by the recent efforts of several deans of accredited law schools to eliminate some of the system's restrictions.

However, features of the ABA system protect schools from some of these dangers. Almost all states effectively prohibit unaccredited schools, eliminating competition from them. In addition, even in the small number of states that do permit competition from unaccredited schools, a low-ranked ABA-accredited school can probably choose to ignore at least some ABA requirements and to reduce costs; despite frequent threats, the ABA has never actually disaccredited a school that has obtained full accreditation.

That the accreditation system benefits most accredited schools, even lower-ranked schools, is demonstrated by the great desire of many unaccredited schools, such as MSL, to gain accreditation. That the system provides benefits to many schools is also shown by the fact that most accredited schools do not voluntarily forfeit their accreditations in order to compete. The reduction in the population of law schools that the system has enforced has probably eased the competitive pressures on the financial health of most law schools. For most schools, the system provides substantial benefits. It reduces entry from new law schools, and it eliminates competition from unaccredited schools. As Figure 3 suggests, it permits accredited schools to raise tuition above competitive levels.

It is not easy to measure the profits that the system creates, because these formally not-for-profit schools do not keep standard private enterprise accounts, and the higher costs from the system may absorb much of the schools' potential net revenues. For example, under standard accounting, higher salaries for faculty, administrators, and librarians would be a cost. However, to the faculty who receive the ABA-imposed higher salaries, and who

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300 *See supra* Part III.C.

benefit from the other costly requirements that the ABA imposes, the costs are really like profits.[301]

4. *Efficiency*

An important element of economic performance is the firm's internal business efficiency. This efficiency has two parts. First, efficiency requires an excellent organization of production, with tight cost controls and an avoidance of waste and slack. Second, efficiency demands high levels of effort by employees. Success in both parts enables the firm to minimize its costs by minimizing the amount of the inputs it uses for each level of output. Inefficiency occurs when the firm's organization is distorted or slack or when work efforts are below the maximum. Then excess inputs are bought and costs are higher.

The ABA's controls appear to reduce the efficiency of law schools in several ways. They cause more faculty members to be employed at higher prices, lower workloads, and lower effort levels. The library facilities are more costly. More administrators are hired because the system prohibits faculty from doing administrative work. Even the accreditation process itself is an additional cost for law schools, in compiling extensive data for the ABA and hosting site visits.

The system locks in place the Harvard model of legal education, and so it prevents innovative competition from other law schools. The system has a cost for schools: It may prevent schools from gaining in ranking and prestige by competing by means of innovation. However, the system also provides a great benefit: It ensures the safety of the schools from being overtaken by others. Risk-averse deans and faculty are content to sacrifice the possibility of greater success for the insurance that the system offers against a real fall.

In addition, economic theory indicates that a major benefit for monopolists and oligopolists is the quiet life; they can succeed without being forced to strive continually to survive in the dangerous hurly-burly of competition. Thus, theory predicts that costs for firms that enjoy market power will tend to rise; the absence of competition permits firms to operate inefficiently.[302]

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301 Part I.F, *supra*, explains that a primary objective of many law schools may be to increase salaries and benefits for faculty. For a discussion of how academic institutions attempt to maximize the sum of tuition revenue and alumni gifts, see Carlson & Shepherd, *supra* note 18, at 578-84.

302 *See* HARVEY J. LEIBENSTEIN, BEYOND ECONOMIC MAN ch. 3 (1976). Some

Accredited law schools behave in exactly this manner, allowing costs to rise more than they rise in fully competitive markets in the economy. For example, tuition levels, which generally track costs, have risen twice as fast as prices in other parts of the economy. The accreditation system gives accredited law schools market power, prevents entry from new competitors, and insulates the schools from competitive pressures. The ABA system allows accredited law schools and their faculties to enjoy a relatively quiet, if inefficient, life. A law school can permit costs and tuition levels to rise with no real fear that high costs will threaten the law school's competitive position; the system prevents lean, efficient competitors from entering the market, offering lower prices, and attracting the law school's students.

Because the law school produces revenues that exceed costs substantially, the officially-nonprofit law school must find somewhere to spend the profits. The primary residual beneficiaries of the profits can be faculty, with higher salaries, lower workloads, and finer buildings. Deans can also divert some of the excess; to make their jobs easier, they may hire more assistant deans and other administrators. Libraries and librarians can also benefit, with more assistants and better facilities. In addition, if the law school is not vigilant, the university may siphon off some of the profits. However, clever law schools use the ABA standards—for example, one standard prohibits universities from removing from law schools "very high" amounts of money[303]—to fend off their universities' demands. A law school will tell the university comptroller that the law school would be willing to provide more to the university, but cannot because doing so would forfeit the law school's accreditation.

The degree of inefficiency that the ABA controls cause may be substantial, possibly as large as one-third or more of the actual costs. This is well above the levels of inefficiency that occur in competitive markets, or even in markets with moderate degrees of market power.

5. *Innovation*

The ABA controls reduce the pace of innovation. Major new innovations could create new styles of legal education, particularly

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economists cast this as a "principal-agent" problem, in which the employees diverge from the stockholders' interest in extracting maximum output from each level of inputs. *See, e.g.*, OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES (1975).

303 ABA STANDARDS, *supra* note 23, std. 210, interp. 2.

in low-cost schools catering to practical-oriented students. There could be more direct involvement of practicing lawyers, firms, and public agencies.

Among specific directions for innovations, there could be new departures in teaching methods and technology, which have been fixed instead in large-lecture formats.[304] Classes could use on-site visits and other direct involvement with social situations, so as to give more vivid training. There could be innovative use of adjunct and visiting faculty.

Some schools might offer shorter training. Essential law-school training might occur in only one year, augmented by individual study or apprenticeship. Indeed, as in the nineteenth century, a person hoping for a career in the law might forego law school and instead pay a lawyer to allow the person to be an apprentice for several years.[305]

Other law schools might experiment with programs in which legal training replaces the normal undergraduate curriculum, or combines with it. Such programs were common in the early twentieth century, before the ABA convinced state legislatures and state supreme courts to enforce the Harvard model on everyone. A school might offer a combined B.A.-J.D. in three years of study after high school. Or, as was also common before, legal training might even replace high school. For some, the provision of legal services might be a trade, like being a plumber or an undertaker. Becoming an excellent carpenter does not require a B.A. in history, or any college degree at all. Likewise, people could prepare for certain segments of the market for legal services with high school vocational training or apprenticeships—as did many U.S. presidents, including Abraham Lincoln.

Innovation could also occur in library size, resources, and retrieval technology, with a greater use by students of computers as both complements to and substitutes for shelved volumes. There could be more innovations in topical programs, such as for international, social, and regional issues. Law schools could experiment with offering bar exam preparation courses for credit, for the first time teaching the core material that students must learn in order to become lawyers. Such courses would save each student the substantial cost of both the fee for a commercial bar review course and the opportunity cost of the months of study outside law school

304 These and other innovations have been stressed by the dissenting law school deans. *See* Cass, *supra* note 263, at 425.

305 *See* ABEL, *supra* note 14, at 42-43.

to prepare for the bar exam.

Other innovations could affect the admissions process, by using alternative testing or other types of information for making admissions decisions.

Preparation for the legal profession might come to resemble preparation for becoming a city planner.[306] A student who intends to seek a career in city planning has several choices. She can obtain a graduate degree from a school that has obtained accreditation from the Planning Accreditation Board; she can earn a graduate degree from an unaccredited school; she can dispense with a graduate degree and rely only on her undergraduate degree; or she can obtain certification by taking the American Institute of Certified Planners exam. All of these routes can lead to a planning career. However, market forces will lead various employers to require various qualifications. Elite planning firms can require both graduation from an accredited school and a planning certificate. Local governments might require neither. Although other forces are also at play, the low barriers to becoming a city planner have contributed to lower salaries for city planners relative to attorneys. The market appears to function efficiently to protect consumers; even with the lower barriers for entry to the planning field, complaints that planners have provided inadequate service are rare, much rarer than complaints about shoddy lawyering.

Likewise, in preparation for the bar exam and for a career in their chosen area of the law, students could choose whatever combination they preferred of law school training, apprenticeship, and focused bar review study. Students with stellar credentials and intentions to work in elite law firms might continue to choose three years of study at a Harvard-style law school and a post-employment apprenticeship, as everyone is now forced to do. Other people, who intended to enter other parts of the profession, might study parts or all of the usual law subjects during high school or college. People would have the freedom to choose the nature and quality of their legal training. The bar exam would continue to guarantee to the public that lawyers, however trained, had the necessary minimum of knowledge.[307]

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306 Interview with Professor Anne Shepherd, Department of City Planning, Georgia Institute of Technology, in Atlanta, Ga. (Mar. 10, 1997).

307 As we discuss in Part VII.C, *infra*, the issue of whether the bar examination should also be modified or eliminated, so that the system would revert to its structure at Lincoln's time, merits further study.

6. *Fairness*

The ABA accreditation system undermines the fairness of legal education, the legal profession, and the social matters that the law touches. For example, the current higher costs and tuition levels have special impacts on lower-income candidates. The system not only tends to deter and exclude low-income students, but it also accentuates the burdens on those who do enter and graduate with heavy debts. Additional financial burdens arise from the requirements that ABA-accredited schools offer no shorter than three-year programs and that applicants have attended college. Even more directly, the prohibition on substantial self-supporting jobs by students tends to weed out those from poorer families.

The unfairness may be further extended by other features of the ABA controls. By requiring the law schools to emphasize abstract legal topics, the ABA tends to exclude students whose backgrounds give them more practical skills and interests. The requirement that applicants take an admissions test, such as the LSAT, may reinforce that; it may apply a cultural and income bias against students whose backgrounds and skills limit their ability to excel at this form of test.

All of these effects permeate not only the working legal profession, but also the ranks of the state and federal judiciaries, and the membership of state and federal legislatures. The effects enlarge other biases in legal services markets against low-income and minority people.

7. *Estimating the Combined Effects*

If anticompetitive features of the ABA restrictions had not existed, then many decades of unrestricted adjustments might have permitted legal education to approach an alternative efficient market equilibrium. Estimating its patterns is a matter of some conjecture, but the main dimensions are reasonably evident.

The variety of law schools (in approaches, tuition levels, and special programs) and level of innovation would be greater. Entrepreneurial law schools would experiment and innovate to develop programs that would provide the most appealing combination of instruction, apprenticeship, and price to each part of the market for legal training. Some schools would continue to provide the costliest Harvard-model education. In the elite segment of the existing legal training market, the ABA constraints do not influence the nature of legal education as substantially as in other segments of the market; a few thousand elite students seek the pres-

tige and pedigree that only an expensive Harvard-model education can offer. Even with no ABA controls, this segment of the market would continue to offer full-time professors with much time off to produce prestigious scholarship, fine buildings to attract elite faculty and students, and expensive libraries, while requiring graduation from an excellent college as a prerequisite.[308] Just as in the more competitive market for undergraduate education, a high-cost end of the market would continue to exist—although elimination of accreditation would permit even these elite schools to innovate toward more variety and higher efficiency.

However, at the market's other extreme, some institutions would transform themselves to become more the equivalent of vocational schools. They would offer practical legal courses that students would attend as part of their high school training. Across the middle ranges, other schools would offer something between the trade school model and the Harvard model. Some would offer one- or two-year courses of study. Others might offer five-year sequences to replace college; the sequences might include special instruction in areas such as taxation, real estate, or complex litigation. Others might offer instruction combined with apprenticeships—indeed, large law firms might offer parts of such programs.

There would be more variety among the types of teachers and teaching environments; the ABA standards would no longer force every school into the Harvard mold. Each consumer would choose the combination of price and other characteristics that served her purposes. A graduate of an elite college aiming for a career advising corporations might choose a different combination than a single-mother high school graduate hoping to rise within the bank where she now works to join the bank's legal staff.

Some schools would continue with traditional classes taught by full-time instructors with time for research. Classes in other schools would be taught by full-time instructors with a heavy teaching load but little time for research, so that salary cost per class would be less. Other schools would staff classes primarily with part-time adjunct practitioners. These instructors might have less research background than traditional faculty, but more practical legal experience.

There would be more law schools, probably more than twenty more, with a comparable enlargement of the flow of graduating students. Recently, applications to law school have declined.

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308 For a discussion of the incentives of elite educational institutions and elite students, see Carlson & Shepherd, *supra* note 18, at 570-84.

Even with this decline, the number of students who would apply if law school were substantially cheaper and shorter, perhaps with no prerequisite of an expensive college degree, substantially exceeds the combined class sizes of existing law schools. Many more law students might appear if some law schools offered open admissions, lasted one year, cost $5000, and required no college education.

Costs and tuition levels in many levels of the market would be substantially lower. For example, average faculty salaries would be significantly lower than they are now, at least at lower-ranked schools. At lower-ranked schools, the impact on salaries of elimination of accreditation would be greatest. Salaries would probably fall substantially. Cheaper schools, using the trade-school approach, would open at the lower end of the market.

The ABA standards presently do not constrain faculty compensation at top law schools as much as they constrain compensation at lower-ranked schools; even without the accreditation system, the handful of elite Harvard-model schools would probably continue to pay high salaries for at least some of their best full-time faculty.

However, even at top schools, the constraints have an impact on salaries. For example, standard 405 requires that a law school's faculty compensation "be comparable with that paid faculty members at similar approved law schools in the same general geographical area."[309] The standard inflates the compensation not only of lower-ranked schools, but also of the top schools; a top school's salaries must keep pace not only with national salary averages for all schools, but also with the salaries of the other top schools with which the school competes. The ABA will threaten disaccreditation if the salaries at NESL are lower than "similar" schools in the area, such as Suffolk Law School. Likewise, Stanford Law School will be put on notice if its salaries lag behind the salaries at University of California at Berkeley School of Law. The ABA's official interpretations of Standard 405 confirm this: "The word 'similar' does not exclude state supported schools, nor exclude national, as opposed to 'regional' schools."[310] Without the accreditation system, salaries for less productive faculty would probably fall somewhat even at top law schools. A Laurence Tribe would probably continue to be highly paid. But his Harvard colleagues who have published little for years might receive smaller

309 ABA STANDARDS, *supra* note 23, std. 405, interp. 2.
310 *Id.*

raises.

Moreover, salary reductions at the low end of the market would percolate up and cause at least some pressure to reduce salaries even at top schools. Competition from the new low-cost schools at the low end of the market that would arise would compel existing low-end schools to compete by lowering costs, including faculty salaries. This helps to explain why faculty from mid- and lower-level law schools have been most active in the accreditation process; the ABA system has helped these faculty the most.

The lower tuition levels at low-end schools would begin to draw students away from mid-level schools, which will then be under pressure to reduce their costs and tuition. This tuition-reducing process will percolate up through the ranks. In addition, at every level of the market, some schools would choose to compete for students by reducing costs and tuition; a top school might even choose to set itself apart as a low-price producer, offering a prestigious education at a bargain price—as do some state schools already. Again, this competition would press faculty salaries lower even at some top schools.

Likewise, the system has had an impact on clinical programs, even at the elite schools. Without the accreditation system, many top law schools might scale back the large clinical programs that the system now requires.[311] Indeed, the "rogue deans" from top law schools who have begun to oppose aspects of the accreditation process frequently challenge these requirements for large clinical programs.[312]

There would be less reliance on costly library facilities, and the use of electronic resources would be more extensive. Some schools would continue with expensive hard-copy libraries. Other schools would rely more on on-line data bases. Other schools might choose to dispense with libraries completely; students could study at law libraries that the government or the bar has established in most communities.

In order to attract students, some schools would rely less on the LSAT.

One school might advertise:

> Come to ABC, where we refuse to follow fads. Get the same education that all leading lawyers have received for fifty years: scholarly full-time faculty, large library with real books,

311 *See supra* text accompanying notes 184-86.

312 *See* Rudolph C. Hasl, *Moving Forward II*, 28 ABA SECTION OF LEGAL EDUCATION AND ADMISSION TO THE BAR, SYLLABUS 10 (1997).

three years of in-depth study, and a large staff to counsel you and help you to get an elite job. Want to be an elite lawyer? ABC is for you.

Ad copy for another school might run:

Come to XYZ law school, the bargain among the elite schools, where the faculty works harder, there are fewer expensive administrators, the library is on-line, we choose the finest students based on life experience and not on unreliable tests, you finish in two years rather than three, and you graduate with one-third of the debts that you would incur at our competitors. And there's more. Act now and there's no need to pay for a bar review course; it's included in our everyday low, low tuition. XYZ: The best legal education without wasting time and money.

C. *Impacts in the Market for Legal Services*

We have seen that the ABA system has had deep impacts on the upstream markets both for law faculty and for legal training. In addition, the impacts flow downstream into the market for legal services. The system alters the legal services market in three main ways.

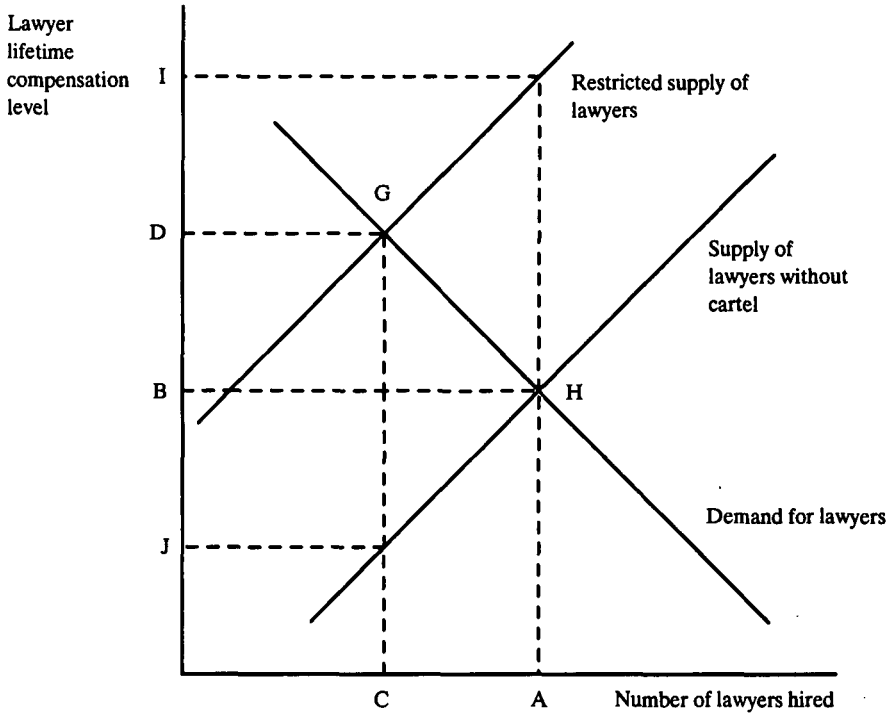
First, the system reduces the supply of lawyers. Because the system denies many applicants spots in law school, these people cannot take the bar exam. In addition, the system decreases the number of lawyers because the system substantially increases the cost of becoming a lawyer, including direct and opportunity costs. This deters many from even attempting to have a career in the law. It is sensible to enter the legal profession only if the benefits from a career in the law outweigh the direct and indirect costs of training. One of the main benefits of a legal career is enhanced income.[313] As the cost of legal training increases, fewer people will choose law as a career; with higher training costs, the benefits of learning law will exceed the costs for fewer people.

Second, the system increases the price of legal services. Because fewer lawyers exist, their hourly fees and contingency percentages increase. A rational person will choose a legal career only if the expected earnings exceed training costs. Accordingly, if training costs increase, then only those who could expect to earn high salaries will enter the law. Higher training costs will eliminate

313 For some lawyers, other benefits exist, such as the enjoyment of helping the poor, even if for low pay. High status can be another benefit, although much of the public has begun to hold lawyers, as a group, in low esteem.

from the market for legal services those lawyers who would charge moderate amounts; faced with high training costs, a lawyer who could expect to earn only a moderate income will choose a different career.

Figure 4. The market for legal services



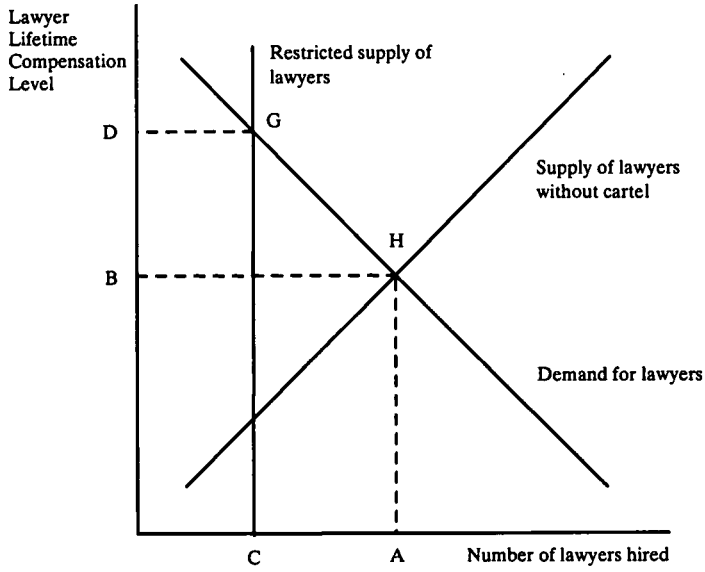
As Figure 4 illustrates, the ABA system, by increasing training costs and reducing the supply of lawyers, moves the supply curve for legal services inward and upward. The supply curve indicates for each potential lawyer the cost of obtaining the necessary qualifications, with those candidates with the lowest cost to the left and the highest cost to the right. The system causes the supply curve to shift upward because, for each potential lawyer, the system causes the cost of entering the profession to rise.[314]

[314] The system's impact might also conceivably appear as in Figure 5, suggesting that the ABA system placed a strict, impenetrable limit on the number of lawyers; regardless of how much clients were willing to pay lawyers, no more than this limit would be permitted to practice law. No additional lawyers would be licensed regardless of what costs potential lawyers were willing to incur to become lawyers.

For any level of legal salaries, the system causes fewer lawyers to be willing to provide labor. For example, suppose that, absent the ABA system, the market compensation would be $30,000 per year, corresponding to point B in Figure 4. Employment of lawyers would be at level A. For the marginal lawyer at point A, the Figure shows that the lifetime income from a $30,000 salary would just cover the lawyer's cost of entering the field. If the lawyer's costs were any greater—as they are for all lawyers to the right of point A—then the lawyer would not enter the legal profession; costs would exceed benefits.

By increasing training costs, the system will make it no longer worthwhile for people to incur training costs in order to do legal work that earns only $30,000 a year. A law school graduate with loans of $70,000 cannot survive on a salary of $30,000. For example, for the person at point A, the system increases the costs of entering the legal profession from B to I. Without the system, the person at A would have just been able to make ends meet at a sal-

Figure 5. The market with a vertical supply curve



This representation would be inaccurate. If a person is willing to incur very high costs, then the person can probably become a lawyer. For example, a person who cannot gain admission to an accredited law school could move to California or Massachusetts, enroll in an unaccredited school, and then take the bar exam in those states as many times as necessary to pass it. Thus, as Figure 4 indicates, even with the ABA system, as lawyers' salary levels increase, more people will become lawyers.

ary level of $30,000, corresponding to level B. However, the system increases the person's costs to level I. At a salary level corresponding to B, costs would far exceed income, and the person would not be able to make ends meet.

The shift in the supply curve produces an equilibrium in which salaries for lawyers are higher; salary levels increase from B to D. However, fewer lawyers are employed; the number of working lawyers shrinks from A to C. The ABA system has achieved exactly the result that the ABA sought during the Great Depression: a reduced supply of lawyers, so that existing lawyers receive higher pay.

The system provided the greatest benefits to those who became lawyers before the system increased costs. They benefited from the higher system salaries, but had incurred only the low pre-system costs to become lawyers.

However, those who became lawyers under the ABA system benefited little. The system offered no windfall to many lawyers. Although the system substantially raised lawyers' incomes and the costs of legal services, the system provided few net benefits to many lawyers, when the increased costs of entering the profession are considered. Although the system increased lawyers' incomes substantially, it also increased substantially the cost of becoming a lawyer, offsetting much or all of the increase in income. For example, the lawyer at point C in Figure 4 would have earned large profits if he had trained and practiced when the ABA system did not exist. His compensation would have been level B, much greater than his costs of becoming a lawyer J. In contrast, with training and practice under the system, the lawyer's compensation increases to D. But so too do his costs. With the system, costs completely consume his compensation. The lawyer does worse under the ABA system than he would have done before it.

Eliminating the ABA system would harm existing lawyers substantially. It would not merely eliminate a monopoly windfall for lawyers; because of the increased costs that the system imposes on lawyers, many lawyers now receive no windfall from the increased compensation that the system produces. Instead, eliminating the system would cause many lawyers to receive less than a reasonable market return on their investments in becoming lawyers. For example, under the system, the lawyer at C in Figure 4 invested the large amount D in order to become a lawyer; he sacrificed seven years of income to attend college and law school, and incurred perhaps $100,000 of student loans and law school tuition.

His compensation, at the system's market price for legal services of D, barely covers his costs; the lawyer is barely able to repay his student loans and other costs. If the system were eliminated, then the market price would fall to B, as lawyers who did not incur the expense of complying with the ABA rules entered the market. At this new price, the lawyer at C who had incurred costs to become a lawyer under the system of D would suffer a desperate reversal and probable financial ruin. Under the system, the lawyer at C earned barely enough to make ends meet. With the system's elimination, and resulting fall in the price of legal services, the lawyer would not recover his investment in legal education. He, and many like him, might default on student loans and enter bankruptcy.

Because of the ABA system's two downstream impacts—reduction of the supply of lawyers and an increase in their price—the system especially harms potential consumers of legal services who are from the poor and middle class. Comparing this market to the market for automobiles, only high-priced Lexus- and Mercedes-quality legal services are available. The ABA system excludes from the market inexpensive but serviceable Toyota- and Volkswagen-quality lawyers.[315] The ABA system prices some of the middle class and most of the poor out of the market for legal services; many cannot obtain legal services because they cannot afford the high prices. Legal services become services mainly for corporations, the wealthy, and those who are horribly injured. A tenant who faces eviction cannot afford a lawyer. The middle class dies without wills.

In addition, the playing field is systematically tilted. Many people who buy defective products have no recourse. Many people lack a fair chance to pursue valid claims against large companies. Although some lawyers are willing to take cases on a contingency, only the most seriously injured victims who have the clearest evidence that the defendant is liable can obtain contingency representation. Because the system reduces the number of contingency lawyers, the remaining contingency lawyers can pick and choose among cases. They will decline to take many cases that would have obtained contingency representation had more lawyers been in the market.[316]

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315 *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 139-45 (1962).

316 *See* HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION, AND COMPENSATION IN NEW YORK ch. 7 (1990) (reporting that only a small fraction of victims of medical negligence seek com-

Without the two hurdles to entry—the accreditation system's limits and the bar exam—larger numbers of competent lawyers would probably be available at much cheaper prices. For example, in an unconstrained market, competent lawyers would be available for $30 per hour or less for simple tasks. This is the amount that qualified professionals earn in other fields, such as carpentry, plumbing, physical therapy, or chiropractic. A consumer can choose to have her taxes prepared by a certified public accountant at $150 per hour. Or she can have the taxes done at H&R Block, which charges approximately $30 per hour and pays its employees approximately $13 per hour.[317] If the return is complicated, the person may choose the CPA. If the return is simple, the choice is H&R Block. However, in the legal services market, only the CPA level of service is available; there is no H&R Block for legal services. Elimination of the ABA system would help to make available the H&R Block level of service.

The present system increases the amounts that federal, state, and local governments must pay for legal services for those who cannot afford the services by themselves. Because the constitution establishes a right to legal representation in criminal cases, the government pays for representation of low-income criminal defendants. In addition, in programs such as the Legal Services Corporation, the public expresses a moral judgment that the poor and middle class should not be entirely excluded from legal representation. Both of these legal-services equivalents of welfare payments would be less necessary if the market for legal services were not rigged to allow only high price services; without the ABA system, more of the poor and middle class would be able to pay for their own lawyers, and would not need to rely on government handouts.

In addition, the system increases the amounts that lawyers and law firms spend on pro bono representation. Seeing that many of the poor and middle class cannot afford representation, many members of the bar feel an obligation to devote substantial time and resources to providing services to these groups free of charge. If inexpensive legal services were available, the bar would no longer need to provide most of these services. Tax accountants do not provide substantial pro bono work; they know that inexpensive tax preparation services are available to the poor and middle class. Elimination of restraints on entry to the legal profes-

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pensation or sue).

317 Telephone Interview with Theodora Shepherd, Tax Preparer for H&R Block (Aug. 28, 1996).

sion would reduce some lawyers' incomes as competition increases. But lawyers would feel less need to provide services for free.

The system may cause still more unfairness. Because the system causes lawyers to be drawn more from privileged backgrounds and to be more burdened with debts after law school, they may tend to be less sympathetic to poor clients. Without the system, there would be wider participation in legal training by less-affluent and minority students. That influx would have broadening effects on the demographics and attitudes of lawyers and judges.

Lowering the barriers to entry of new lawyers might redistribute power to some extent, including political power. Becoming an attorney can lead not only to a good income, but also to a career in politics, government, and the judiciary. Lawyers hold a disproportionate fraction of powerful positions in the judicial and executive branches of federal, state, and local government. In addition, legislatures at all levels are filled with lawyers. The system effectively denies access to legal careers to certain groups, such as minorities and the poor. Thus, the system also denies these groups access to power in all branches of government, including in the legislatures.

As beneficial as reducing the barriers to entry might be, that may simply not occur. Most of those who decide whether to eliminate the ABA system or loosen the exclusionary impact of the bar exam benefit from maintaining the status quo. Existing law professors and lawyers benefit from the ABA system because the system reduces the number of new professors and new lawyers and reduces competition. However, members of these groups often can control whether the system continues. Law faculty dominate bar association committees that decide whether to maintain the system.[318] State supreme courts and state legislatures determine whether a state will require graduation from an ABA accredited school and passing a bar exam. State supreme court justices are almost always appointed from among practicing lawyers. Lawyers

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318 The consent decree attempted to reduce the domination of the ABA standard-setting committees by law faculty and librarians. It required the ABA to appoint to the committees lawyers who were not legal educators. *See* United States v. ABA, 934 F. Supp. 435, 437 (D.D.C. 1996) (requiring that no more than 50% of the membership of the Accreditation and Standards Review Committees of the ABA be law school deans or faculty). However, this change can be expected to have little impact on the committees' anticompetitive approach. Like legal academics, practicing lawyers benefit from maintaining strict accreditation standards for law schools; strict standards that reduce the number of law schools also reduce the number of new lawyers who compete with existing lawyers. Thus, the new nonfaculty members of the committees have an incentive to support the same exclusionary policies that the committees presently pursue.

make up large fractions of state legislatures. Because of the political power of existing law faculty and existing lawyers, the elimination of barriers to entry of new lawyers will not come quickly or easily.

D. *Impacts in the Intra-University Market for Funding*

Within each university, the law school must compete with the university's other parts for funding.[319] The accreditation system helps law schools to compete successfully in this intra-university market, and to gain more funds from their own campuses' finances. A law school dean will display to the university president an action letter from ABA accreditors that found fault with the law school's library or faculty salaries. With a quaver in her voice, the dean will request funds for a new library and higher faculty salaries, lest the law school loses accreditation.[320]

It is well known that law school officials sometimes attempt to game the system; school officials will purposefully point out flaws to the ABA accreditors in order to obtain a negative ABA report that can then serve to extract more funds from her university.[321] The ABA site visit teams appear to recognize how they can help law schools to obtain money from their universities. A site team will ask the school's officials to identify the school's weaknesses. The school officials may respond with a wish list of self-criticism—our library is inadequate or our faculty salaries are low. The school officials know that whatever they list will appear in the ABA committee's action letter as a possible basis for disaccreditation. The school's officials then use the action letter to obtain funds from the university for the items on the list.

Many university administrators understand the game. Some also know that the threat of disaccreditation is almost surely a bluff. Despite frequently noting supposedly unacceptable flaws, the ABA has never fully removed a law school's accreditation.[322] However, the ABA system can cause unwary university administrators to devote more funds to their law schools than they otherwise would have.[323]

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319 *See supra* Part I.D.

320 *See* Cass, *supra* note 263, at 424.

321 Administrators at several law schools other than Emory described these practices. The administrators asked not to be identified in this Article.

322 *See* Cass, *supra* note 263, at 424. Only one school had its accreditation removed even temporarily. The ABA nearly disaccredited the University of Oregon School of Law in the early 1990s. *See id.*

323 *See id.*

The gain to the law school and its faculty is a loss to the other departments within the university. The funds that the ABA system coerces from a university is an enforced subsidy of the law school and law faculty by faculty, students, and alumni in other parts of the university. For example, in order to provide the additional money for the law school, the university may reduce wages and hiring in other parts of the university. Law school salaries rise while English professors earn less. Or the university may increase tuition for its undergraduate students and other graduate students; undergraduate students may help pay for law professors' higher salaries.

E. *Market Power*

The ABA's market power in the four markets for hiring law faculty, legal training, legal services, and intra-university funding appears to be large. Although a showing of market power is not necessary for the system to be illegal,[324] the system's large market power suggests the great impact and harms that the system has caused. These harms confirm the validity of the legal doctrine that makes the system illegal.

The main standard criteria for judging market power in any market include the following five:[325]

1. The extent of control within the markets that are directly affected, commonly indicated by the market share and/or degree of concentration;
2. Evidence of collusive behavior and conditions, especially when the participants are few;
3. The existence of high barriers against small rivals and new competition;
4. Impacts in other markets; and
5. High excess profits, if the profits do not arise from superior efficiency or mere luck.

We now consider each of the indicators, which, both singly and taken together, suggest a degree of market power so high that

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324 The system should be treated as a horizontal price-fixing agreement, which is illegal under either per se analysis or truncated rule of reason analysis, even without a showing of market power. *See infra* Part VI.

325 *See generally* JOE S. BAIN, INDUSTRIAL ORGANIZATION (2d ed. 1968); JOHN M. BLAIR, ECONOMIC CONCENTRATION (1972); KAYSEN & TURNER, *supra* note 6; SCHERER & ROSS, *supra* note 5; SHEPHERD, *supra* note 5, chs. 1-3. There is naturally some controversy over the details of measuring these conditions, and the relative importance of these elements. But there is a strong consensus among economists that these elements are all relevant.

it is rarely found anywhere in the economy's industrial and commercial markets.[326]

1. *The Extent of Control over the Markets: Market Share*

The ABA accreditation system creates almost complete monopoly control over each of the three markets for hiring law faculty, for legal training, and for legal services. In each market, the system has the power to restrict output, raise prices, and exclude competition. And the controls interact and reinforce each other among the three levels.

Existing faculty at ABA-approved law schools have a virtually complete monopoly over the market for law faculty. The ABA requirements that provide high wages and benefits apply to all faculty at ABA-approved schools.

As a necessary consequence of the monopoly that faculty at ABA schools have over the market for law faculty, the ABA-approved law schools themselves have a virtually complete monopoly over the market for legal training. As in the market for faculty, ABA-approved schools' share of the market for legal training appears to be over ninety percent, even if there may be a fringe of minor alternatives. The laws of forty-seven states provide that all law students must receive instruction from ABA-approved schools. In these states, no other law schools exist than ABA-approved schools.

Likewise, in most states, the accreditation system creates a complete monopoly for graduates of ABA-approved law schools over the market for legal services. Almost all states have given the ABA authority to limit entry to the legal profession to those who graduate from ABA-accredited law schools. No one else can enter the market. The ABA-approved schools produce virtually all of the lawyers who function on significant legal issues, either through their advice to clients in corporate and personal life or in litigating cases that come before the courts.

The ABA's controls over the markets for faculty hiring and legal training derive from and reinforce the ABA's control over entry to the market for legal services; the system permits to become lawyers only people who have studied under the training system that the ABA controls, and who have been indoctrinated by it for three years. The ABA has created what in economic and antitrust terms is often called a "bottleneck," which gives virtually

326 *See generally* SHEPHERD, *supra* note 5; William G. Shepherd, *Causes of Increased Competition in the U.S. Economy, 1939-1980*, 64 REV. ECON. & STAT. 613, 617-20 (1982).

complete control not only over the market for faculty, but also over the downstream markets for legal training and legal services. The bottleneck is the requirement that lawyers study at ABA-approved schools with ABA-approved faculty. The ABA system restricts the only route of entry to the profession by limiting the number of approved schools, reducing each school's capacity, and increasing the price of training.

Therefore, the primary market-share indicator shows high monopoly power in the markets for faculty, for legal training, and for legal services. The level of market power is quite rare among markets in the economy. Very few firms hold shares over sixty percent in any significant markets in the U.S. economy, and those shares are usually subject to decline over time.[327] The virtual monopoly that the ABA has permitted to ABA-accredited law school faculty, ABA-accredited schools, and graduates from these schools is striking in its size and stability.

2. *Cooperative Actions of the ABA and Others: The ABA Standards*

The ABA's tight controls have existed for more than fifty years, and have been particularly elaborate and tight for the two decades since 1973. The officials who developed them have remained largely unchanged, and so the policies have had continuity and force.

3. *Barriers to Entry*

The ABA has raised absolute barriers (where it chooses) against entry by new law schools. In theory, the ABA's accrediting approach could be so liberal that it raises no actual barrier. But in fact, the ABA has been tight and the barriers are high. If a new school has ample resources and avoids any policies which deviate from ABA rules, its chances for ABA approval are good. But lower-funded and innovative applicants that challenge the controls face insurmountable barriers. Also, an entrepreneur who is considering establishing a law school would know of the absolute necessity of ABA accreditation in almost all states, of the near necessity in the others, and of the expense and difficulty of ob-

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327 For distributions of U.S. markets by their degrees of market power, see SHEPHERD, *supra* note 5, ch. 3. On the rates of decline of high market shares, see generally WILLIAM G. SHEPHERD, THE TREATMENT OF MARKET POWER (1976); P.A. Geroski, *Do Dominant Firms Decline?*, *in* THE ECONOMICS OF MARKET DOMINANCE 168 (Donald Hay & John Vickers eds., 1987).

taining accreditation. Thus, the system dissuades many potential competitors from even attempting to compete.

4. *Impacts in Other Markets*

The system has distortionary impacts not only in the primary markets for faculty hiring, legal training, and legal services. In addition, the system has substantial impacts in the intra-university market for funding, permitting law schools to extract additional funding from their universities.[328]

5. *Excess Profits*

Standard measures of profits are difficult to apply in this market because many law schools are not-for-profit institutions that seek to maximize faculty compensation.[329] However, both the high salaries of law faculty and the much lower prices for unaccredited law schools suggest that many accredited schools do obtain, or could easily obtain, excess profits.

F. *The System's Impacts During a Recession*

Both economic theory and economic experience teach that members of cartels will tend to exhibit four behaviors. First, some individual cartel members will attempt to defect from the cartel. Second, the cartel will attempt to punish the defectors. Third, continued defections will lead the cartel's members to abandon the cartel. Fourth, a cartel will tend to collapse in a period when demand for the industry's product declines. The accreditation system exhibits each of the four behaviors, which we now discuss in turn.

First, economics indicates that an individual member of any cartel can always gain advantage by defecting from the cartel, as long as the others continue in the cartel. For example, suppose that three competing producers of a product agree to create a cartel and to raise the product's price to an agreed level. Any of the three producers has an incentive to defect from the cartel and secretly to charge a slightly lower price; as long as the two other producers do not lower their prices, the defecting producer will increase sales and profits.[330]

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328 *See supra* Part IV.D.

329 *See supra* text accompanying notes 20-26.

330 *See* SCHERER & ROSS, *supra* note 5, at 244-48. *See generally* ROBERT BORK, THE ANTITRUST PARADOX (1993); STIGLER, *supra* note 5; MACHLUP, *supra* note 269; THE CAUSES AND CONSEQUENCES OF ANTITRUST, *supra* note 2.

A cartel's members will have a love-hate relationship with the cartel. The cartel's members will all chafe at the limitations that the cartel imposes; defecting from the cartel would benefit each member, if the other members did not defect. However, at the same time that the cartel's members resent the cartel, they will recognize that the cartel is providing its members with monopoly profits and other benefits. Few will actually defect.

Frequently, members of the accreditation system exhibit this predicted behavior. For decades, law faculty and administrators have exhibited the love-hate relationship with the system. For years, members of the system have complained about its various aspects, while simultaneously enjoying its benefits.

In addition, in recent years, the predicted defections from the system have begun to occur. Faculties at several ABA-accredited schools began to bend or break the ABA constraints; they sought to gain advantage over faculties at other schools by improving their rankings and attracting better students. That is, the schools were defecting from the cartel. We use the term "defecting" in a special, nonjudgmental sense. By bending ABA requirements, the schools were attempting to provide improved services and lower prices to students.

For example, the faculty at Chicago-Kent Law School recently attempted to improve the school's reputation and ranking. Their strategy involved bending several ABA standards, including standards as to student-faculty ratios, faculty pay, use of visiting faculty instead of full-time faculty, and faculty sabbaticals.[331] Among other changes, Chicago-Kent began to use visiting faculty with significantly lower salaries than full-time faculty to teach both legal writing classes and substantive courses.[332] It altered its sabbatical leave program from the traditional approach.[333] It required faculty who produced little scholarship to teach more than productive scholars.[334] It opened a fee-generating clinic where clinical faculty generated their own salaries through the fees.[335] In economic terms, the faculty at Chicago-Kent were attempting to defect from the cartel in order to increase their benefits. These changes would increase the faculty's and the school's ranking, at the expense of other faculties at other schools.

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331 *See* Matasar, *supra* note 267, at 427-28.

332 *See id.* at 428.

333 *See id.* As the law school's dean noted, "Unfortunately, our university cannot afford to pay faculty members not to teach—even if we greatly cherish research." *Id.*

334 *See id.*

335 *See id.* at 427.

Second, economics suggests that the other cartel members would react swiftly and firmly against the defections; the success of a cartel depends on no member's defecting from the cartel by cutting price so as to take advantage of the other members.[336] As theory would predict, ABA accreditors challenged Chicago-Kent's attempted defection strenuously. Repeatedly, ABA accreditors indicated serious "concerns" about each of the school's innovations, the accreditors demanded changes, and they threatened not to renew the school's accreditation. Eventually, after three years of intense negotiations, the accreditors backed down, and provided full accreditation, but only after what the school's dean described as "trial by ordeal."[337]

Chicago-Kent's strategy paid large benefits. Chicago-Kent increased its ranking substantially, so that the rankings in *U.S. News & World Report* named Chicago-Kent as the nation's top up-and-coming law school.[338] Chicago-Kent's success, which was won through defecting from the cartel's standards, came at the expense of the other members of the system, who had not attempted to bend the standards.

Other faculty that attempt to avoid the system's requirements also feel the ABA's wrath. For example, a law school's faculty may sometimes try to reduce its benefits—so as to be able to reduce its prices and attract better students—by spending less than ABA standards require on law buildings or libraries. In response to such attempts to defect from the system, the ABA has now threatened approximately one-third of ABA law schools with disaccreditation because of inadequate facilities.[339]

Third, theory shows that continued defection by cartel members may eventually cause the cartel's other members to leave the cartel, and may cause the cartel to collapse. As the defectors gain profits and market share at the expense of the cartel's other members, the other members may eventually conclude that the cartel provides more harm than benefit; they may conclude that it is worse to be constrained by the cartel and be exploited by the defectors than to leave the protections of the cartel but gain the freedom to respond to the defections. The cartel may fail, and vigorous competition will break out, when members of the cartel continue both to defect from the cartel with impunity and to gain

336 *See* SCHERER & ROSS, *supra* note 5, ch. 6.

337 Matasar, *supra* note 267, at 427.

338 *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Apr. 29, 1991, at 74.

339 *See supra* text accompanying note 176.

advantage over the other cartel members by ignoring the cartel's restrictions; the cartel's other members will have no choice but to abandon the cartel and retaliate against the defectors by competing vigorously themselves.[340]

The accreditation system has behaved no differently. As economic theory predicted, other members of the system were sitting ducks to defections of schools such as Chicago-Kent; the system's standards prevented the members from responding to Chicago-Kent's innovations. As predicted, Chicago-Kent's defection from the system has created pressures for the system's other members also to defect. The rogue deans have responded to these pressures by demanding the end of the system's tight controls.

Chicago-Kent's defection may have caused the rogue deans to seek to leave the system not only to defend against Chicago-Kent. In addition, Chicago-Kent's strategy may have demonstrated to the rogue deans that they too could improve their faculties' competitive position by defecting. Although the system protected the rogue deans' faculties, it also prevented the schools from increasing their prestige by competing against other schools. The system protected Emory's faculty from competition from Georgia State. But it prevented Emory from streamlining its operations to challenge Harvard and Yale.

Fourth, economic theory predicts that a cartel tends to collapse when external forces reduce profits for some of the cartel's members. A cartel will be stable while all members of the cartel are profitable. However, the cartel will tend to come under pressure and even collapse during periods when some of the cartel's members are suffering financially. When a cartel member is facing lean times, the member may be tempted to defect from the cartel to save itself. A cartel member may recognize that, in the long run, the member's interests may be best served by remaining in the cartel. However, in the short run, the member may have no choice but to defect; unless the member defects and raises revenue, the member may not be able to meet its payroll.[341]

The accreditation system exhibits this behavior thoroughly. The system was stable during the 1960s through the early 1990s, when the number of students seeking legal training increased by a

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340 *See generally* STOCKING & WATKINS, *supra* note 269; SCHERER & ROSS, *supra* note 5, chs. 7-9; MACHLUP, *supra* note 269; KAYSEN & TURNER, *supra* note 6; AREEDA ET AL., *supra* note 5; FOX & SULLIVAN, *supra* note 5; STIGLER, *supra* note 5; THE CAUSES AND CONSEQUENCES OF ANTITRUST, *supra* note 2.

341 *See* SCHERER & ROSS, *supra* note 5, at 286.

factor of five.[342] This was true even though, during this period, the system faced criticism from law schools that the ABA had refused to accredit.[343] The stability reflects the benefits that the system offered to the system's faculty members during the period; for example, the system excluded all but a trickle of the competition from additional law schools that would have otherwise flooded the market with many new law faculty. Large new demand joined with artificially limited output to produce the inevitable economic impact: substantial increases in salaries and benefits to law professors. During the 1970s and 1980s, salaries for law professors almost doubled, increasing far faster than the salaries of professors in almost all other fields.[344]

However, the bull market for law faculty and administrators ended in the early 1990s. The market for legal training entered a severe recession, with demand for legal training declining sharply.[345]

The drop in the market for legal training has had large impacts in the market for law faculty. The quality, according to traditional measures, of students that law schools attract has fallen: median grades and LSAT scores for many law schools' entering classes have fallen.[346] Other schools have maintained the quality of their student bodies by reducing the number of students that they admit.[347] This strategy maintains prestige but is costly; the school loses tuition revenue. It appears that many lower-ranked schools may soon have a policy of open admissions, at least at the high tuition levels that the ABA system imposes; they will admit anyone who applies. Experts predict that, in the next several years, financial pressures will cause some schools to close.[348]

The drop in applications has caused law faculties to begin to compete fiercely for students. Schools are spending more on recruiting.[349]

In addition, as the drop in applicants has deepened, faculties have attempted to compete for students in the way that economics

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342 *See supra* Part II.B.

343 *See* Ken Myers, *California School Says New ABA Plan Gives Accredit Where It Is Due*, NAT'L L.J., Aug. 14, 1995, at A15.

344 *See supra* text accompanying notes 276-78.

345 *See supra* text accompanying note 229.

346 *See* Riedel, *supra* note 229, at 20-22. For example, the median LSAT score for students at Suffolk University Law School has fallen two points in the past two years. *See id.*

347 *See id.*

348 *See id.* at 27.

349 *See id.* at 22 (reporting Rutgers' dean's statement in response to decline in applications: "We're planning to spend some more money on student recruiting . . . .").

predicts: by defecting from the ABA cartel. Before the decline, all law schools could succeed by maintaining a disciplined accreditation system. Although the system reduced ABA-accredited faculties' flexibility to gain advantage over ABA-accredited rivals, it benefited the faculties by eliminating competition from new non-ABA competitors. The system permitted even the lowest-ranked ABA faculties to enjoy excess demand for their services; even the lowest-ranked ABA law schools turned away many applicants. Faculty salaries and benefits rose. The schools accepted the little dose of bitter in order to obtain the gallon of sweet.

However, for many faculties, the decline in applications has eliminated the sweet and left only the bitter; for some schools, the system no longer provides benefits, but only harms. A cartel benefits its members only if it reduces the industry's output below the output that would have occurred without the cartel. With restricted output, consumers pay higher prices. For many years, the ABA system benefited ABA-accredited faculties in this way. The system restricted consumers to purchasing legal education only from ABA-accredited faculties. The system decreased industry output by killing new competition, and so raised prices.

The recent drop in demand has meant that the system may no longer benefit some ABA-accredited schools. Before the decline in applications, the system benefited even lower-ranked ABA schools by eliminating competitors and ensuring that the number of applicants exceeded each school's number of student positions. However, the recession eliminated these benefits; the recession has forced many lower-ranked accredited schools to accept all who apply, and some schools may be in danger of failing. Although the system now offers few benefits for the schools, it still has large costs. Because the system continues to require high faculty salaries and expensive facilities, it prevents faculties from lowering price to attract more students. The system that once enriched the faculties now threatens to eliminate their jobs.

Thus, as economic theory predicts, the drop in demand caused the ABA system to begin to fragment. Many ABA-accredited faculties, represented by their rogue deans, demanded freedom from the system's restrictions. It is not by chance that the faculties challenged the system during the recession, rather than earlier. The system benefited the faculties until the decline. The decline eliminated the benefits. Reflecting the unease among faculties about the system, the ABA, in the DOJ consent decree, voluntarily agreed to eliminate several of the system's requirements. The

faculties and their ABA trade association opposed the challenges by the DOJ only weakly, and they agreed to substantial reductions in the system's authority. It is probable that a challenge by the DOJ in the mid-1980s, when the system was providing faculties with great benefits, would have met much stiffer opposition from faculties and from the ABA—rather than the present public approval from many faculties and their rogue deans.

V. OFFSETTING BENEFITS

The ABA system has sought to control quality directly, rather than let quality develop and evolve in a normal free market. The ABA's accreditation program may have yielded several benefits, which we now discuss. We conclude that the benefits are small, and probably do not compensate for the large harms.

A. *Quality of Education*

Consider the ABA system's effects in their most favorable light. An orderly society needs fine legal education, not only to avoid poor lawyers but also to staff the courts and legislatures with high-quality legal talent. Without some system to promote quality in schooling, the floodgates will open to poor-quality schools that send out incompetent or corrupt lawyers. The ABA controls prevent a disintegration of legal training into chaos and poor quality. The faculties' high salaries and easy workloads attract superb teachers, who give abundant attention to their high-quality students. These skillful students devote full-time attention to their learning, making good use of ample library resources.

However, the criterion of "high quality" is ambiguous and can cause error. Economic science has increasingly stressed the benefits of diversity in the quality and types of services in the market. "High quality" and/or cost may be appropriate for some purposes and for some students, particularly those who can afford high prices. But the highest, most-expensive levels of law school quality may not be suitable for all, any more than all drivers need to own an expensive Lexus. If the ABA system were replaced by a more open and balanced approach, a wider range of schooling choices would result. Students would be able to choose a Toyota legal education: no frills, but solid and inexpensive.

As for the law schools' libraries, they may be spacious and fully stocked, in line with ABA standards. But many students prefer to study at home or in other venues, getting access to sources efficiently by using computers. The ABA library rules may be im-

posing costly and obsolete burdens on the schools and their students.

Moreover, the ABA controls may be self-defeating; some of the controls may reduce quality rather than raise it. Many law school courses are grueling, impersonal, large-scale lecture scenes rather than small, intimate, and supportive learning dialogues. That is true even in the highest-ranking schools. The ABA ignores the actual enrollments in some large courses, even when they are so high as to impair effective learning; a school complies with the ABA standards if it exceeds a required faculty-student ratio, even if the faculty do not teach. Likewise, because the ABA applies restrictive faculty-counting rules, a school that had only small classes would violate the ABA standards if the instructors were adjuncts, rather than full-time faculty.

Moreover, the ABA system does not necessarily succeed in its stated goal of producing excellent teaching and productive scholars. Many law school faculty members are relatively unversed in the methods of actual legal practice. Frequently, a law professor's resume includes one year of clerking for a judge and only a year or two in a law firm. Many such faculty cannot teach the skills and judgment that excellent lawyers require; the faculty lack the essential experience that would indicate what those skills and judgment are. The best culinary schools hire as faculty the best, most experienced chefs. The best music schools often hire faculty who have had long careers as top performers. These faculty are able to teach their students the actual skills that are necessary to succeed at their trade. In contrast, senior faculty at law schools have little practical knowledge. The average full professor at a law school knows less about practicing law than a third-year associate at a law firm.

The ABA system has led to standards for legal scholarship that are low, at least compared to other fields. One would expect this of a system that was designed, in substantial part, to benefit law professors, not students. A typical law school grants tenure after six years to junior faculty who have published a total of two or three law review articles in good journals. In contrast, departments in other fields, such as economics, grant tenure after six years only to scholars who have published an average of two articles per year, and maybe a book or two.[350]

Moreover, faculty at law schools are usually not expected to

350 Articles in law reviews tend to be longer than articles in other fields. But this may often indicate only that journals in other fields impose strict page limits. Articles in other fields can require as much or more effort than do articles in law reviews.

obtain grant funding from private and government agencies. In contrast, faculty in many other fields are required to bring in grant funding; a proven ability to do so is a criterion for tenure. Obtaining grants consumes much time, both in writing grant applications and in doing one's share in the process for evaluating grant applications. The accreditation system has permitted law faculty to escape this time-consuming duty of faculty in other fields. The law faculty benefit. However, their law schools and universities must make do without the funding that the faculty could have obtained.

Altogether, existing faculty have reaped large benefits from the ABA controls, while others, including a range of potential faculty and students, have suffered exclusion and economic harm. The quality of learning and the quality of scholarship may have been reduced, rather than enhanced. Returning to the analogy to the automobile market, the system has eliminated from the market inexpensive Toyota education. The system has not necessarily replaced it with expensive but excellent Lexus education. Instead, much legal training resembles an overpriced Yugo.

B. *Extracting More Funds from Campus Budgets*

The ABA's accreditation system provides each accredited law school with a stronger basis for competing within its university for funding.[351] The system permits the law school to manipulate the apparent threat of disaccreditation to obtain additional funds from the university. However, the university provides this additional funding for the law school by reducing funding for the university's other programs. The net benefits may be zero or negative.

C. *Larger Faculty Rewards*

Law school faculty members have benefited, in higher salaries and lighter work burdens.[352] Yet these beneficiaries are a small private group, not a wide section of society. Moreover, they include merely those who happen to have obtained the limited number of faculty positions. Many qualified aspiring teachers of law have been kept from holding jobs, either in the accredited law schools or in the possible alternative programs that the ABA system has excluded. The gains for the fortunate faculty may be overbalanced by the losses both of the unlucky, unemployed

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351 *See supra* Part IV.D.

352 Also, the ranks of law school administrators have been enlarged by prohibiting faculty from performing administrative tasks.

would-be teachers, and of students and others who have borne the higher costs.

D. *Preventing Excessive Competition*

It may be an economic benefit to hold the ranks of law schools to the "right" size and degree of competition, both overall and in specific sections of the country. The ABA system may be averting "excessive competition," particularly from substandard schools that would train inferior lawyers. Accordingly, avoiding destructive competition may provide benefits in several markets: (1) in the faculty market, protecting high-quality teachers from being undercut by cheaper ones; (2) in the training market, protecting good-quality law schools from being undercut by unhealthy competition; and (3) in the legal services market, protecting good lawyers from being undermined by inferior ones.

By reducing competition, the ABA system may have provided greater stability for law faculty, law schools, and existing lawyers. But that has protected costly methods from the pressure of competition by newer and more effective methods. Hence the existence of net benefits is doubtful.

E. *Protecting Consumers in the Market for Legal Training*

To a small degree, the ABA system may protect law students from being cheated by low-quality law schools. However, the net benefits of this protection are probably small. Without the ABA system, the market for legal education would probably work well. Consumers of legal training are sophisticated. Potential law students generally research carefully the law schools among which they will choose. Rating services provide extensive information about the schools. For example, each year, *U.S. News & World Report* publishes the results of its annual study of the quality of United States law schools.[353] The study includes several rankings of law schools, based on extensive surveys of law academics and practicing lawyers. In addition, the survey provides extensive information for each law school about student selectivity, faculty resources, placement success, students' median LSAT score, average starting salaries for graduates, and employment rates for graduates. In addition, many other books and publications provide detailed information on law schools.[354]

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353 *See, e.g.*, *The Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 2, 1998, at 66, 77.

354 *See, e.g.*, THOMAS H. MARTINSON, THE BEST LAW SCHOOLS (1993); IAN VAN

In contrast to the small benefits, the costs of the ABA system are large, as we have noted.

F. *Protecting Consumers in the Market for Legal Services*

The ABA system may protect some consumers in the market for legal services from incompetent or deceptive lawyers. However, many consumers of legal services do not need this protection, and they benefit little from the ABA system. Many consumers of legal services are sophisticated. For example, whether or not a lawyer graduated from an ABA-accredited law school would have little influence on a corporate general counsel's choice of lawyers. Instead, the general counsel will base her choice on other information, such as lawyers' professional reputations, their experience, and information from referrals and references. In addition, that a certain lawyer is employed by a certain law firm indicates the lawyer's level of quality. Each law firm chooses only lawyers that reach standards of competency. Indeed, law firms offer a screening service. Using their expertise in evaluating legal talent, the firms employ only skilled lawyers and stake their reputations on the lawyers' competence.

The ABA system restricts the choices of the corporate general counsel, without providing benefits. For certain cases, such as those with small stakes, the corporate general counsel might prefer to use lawyers who cost $30 per hour. However, the ABA system contributes to making inexpensive lawyers unavailable. Elimination of the system would retain the general counsel's existing choices, but also provide cheaper alternatives.

However, others are not so able to protect themselves. Examples of consumers in the market for legal services who may benefit from the protections that the ABA system creates are the poor and unsophisticated. The system helps to eliminate at least some incompetent lawyers whom the poor or unsophisticated might otherwise hire.

Yet the ABA system also harms the poor or unsophisticated, and the harms may outweigh the benefits. The system harms these potential consumers by reducing the supply of legal services and increasing costs. The same poor or unsophisticated consumers who would benefit from the protections of the system may be un-

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TUYL, THE PRINCETON REVIEW STUDENT ACCESS GUIDE TO THE BEST LAW SCHOOLS (1996); THE BUYER'S GUIDE TO LAW SCHOOLS (1995); THE GORMAN REPORT (1997) (ratings of all U.S. graduate schools, including law schools); INSIDE THE LAW SCHOOLS (Sally F. Goldfarb & Edward A. Adams eds., 6th ed. 1993).

able to afford any lawyer at all because of the system. For this group, the protections from the system are useless. Accreditation may increase the quality of lawyers somewhat. However, it causes the lawyers to be too expensive for most low-income citizens to afford.

VI. ACCREDITATION AND ANTITRUST

We have seen that the ABA system has restrained competition and imposed economic costs in four markets. The economic case against the cartel seems strong. We now show that the antitrust laws make the conduct illegal.[355]

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal."[356] In contrast to section 2, which addresses anticompetitive conduct by a single firm, section 1 makes unlawful certain conduct by firms acting together. A section 1 claim requires proof of three elements: (1) the existence of a contract, combination, or conspiracy among two or more actors; (2) that the combination restrained interstate commerce; and (3) that the restraint was unreasonable.[357] For the purposes of section 1, the courts treat a professional organization not as a single entity, which could not conspire with itself for the purposes of section 1, but instead as a combination of its members that can incur antitrust liability.[358] Indeed, in *Goldfarb v. Virginia State Bar*, the Supreme Court held specifically that certain bar association standards that influence the price of legal services can violate the Sherman Act.[359]

We reach the following three conclusions. First, the law requires evaluation of the ABA's conduct under a per se rule, or some variant of it, rather than under the rule of reason. Second, the ABA's conduct violates section 1 under several theories. The most appropriate theory is that the ABA's conduct is a horizontal price-fixing agreement among law faculty to fix the compensation that they will demand from law schools for their services. The

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355 For earlier discussions of the Sherman Act's application to ABA accreditation before the recent developments and changes, see sources cited *supra* note 3.

356 15 U.S.C. § 1 (1994).

357 *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210-15 (1940).

358 National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978) (holding that engineering association rule that eliminated competitive bidding violated section 1); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding that state and county bar associations could be liable under section 1 for establishing minimum fee schedules).

359 *See Goldfarb*, 421 U.S. at 792-93.

ABA enforces the price-fixing agreement with a boycott.

Third, several defenses that have been asserted should fail. Many states' reliance on ABA accreditation for licensing does not protect the ABA. Also incorrect is the argument that the ABA has caused no injury because any injury arises from the government's reliance on the ABA's accreditation decisions, not from the decisions themselves. Likewise, the Department of Education's approval of the ABA as an accreditor does not free the ABA from liability. Finally, that the ABA's conduct involves either a "learned profession" or nonprofit organizations is no defense for the ABA.

A. *A Court Would Probably Apply the Per Se Rule or a Variant of It*

The Supreme Court has established "two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are 'illegal *per se*.'"[360] In contrast, "[i]n the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."[361] Courts examine the second category of agreements using the "rule of reason."

The per se rule is a swift, conclusory means to condemn certain conduct; it permits an "evidentiary shortcut to antitrust condemnation."[362] The benefits that the rule provides in terms of certainty and efficient justice outweigh the costs of occasional overbreadth.[363] Determination of whether particular conduct is subject to the per se rule depends upon courts' confidence that rule of reason analysis, if applied, would condemn the conduct. The per se rule is an irrebuttable rule-of-thumb presumption: If rule-of-reason analysis would almost always condemn certain conduct, then the per se rule applies.

Examples of conduct that courts have traditionally treated as illegal per se are price-fixing and boycotts against competitors.[364]

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360 *Prof'l Eng'rs*, 435 U.S. at 692, *quoted with approval in* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433 (1990).

361 *Prof'l Eng'rs*, 435 U.S. at 692.

362 *Trial Lawyers*, 493 U.S. at 440 (Brennan, J., dissenting).

363 *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343-44 (1982).

364 *See Trial Lawyers*, 493 U.S. at 435-36 (price-fixing); United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927) (price-fixing); United States v. Topco Assocs., Inc., 405

As we show, this is exactly the nature of the ABA system. Courts rarely accept justification for this conduct. For example, price agreements are illegal regardless of possible procompetitive effects.[365] The "anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."[366]

The Supreme Court has stated at various times that it might give some deference to the learned professions and to educational institutions. Although no blanket exemption exists for nonprofit institutions or professional associations,[367] the Court has indicated that, when examining seemingly anticompetitive conduct, courts might consider the public-service nature of the defendants and their business; when defendants are from the professions, from education, or from some unusual market, the Court could apply the rule of reason to conduct that would have received per se condemnation if done by a commercial defendant in a more typical market.[368] The Court has noted that "we have been slow to condemn rules adopted by professional associations as unreasonable *per se*."[369]

The reluctance to apply per se rules to education and the professions stems from the oft-quoted footnote 17 in *Goldfarb*, in which the Court suggested that the "public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[370] Some

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U.S. 596, 608 (1972) (market allocation illegal per se); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467-68 (1941) (boycotts).

365 *See Maricopa County*, 457 U.S. at 344 n.16; Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958); *see also* Thomas A. Piraino, Jr., *Reconciling the Per Se and Rule of Reason Approaches to Antitrust Analysis*, 64 S. CAL. L. REV. 685, 692 (1991).

366 *Maricopa County*, 457 U.S. at 351; *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 226 n.59 (1940).

367 *See infra* Part VI.C.

368 *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458 (1986) (applying rule of reason analysis to boycott by dentists' nonprofit trade association); National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 682-83 (1978) (applying the rule of reason analysis to a professional association's elimination of bidding and price competition).

369 *Indiana Fed'n*, 476 U.S. at 458 (citing National Soc'y of Prof'l Engr's v. United States, 435 U.S. 679 (1978)). Other courts have "noted the pains the Court had taken to carve out the possibility that a practice which might violate the Sherman Act in another context might not violate the Act when a learned profession was involved." Wilk v. AMA, 895 F.2d 352, 359 (7th Cir. 1990); *see also* United States v. Brown Univ., 5 F.3d 658, 671 (3d Cir. 1993) ("[T]he Supreme Court has been avowedly reluctant 'to condemn rules adopted by professional associations as unreasonable *per se*.'") (quoting *Indiana Fed'n*, 476 U.S. at 458).

370 Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89 n.17 (1975). The Court added,

of the Court's subsequent decisions have left open the possibility of different treatment for education and professions, and they have noted that practices held illegal were "not premised on public service or ethical norms."[371]

Despite the Supreme Court's nod to the professions in its *Goldfarb* footnote and in the other cases, the Court has recently indicated that the per se rule applies to all markets, including the professions. Indeed, without saying so explicitly, the *Goldfarb* Court itself found the bar associations' price fixing illegal with a dispatch that bordered on per se treatment, noting, "On this record respondents' activities constitute a classic illustration of price fixing."[372] Recently, in *FTC v. Superior Court Trial Lawyers Ass'n*,[373] the Court addressed an agreement among lawyers to demand higher wages on threat of boycott. As with the ABA, the lawyers indicated that higher wages were necessary to provide good service to the public.[374] The Court held that the agreement was illegal per se: "The horizontal arrangement among these competitors was unquestionably a 'naked restraint' on price and output."[375] Thus, "respondents' boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act."[376]

Similarly, in *Arizona v. Maricopa County Medical Society*, the Court held that a medical association's setting of maximum fees was illegal per se. The association and lower court had argued that the per se rule should not apply because "the health care industry was so far removed from the competitive model" and because antitrust courts had little experience with this industry.[377] The Court rejected these arguments:

"It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas." *Id.*

371 *Maricopa County*, 457 U.S. at 349; *see also Prof'l Eng'rs*, 435 U.S. at 696. An argument that the challenged restraint makes an important commodity more affordable to the impoverished is inadequate; the Court has rejected similar arguments involving medical services, legal advice, food, and housing. *See, e.g.*, *Maricopa County*, 457 U.S. at 349.

372 *Goldfarb*, 421 U.S. at 783.

373 493 U.S. 411 (1990).

374 *See id.* at 423-24.

375 *Id.* at 423.

376 *Id.* (internal quotation marks omitted). Instead of involving a private claim under section 1 of the Sherman Act, *Trial Lawyers* involved a claim by the FTC under section 5 of the Federal Trade Commission Act ("FTC Act"). *See id.* at 422. However, the FTC Act incorporates section 1 of the Sherman Act; any conduct that violates section 1 of the Sherman Act also violates the FTC Act. *See id.* Thus, in finding a violation of the FTC Act, the Court also held explicitly that the defendants' conduct violated the Sherman Act. *See id.*

377 Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 343-44 (1982).

> We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry. The argument quite obviously is inconsistent with *Socony-Vacuum*. In unequivocal terms, we stated that, whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike. . . . Finally, the argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.[378]

However, in several other cases, the Court has followed the *Goldfarb* footnote rather than the *Goldfarb* result, and has at least asserted that it is applying at least some level of rule of reason analysis to nontraditional markets such as the professions and education. For example, in *FTC v. Indiana Federation of Dentists*, the Court addressed an agreement by an organization of dentists to withhold x-rays from insurers.[379] The Court held that the agreement was an illegal boycott under the Sherman Act's section 1, but indicated that it was using the rule of reason rather than the usual per se rule; the Court cited the *Goldfarb* footnote and indicated that "we have been slow to condemn rules adopted by professional associations as unreasonable *per se*, . . . and, in general, to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."[380] Similarly, in *National Society of Professional Engineers v. United States*,[381] the Court held that a professional association's rule that prohibited its members from competitive bidding violated the Sherman Act. As in *Indiana Dentists*, the Court, after reciting the *Goldfarb* footnote, found the rule illegal while indicating that it was using the rule of reason rather than a per se rule.[382]

Although the Court purported to apply the rule of reason in

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378 *Id.* at 349-50 (internal citations, footnotes, and quotation marks omitted).
379 476 U.S. 447, 465 (1986).
380 *Id.* at 458-59 (citation omitted).
381 435 U.S. 679 (1978).
382 *See id.* at 686-87.

the two cases, its analysis was abrupt, and was difficult to distinguish from per se analysis. In both cases, the Court refused to accept the defendants' justifications for the anticompetitive conduct; regardless of any justifications, that the conduct reduced competition made it illegal.[383] Indeed, the analysis in *Trial Lawyers* and *Maricopa* is nearly identical to the analysis in *Indiana Dentists* and *Professional Engineers*, although the Court claimed to apply a per se rule in the first two cases and the rule of reason in the second two. In *Indiana Dentists* and *Professional Engineers*, the Court, despite its contrary claims, did not apply full rule of reason analysis.[384] Instead, the Court appeared to apply little more than per se analysis but to call it analysis under the rule of reason; indeed, the Court in *Indiana Dentists* began its purported rule-of-reason analysis by stating, "Application of the Rule of Reason to these facts is not a matter of any great difficulty."[385] While providing nominal respect both for the learned professions and for its earlier deferential statement in the *Goldfarb* footnote, the Court held the associations' conduct illegal with what looked and smelled like a close cousin to per se analysis.[386] Because of the abbreviated nature of the rule of reason analysis in these cases, the shorthand economic analysis is known as "truncated rule of reason."[387]

It is not entirely clear what factors will cause courts, in addressing price-fixing or boycotts by professional organizations, to apply the truncated rule of reason analysis, as in *Indiana Dentists* and *Professional Engineers*, rather than per se analysis, as in *Trial Lawyers* and *Maricopa*. When factual embellishment is torn away, much of the ABA's conduct, in fact if not in intention, is horizontal price fixing and boycotts.[388] Thus, if only the conduct's economic impact is considered, the conduct should be illegal per se.

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383 *See Indiana Fed'n*, 476 U.S. at 459; National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695-96 (1978).

384 For a discussion of the three-step rule of reason analysis, see United States v. Brown Univ., 5 F.3d 658, 668-69 (3d Cir. 1993).

385 476 U.S. at 459.

386 In two cases, the court has applied the rule of reason to deny liability for agreements on price because the agreements actually increased, not decreased, competition. In *NCAA v. Board of Regents*, 468 U.S. 85, 100-02 (1984), and *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 23-25 (1979), the products—college football broadcasts and blanket licenses to musical compositions—would not exist without agreement on price. The cases provide no sanctuary for the ABA. Law faculty, legal education, and lawyers would exist without the ABA system, and the ABA system's unmistakable impact was to reduce competition in the markets for each of them.

387 William J. Sims, Note, NCAA v. Board of Regents *and a Truncated Rule of Reason: Retaining Flexibility Without Sacrificing Efficiency*, 27 ARIZ. L. REV. 193, 198 (1985).

388 *See supra* Part IV.

This is the result that would occur if the court were to follow the *Trial Lawyers/Maricopa* branch of cases. However, although in purely economic terms much of the ABA's conduct deserves per se treatment, the conduct arises in an unusual setting. To paraphrase *Indiana Dentists*, "the economic impact of certain [ABA] practices is not immediately obvious."[389] Our economic analysis demonstrates that the adverse impact of the ABA system becomes obvious only after a little prodding. Thus, although a court should apply to the ABA system a per se rule, the court might apply some variant of the rule of reason, and consider the conduct's possible costs and benefits.

Perhaps the distinction between the per se rule and the truncated rule of reason does not really matter. The Court's analysis under both approaches is similar. As we show below,[390] the analysis under the truncated rule of reason should lead to the same conclusion as the per se rule: The ABA's conduct harms competition and is illegal.

In *Brown University*,[391] the Third Circuit addressed the "Ivy Overlap Group" price-fixing agreement among a group of colleges and universities, including the Massachusetts Institute of Technology ("MIT"). Reversing the district court's application of the truncated rule of reason, the court remanded for full rule of reason analysis.[392] In three ways, the court attempted to distinguish *Indiana Dentists*, *Professional Engineers*, *Trial Lawyers*, and *Maricopa*, which had all indicated that full rule of reason analysis was unnecessary. First, the *Brown University* court suggested that Overlap may have served the interests not of the universities that had reached the agreement, but of needy students by providing funds for financial aid. In contrast, the agreements in the four cases served the defendants' self-interest.[393]

Second, the *Brown University* court suggested that Overlap may have promoted competition by increasing choices for needy students.[394] Third, the court asserted that Overlap and MIT were less commercial than the nonprofit professional associations in the four cases:

> MIT deviates even further from the profit-maximizing prototype than do professional associations. While non-profit pro-

389 FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 458-59 (1986).

390 *See infra* Part VI.B.

391 5 F.3d 658 (3d Cir. 1993).

392 *See id.* at 678.

393 *See id.*

394 *See id.*

> fessional associations advance the commercial interests of their for-profit constituents, MIT is, as its 501(c)(3) status suggests, an organization "operated exclusively for . . . education purposes . . . no part of the net earnings of which inures to the benefit of any private shareholder or individual."[395]

Located within the Third Circuit, the district court in *MSL v. ABA* indicated that it would follow Third Circuit precedent and apply full rule of reason analysis[396]—although the district court later granted summary judgment, and the Third Circuit affirmed, on grounds that did not require choice between per se and rule of reason treatment.[397]

The district court's requirement of full rule of reason analysis misreads Supreme Court and Third Circuit precedent. *Brown University* does not require full rule-of-reason analysis of the ABA system. Each of the three conditions that the *Brown University* court cited to distinguish *Indiana Dentists*, *Professional Engineers*, *Trial Lawyers*, and *Maricopa* does not exist in the ABA system. First, unlike the Overlap agreement in *Brown University*, the ABA system squarely served the economic interests of faculty by raising salaries and benefits. Second, unlike Overlap, the ABA system in no way increased competition. Instead, its impact was to reduce competition in the markets for faculty, for legal training, for legal services, and for intra-university funding. Third, unlike Overlap, the members of the ABA system were not nonprofit schools. Instead, they were law faculty gaining economic advantage.

In sum, the ABA system is unlike Overlap. Instead, the ABA system resembles the professional associations in *Indiana Dentists*, *Professional Engineers*, *Trial Lawyers*, and *Maricopa*. In all of these cases, full rule of reason analysis was unnecessary. Instead, a per se rule or truncated rule of reason analysis was appropriate.

Moreover, even *Brown University*'s requirement of full rule of reason analysis was incorrect on that case's facts. When the Overlap agreement's unusual factual facade is removed, the agreement is, in operation and economic impact, a normal horizontal price-fixing agreement.[398] The Supreme Court has made clear in *Indiana Dentists*, *Professional Engineers*, *Trial Lawyers*, and *Maricopa* that even price-fixing agreements in unusual con-

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395 *Id.* at 672 (quoting 26 U.S.C. § 501(c)(3) (1994)).

396 *See* Massachusetts Sch. of Law v. ABA, 853 F. Supp. 837, 840-43 (E.D. Pa. 1994).

397 Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435, 439-42 (E.D. Pa. 1996) (granting summary judgment for defendants based on lack of causation), *aff'd*, 107 F.3d 1026 (3d Cir.), *cert. denied*, 118 S. Ct. 264 (1997).

398 *See* Carlson & Shepherd, *supra* note 18, Part IV.

texts receive, at most, truncated rule-of-reason treatment, and often per se prohibition. Overlap deserved, at most, truncated rule of reason analysis. So too does the ABA system.

B. *Under Both the Per Se Rule and the Rule of Reason, the ABA's Practices Are Illegal*

The ABA's conduct violates the antitrust laws under several theories. It is illegal as a boycott by ABA-approved schools of non-ABA schools in the market for legal education. In addition, the conduct may be illegal price-fixing by law schools in the same market, although this theory is weak. Alternatively, the ABA's conduct might be illegal as a restraint of still another market: the market for information about law schools.

However, the most direct and appropriate analysis is that the ABA's conduct is not a constraint on the market for legal education. Instead, it is a horizontal price-fixing agreement among law faculty to constrain the market for the hiring of law faculty, enforced by a boycott.

1. *Illegal Boycott of Competing Law Schools*

Both litigants and commentators[399] have suggested that the conduct of the ABA was an illegal group boycott of unaccredited schools by which the ABA schools attempted to gain advantage by eliminating competition from non-ABA schools.[400] Because the courts abhor boycotts, boycotts are usually held to be illegal per se.[401] Accordingly, the ABA's conduct would probably be held to be illegal under this theory. Because of the boycott's unusual context, the conduct might be illegal under the rule of reason, rather than illegal per se.[402]

However, the theory that the ABA system is a boycott by accredited law schools seeking to gain advantage over unaccredited schools is not completely satisfying. Courts are suspicious of theo-

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399 *See* Complaint at 14, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206) ("The ABA thus possesses monopoly power in the field of law school education, law school accreditation and the licensing of lawyers in the United States."); First, *Competition (II)*, *supra* note 3, at 1100 (arguing that ABA accreditation is illegal boycott of competing schools); Portinga, *supra* note 3, at 654 (same).

400 Leading cases in group boycotts include *St. Paul Fire & Marine Insurance Co. v. Barry*, 438 U.S. 531, 541 (1978) (holding boycotts illegal per se); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959) (same); and *Silver v. New York Stock Exchange*, 373 U.S. 341, 347 (1963) (same).

401 *See Klor's*, 359 U.S. at 212 (holding boycotts illegal per se, stating, "Group boycotts . . . have long been held to be in the forbidden category.").

402 *See* First, *Competition (II)*, *supra* note 3, at 1100.

ries that are "economically senseless":[403] "[I]f the factual context renders [the plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiff] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[404]

Standing alone, the boycott theory has touches of implausibility. Under the theory, ABA law schools are boycotting other law schools in order to gain benefits. However, in fact, a main impact of the boycott has been to raise law schools' costs, by increasing faculty salaries and benefits and requiring expensive facilities. As the district court judge noted in MSL's federal lawsuit, it seems implausible that schools would enter into a conspiracy that works against their economic interests: "This may be one of the few cases on record involving an employer's trade association conspiring to raise wages paid to its members' employees, restrict their production, and limit sales to potential customers. . . . [I]t is reassuring to know that the schools making up the AALS do not teach economics or logic, but only law."[405]

The law school boycott theory is also an implausible explanation of the other standards that impose costs on law students, but provide no corresponding gain to the law schools.[406] For example, the standards require students to have completed three years of college, and the standards limit students' outside work for pay during law school.

The ABA argues that MSL's conspiracy argument is implausible because no anticompetitive conspiracy exists; instead, the accreditation system is a procompetitive system that provides great benefits. However, as we discuss below,[407] the ABA system is a fully plausible anticompetitive conspiracy when looked at in a different way.

2. *Price-Fixing by Law Schools*

Litigants and commentators have also characterized the ABA

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403 Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 468-69 (1992) ("If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.").

404 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); *see also* Defendant ABA's Motion for Summary Judgment at 43-47, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

405 Massachusetts Sch. of Law v. ABA, 855 F. Supp. 108, 110 n.5 (E.D. Pa. 1994); *see also* Defendant ABA's Motion for Summary Judgment at 43-47, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

406 For a description of these standards, see *supra* Part III.B.

407 *See infra* Part VI.B.4.

accreditation process as an agreement among law schools to fix prices: The law schools agreed to set salaries and working conditions for their faculty.[408] However, this is not an illegal monopsony, in which employers conspire to *limit* the compensation that they will pay their employees.[409] Instead, the ABA agreement set *minimum* levels of pay and benefits, and required the law schools to *increase* faculty compensation. Again, the theory that the ABA accreditation process is price-fixing by law schools is, standing alone, implausible, and so, under *Matsushita*, may be nonactionable.

3. *Restraint of the Market for Information About Law Schools*

Another route of attack would be the argument that the ABA and AALS illegally restrained trade by combining to dominate the market for providing information about law schools.[410] However, the argument should fail because the ABA and AALS lack market power. The correct market definition probably includes all providers of information about law schools. In this market, the ABA and AALS are minor players. In determining which law school to attend, an applicant can consider a large number of information sources on law schools. The sources include not only many books, but also detailed rankings, such as in *U.S. News & World Report*.[411] Many students do not use the ABA's and AALS's information sources; many students have no knowledge of the accreditation status of the law schools that they are considering—indeed, many students know nothing of the accreditation system. No reported case has yet discussed this theory of antitrust liability in the context of accreditation.

4. *Price-fixing and Boycott in the Market for Law Faculty*

Litigants and commentators have missed the most direct and appropriate analysis: that the ABA's conduct is a horizontal price-fixing agreement among law faculty to fix the compensation that they will demand from law schools for their services. The price-fixing agreement directly controls the market for law faculty, not

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408 *See* Complaint at 2, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206) (claiming price-fixing in market for legal training); Portinga, *supra* note 3, at 657 (observing that ABA standard for faculty salaries "comes perilously close to price fixing").

409 For example, the Robinson-Patman Act prohibits monopsonistic exploitation of market power. *See* 15 U.S.C. § 13 (1994).

410 *See* Havighurst & Brody, *supra* note 3, at 232.

411 *See supra* Part V.E.

the downstream markets for legal education or legal services. The ABA enforces the price-fixing agreement by boycotting law schools and faculties that do not arrange for the ABA compensation levels. In economic effect, the ABA system is a powerful union for law school faculty, but it is a union that the labor laws do not protect.

a. Horizontal Agreement to Fix Faculty Compensation

As discussed above, in terms of both its personnel and its impact, the ABA accreditation system is a cartel of law professors.[412] By capturing all levels of the accreditation system, law faculty have ensured that accreditation standards and procedures primarily benefit law faculty. The standards that the ABA system sets are horizontal agreements among the representatives of law faculty to fix the prices that faculty will charge for their services: The standards are horizontal agreements about what pay and benefits existing faculty will require from their law schools and universities. The system enforces its agreement by boycotting any faculty that agree to lower salaries and fewer benefits.

The ABA schools help to enforce the system because the system not only eliminates competition in the market for faculty. In addition, the system permits the ABA law schools to monopolize the market for legal training by precluding competition from new law schools.

This explains the seeming mystery of why law schools would enforce a boycott that tends to raise the schools' costs.[413] Law schools tolerate, and even support, the accreditation system because it benefits them indirectly. The boycott of unaccredited law schools in the market for legal training is the means by which the ABA system enforces faculty members' horizontal price-fixing agreement in the market for law faculty. Although the system raises costs for law schools, law schools nonetheless support the system because the system has the side effect, in the down-stream market for legal training, of limiting entry of new law schools.

In effect, law schools and their faculty have struck an implicit deal. The law schools do not resist their faculty members' demands through the accreditation system for higher salaries and benefits. In return, the faculty members help the law schools to boycott new low-cost law schools that might enter the market for legal training and compete with existing law schools. Without the

412 *See supra* Part IV.

413 *See id.*

boycott, the existing law schools, with their bloated costs and inefficiency, would be easy prey for new efficient schools. A domestic automobile producer might agree to the demands of the United Auto Workers ("UAW") for wage increases only if the UAW could guarantee that it could obtain tariff protections against Japanese imports; without the tariffs, the wage increases would make the domestic producer uncompetitive with Japanese rivals. Similarly, the law schools do not resist the accreditation standards, although they increase costs, because the accreditation system has been able to eliminate competition from new low-cost schools. The system has won from state governments protection for law schools that is far stronger than tariffs; almost all states prohibit students from unaccredited, low-cost law schools from practicing law. The increased salaries for law faculty are the quid by which the law schools receive the quo of elimination of competition in the market for legal training.

In addition, this theory explains why the system enforces standards that increase costs for law students but provide no benefits for law schools or law faculty. For example, standards require years of expensive college education before law school and limit the amount of paid outside work that students may perform during law school.[414] Although these standards provide no direct benefit to law faculty, they benefit existing lawyers. To induce practicing lawyers to support the accreditation system, the system imposes these standards that increase costs for law students. By increasing students' costs, the standards create barriers to entry into the market for legal services, deterring some people from becoming lawyers. Practicing lawyers support the system because it reduces competition for lawyers in the downstream market for legal services. The quid is practicing lawyers' support for the system in the ABA and before state legislatures and supreme courts. The quo is the barriers to entry into the market for legal services that the system imposes.

Because of the many harmful effects of horizontal price-fixing and boycotts, the antitrust laws deal firmly with them. The Supreme Court has noted that horizontal price-fixing is "perhaps the paradigm of an unreasonable restraint of trade."[415] In a long line of cases with facts that closely resemble the ABA system, the Court has been strict with horizontal price-fixing and boycotts even when they arise in the learned professions and even when

414 *See supra* Part III.B.2.

415 NCAA v. Board of Regents, 468 U.S. 85, 100-03 (1984).

they are administered by professional associations. For example, in *Trial Lawyers*, a group of lawyers, the Superior Court Trial Lawyers Association, agreed to demand higher pay from the District of Columbia for representing indigent litigants—the city paid them under the Criminal Justice Act ("CJA").[416] When the city refused to pay the amount that the group demanded, the group boycotted the city; all of the group's members refused together to work for less than the demanded amount. The boycott forced the city to agree to the group's demands.[417]

The Court held that the price-fixing and boycott were a per se violation of the Sherman Act's section 1:

> [R]espondents' boycott constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act.... Prior to the boycott CJA lawyers were in competition with one another, each deciding independently whether and how often to offer to provide services to the District at CJA rates. The agreement among the CJA lawyers was designed to obtain higher prices for their services and was implemented by a concerted refusal to serve an important customer in the market for legal services.... The horizontal arrangement among these competitors was unquestionably a naked restraint on price and output.[418]

Similarly here, a group of lawyers (faculty at ABA schools), through their trade association (the ABA accreditation apparatus), agreed to demand higher pay and benefits from their employers (law schools). Also similarly, the group boycotted any employer law school that refused to comply with the group's demands. Indeed, the group's boycott was even more severe than in *Trial Lawyers*. Not only did the group's own members withhold work from employers who refused to comply with the demands, but the group also prevented anyone else from entering the market and working for such employers. Also as in *Trial Lawyers*, the price-fixing and boycott have forced the employers to raise compensation for the group's members. Thus, as in *Trial Lawyers*, the ABA's conduct violates the Sherman Act.

Likewise, in *Goldfarb*, a county bar association established a list of minimum fees—just as the ABA established minimum salaries and benefits for law faculty.[419] And just as state governments enforced the ABA's fixing of salaries and benefits, the state su-

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416 *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 415 (1990).

417 *See id.* at 417-18.

418 *Id.* at 422 (internal citations, footnote, and quotation marks omitted).

419 *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 776 (1975).

preme court's authority enforced the county bar's fee minimums.[420] Although the conspirators were professionals and although the price agreement would have had little impact but for the state's enforcement, the Court held the fee minimums to be illegal as "a classic illustration of price fixing."[421]

Finally, in *Maricopa*, the Court held that a medical association's setting of maximum fees was illegal per se;[422] price-fixing was illegal per se, whether the set prices were maximums or minimums.[423] The result was the same in *Professional Engineers*.[424] There, the Court held that a professional association's rule that prohibited its members from competitive bidding violated the Sherman Act.[425]

b. Boycott of Competing Law Faculties

In addition to finding the ABA system's agreements on salary and benefits to be illegal horizontal price-fixing, a court should find that the system's conduct constitutes an illegal boycott. In evaluating whether an organization has conducted an illegal boycott, a court probes "[t]he purpose and object of this combination, its potential power, its tendency to monopoly, and the coercion it could and did practice upon a rival method of competition."[426] All of these grounds suggest that the ABA accreditation process is an illegal boycott: A purpose of the boycott, among other purposes, was to reduce competition; the ABA law schools had monopoly market power; and, in all but a few states, the ABA completely eliminated competition from schools that refused to submit to the ABA's requirements. Since the turn of the century, the Supreme Court has held that the Sherman Act prohibits boycotts "aimed at compelling third parties and strangers involuntarily not to engage in the course of trade except on conditions that the combination imposes."[427] This is exactly the nature of the ABA accreditation process.

In several cases that deal specifically with membership and

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420 *See id.* at 776, 778 n.6.

421 *Id.* at 783.

422 Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 348, 351 (1982).

423 *Id.* at 347.

424 *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692-93 (1978).

425 *See id.* at 686-87.

426 Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 467 (1941) (holding trade organization's agreement not to sell to certain buyers illegal under Federal Trade Commission Act).

427 Loewe v. Lawlor, 208 U.S. 274, 294 (1908) (holding trade association's boycott of competitor illegal); *see also* Montague & Co. v. Lowry, 193 U.S. 38, 48 (1904) (same).

accreditation standards of organizations like the ABA, the Court has held that unfair standards can be illegal. Even if the government endorses the standards, exclusionary standards constitute an illegal boycott if the standards are unreasonable and unnecessarily restrict competition. Indeed, the Court has repeatedly noted the anticompetitive potential of trade associations such as the ABA accreditation system.

For example, in *Silver v. New York Stock Exchange*, the Supreme Court dealt with conduct that is analogous to the ABA's conduct.[428] Just as the ABA limits the number of accredited law schools, the New York Stock Exchange ("NYSE") limited the number of broker-dealers who could be its members, and who could trade on the exchange.[429] In addition, just as state governments permit the ABA to determine which law schools can prepare students to become lawyers, the government—the federal government under the Securities and Exchange Act—authorized the NYSE to enforce standards for membership, and to discipline and expel members who violated the standards.[430] Using this power, the NYSE forbid its members from providing telephone links to a nonmember broker-dealer; the NYSE's ruling prevented the nonmember from competing with the NYSE's member broker-dealers.

When the nonmember sued, the Supreme Court held that the NYSE and its members had violated section 1 of the Sherman Act: "The concerted action of the Exchange and its members here was, in simple terms, a group boycott depriving petitioners of a valuable business service which they needed in order to compete effectively as broker-dealers in the over-the-counter securities market."[431] The Court offered a further definition of a boycott: "A valuable service germane to petitioners' business and important to their effective competition with others was withheld from them by collective action. That is enough to create a violation of the Sherman Act."[432]

The government's grant of authority to the NYSE and its members to conduct collective self-regulation carried with it a corresponding responsibility to exercise the authority fairly. Accordingly, the government, through the courts, could enforce the anti-

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428 *See* 373 U.S. 341 (1963).
429 *See id.* at 350.
430 *See id.* at 353.
431 *Id.* at 347.
432 *Id.* at 349 n.5.

trust laws to protect against anticompetitive rules: "[S]ome government oversight is warranted, indeed necessary, to insure that action in the name of self-regulation is neither discriminatory nor capricious."[433] The antitrust laws would step in were the NYSE to "apply its rules so as to do injury to competition which cannot be justified as furthering legitimate self-regulative ends."[434] The Court then held that the standard was an illegal boycott "because the collective refusal to continue the private wires occurred under totally unjustifiable circumstances" and there was "no justification" for the standard;[435] instead, the NYSE's behavior represented "anticompetitive applications of exchange rules."[436]

Similarly here, to paraphrase *Silver*, "A valuable service germane to [MSL]'s business and important to their effective competition with others was withheld from them by collective action."[437] The "valuable service" was the grant of ABA accreditation. The "collective action" was the refusal of the ABA, representing all accredited law school faculties, to provide the accreditation that was essential for MSL's survival. That states had effectively delegated to the ABA authority to determine which students could receive law licenses does not shelter the ABA's boycott. Instead, even with the delegation of authority, the ABA, like the stock exchange in *Silver*, had a legal responsibility under the Sherman Act to ensure that its standards were "neither discriminatory nor capricious." As we have seen above, many of the ABA standards fail this test; many of the standards do not "further[] legitimate self-regulative ends" and instead are "anticompetitive applications of [ABA] rules," which are "discriminatory and capricious."

Likewise, the Supreme Court has held that a private standard-setting agency, such as the ABA, violates the antitrust laws if one group of competitors uses the agency to exclude other competitors. In *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*,[438] the leading manufacturer of boiler cut-off valves had gained influence in the committees of the American Society of Mechanical Engineers ("ASME") that set standards for engineering products: Several of the company's employees were members of the committees. Federal, state, and local governments incorpo-

433 *Id.* at 359 (quoting SEC Chairman Cary).
434 *Id.* at 358.
435 *Id.* at 361.
436 *Id.* at 362.
437 *Id.* at 348 n.5.
438 456 U.S. 556 (1982).

rated the ASME standards into their building codes.[439] The manufacturer's employees on the committees caused ASME to issue a standard that decertified the improved cut-off valve of a competitor.[440] The standard caused consumers not to purchase the competing valve, and the competitor went bankrupt.[441]

The Supreme Court held that ASME had violated the Sherman Act.[442] The Court declared that a standard-setting association violated the Sherman Act if representatives of some competitors manipulated the standards to harm other competitors:

> [A] standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes. Although, undoubtedly, most serve ASME without concern for the interests of their corporate employers, some may well view their positions with ASME, at least in part, as an opportunity to benefit their employers. When the great influence of ASME's reputation is placed at their disposal, the less altruistic of ASME's agents have an opportunity to harm their employers' competitors through manipulation of ASME's codes.[443]

The facts in *Hydrolevel* mirror those of ABA accreditation, and confirm that the ABA has violated the Sherman Act. Just as the leading valve manufacturer had captured ASME's relevant standard-setting committees, faculty from existing ABA law schools have captured the ABA's accreditation apparatus. Just as with ASME, state governments incorporated the ABA standards and accreditation decisions into law, and enforced the ABA standards.

Similarly, the existing law schools' faculty who had captured the accreditation process pushed through accreditation standards that benefited them. In *Hydrolevel* the employees of the leading manufacturer obtained standards that decertified the competitor's product and ruined the competitor. Likewise, employees of existing law schools obtained standards that denied accreditation to law schools that sought to compete with the existing law schools by offering lower prices and different services. As in *Hydrolevel*, the standards caused the competitors and potential competitors to be unable to compete; in most states, a school's lack of ABA accredi-

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439 *See id.* at 559.
440 *See id.* at 559-60.
441 *See id.* at 556, 564.
442 *See id.* at 568.
443 *Id.* at 571.

tation was fatal. Accordingly, as in *Hydrolevel*, the ABA's accreditation system has violated the Sherman Act. To paraphrase *Hydrolevel*: "When it cloaks its subcommittee officials with the authority of its reputation, [the ABA] permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace."[444]

In *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Supreme Court affirmed an $11.4 million judgment against makers of steel conduit, who had manipulated the standard-setting apparatus of their trade association so that the trade association adopted a standard that denied certification to competing plastic pipe—just as existing law faculty manipulated the ABA accreditation system to deny certification to competing law schools and faculties.[445] In language that applies with equal force to the ABA system, the Court noted:

> There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. . . . Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny.[446]

Finally, in *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, the manufacturers of gas burners convinced the American Gas Association to deny its seal of approval to the plaintiff's new competing gas burner. Because the new burner lacked the seal, local gas companies refused to supply gas for the new burner, reducing the new burner's sales.[447] The Court held that the plaintiff had asserted an actionable antitrust claim against both the association and its members.[448]

C. *No Defenses Protect the ABA from Liability*

Several possible defenses could be raised to the antitrust claims. However, the defenses should not succeed.

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444 *Id.* at 570-71.

445 *See* 486 U.S. 492 (1988) (affirming judgment and rejecting claim of *Noerr-Pennington* immunity).

446 *Id.* at 500 (citation and footnote omitted); *see also* 7 PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1477, at 343 (1986) (stating that trade and standard-setting associations routinely are treated as continuing conspiracies of their members).

447 Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 657-58 (1961).

448 *See id.* at 658-60.

1. *The Antitrust Laws Exempt Neither the Learned Professions nor Nonprofit Groups*

That the markets involve a "learned profession" and education will not protect the ABA. In response to assertions that the learned professions and education did not involve "commerce" as required by the Sherman Act, the Supreme Court has been clear that Congress did not intend a learned-profession or educational exclusion from the Sherman Act. For example, in *Goldfarb*, the Court rejected state and local bar associations' claims of just such immunity, noting: "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose."[449] Nor does the ABA's non-profit status protect it, as the Court's decisions make clear.[450]

An early court of appeals decision supports a nonprofit exemption for higher education. In *Marjorie Webster Junior College, Inc. v. Middle States Ass'n*,[451] the United States Court of Appeals for the District of Columbia Circuit addressed facts that mirror ABA accreditation: An association of colleges denied accreditation to Marjorie Webster College because the college was proprietary; the association's policies limited accreditation to nonprofit institutions. The court held that the antitrust laws did not apply to education and the learned professions, stating: "[T]he proscriptions of the Sherman Act were tailored . . . for the business world, not for the non-commercial aspects of the liberal arts and the learned professions."[452] Specifically, accreditation did not implicate commerce, but instead was purely educational: "[T]he process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself."[453]

However, *Marjorie Webster*, decided in 1970, is not good

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449 421 U.S. 773, 786-87 (1975) (holding that minimum fee schedule for attorneys published by county bar association violates section 1 of the Sherman Act); *see also* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978) (holding that professional association's canon of ethics forbidding competitive bidding for engineering services violates Sherman Act).

450 Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 351 (1982) (holding that agreement by members of nonprofit medical societies to fix maximum prices for medical services is per se unlawful); *see also Prof'l Eng'rs*, 435 U.S. at 696 (holding that a similar agreement by nonprofit professional engineers society is per se unlawful).

451 432 F.2d 650, 654 (D.C. Cir. 1970).

452 *Id.* at 654 (footnote and internal quotation marks omitted) (alteration in original).

453 *Id.* at 655.

law.[454] In 1975, the Supreme Court's *Goldfarb* decision, in holding that the antitrust laws govern the legal profession, stated that Congress had intended the Sherman Act to cover the entire economy with no exceptions.[455] The Court noted, "The language of § 1 of the Sherman Act, of course, contains no exception.... And our cases have repeatedly established that there is a heavy presumption against implicit exemptions."[456] That the defendant in *Goldfarb* was a bar association of lawyers, from a learned profession, did not protect the association from antitrust liability: "The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act,... nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions."[457]

At the same time that the *Goldfarb* Court imposed the antitrust laws on state and local bar associations, the Court, in a footnote, suggested that, in certain unspecified circumstances, courts might offer some antitrust deference to the professions.[458] The *Goldfarb* footnote is properly viewed not as opening the possibility of an exemption for the learned professions, but as the polite words of regret of the executioner. Despite the footnote, the *Goldfarb* court itself readily applied the Sherman Act to the legal profession.

In later decisions, although the Court again spoke of some deference to professional organizations, the Court nonetheless applied the Sherman Act to the organizations vigorously, making clear that no blanket exemption protects education or the learned professions. For example, in *Professional Engineers*, the Court held that the Act applied to a professional organization of engineers. Rejecting any exemption for professional associations, the Court held that the Act applied in all markets, and "reflects a legislative judgment that ultimately competition will produce not only

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454 Indeed, the circuit court that decided *Marjorie Webster* has held more recently that nonprofit collegiate athletic leagues are not exempt from antitrust scrutiny. *See* Association for Intercollegiate Athletics for Women v. NCAA, 735 F.2d 577 (D.C. Cir. 1984):

The Robinson-Patman Act includes an express exemption for nonprofit institutions. *See* 15 U.S.C. § 13 (1994). However, that Act does not apply here. Governing cases of monopsonistic exploitation of market power, the Act applies only to commodities, not payments for services, and immunizes nonprofit organizations only for their purchases of goods at below-market prices for their own use. *See* ABA ANTITRUST LAW SECTION, FEDERAL AND STATE PRICE DISCRIMINATION LAW ch. 2 (1991).

455 *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975).

456 *Id.* (citation omitted).

457 *Id.* (citation omitted).

458 *See id.* at 788-89 n.17.

lower prices, but also better goods and services."[459] Likewise, in *Maricopa*, the Court indicated that the list of maximum fees that a doctors' association established was illegal per se.[460] That the price fixers were members of a learned profession did not provide shelter from the Sherman Act.[461] Similarly, the Court, in 1990, confronted a strike by an association of trial lawyers to protest low fees for court-appointed attorneys.[462] The Court held that the boycott was unlawful regardless of any public-service justification and regardless that the boycott involved a learned profession.[463]

The Third Circuit, in *United States v. Brown University*,[464] recently held that the Sherman Act applied to an agreement by several elite universities to fix undergraduate tuition levels. Although finding that no exemption protected the schools' agreement, the court attempted to reconcile the *Goldfarb* line of Supreme Court precedent with *Marjorie Webster*, rather than holding that the Supreme Court had implicitly rejected *Marjorie Webster*. Citing *Marjorie Webster*, the Third Circuit held that the Sherman Act did not apply to "noncommercial aspects of the liberal arts."[465] However, the Act did apply to education's commercial aspects, and the collection of tuition that was at issue in the case was commercial: "The exchange of money for services, even by a nonprofit organization, is a quintessential commercial transaction. Therefore, the payment of tuition in return for educational services constitutes commerce."[466]

Although *Brown University* attempts to keep alive the possibility that some aspects of education may lie beyond the Sherman

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459 National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).

460 Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 348 (1982).

461 *Id.* ("Nor does the fact that doctors—rather than nonprofessionals—are the parties to the price-fixing agreements" allow the doctors to escape per se rule.); *accord* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) (holding that rule of dentists' association that prohibited submission of x-rays to insurance examiners was illegal).

462 *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990).

463 *See id.* at 424; *see also* NCAA v. Board of Regents of the Univ. of Okla., 468 U.S. 85, 100-02 (1984) (holding that nonprofit status does not trigger rule of reason analysis).

464 5 F.3d 658 (3d Cir. 1993). For contrasting analyses of the legal and economic issues in *Brown University*, compare George B. Shepherd, *Overlap and Antitrust: Fixing Prices in a Smoke-Filled Classroom*, ANTITRUST BULL., Winter 1995, at 859, and Carlson & Shepherd, *supra* note 18, with Stephan D. Browning, Note, *The Misguided Application of the Sherman Act to Colleges and Universities in the Context of Sharing Financial Aid Information*, 33 B.C. L. REV. 763 (1992). *See also* David P. Kreisler, Note, *The Antitrust Laws and the Overlap Group: Were Colleges and Universities the Robber Barons of the 1980s?*, 42 SYRACUSE L. REV. 217 (1991); Steven C. Salop & Lawrence J. White, *Policy Watch: Antitrust Goes to College*, 5 J. ECON. PERSP. 193 (1991).

465 *Brown Univ.*, 5 F.3d at 667.

466 *Id.* at 666 (citation omitted).

Act's reach, the decision should not help the ABA, for three reasons. First, the Third Circuit's attempt to resuscitate *Marjorie Webster* misreads Supreme Court precedent. The Supreme Court's recent decisions make clear that *Marjorie Webster* is no longer good law. In *Trial Lawyers*, the Court could not have been clearer that price-fixing agreements and boycotts are illegal per se, regardless of whether the price-fixers are of the learned professions and regardless of public-service justifications.

Second, neither the Third Circuit in *Brown University* nor the Supreme Court in *Goldfarb* and later cases has actually exempted any conduct of the learned professions from the antitrust laws. The courts' words of deference to the learned professions hide a sure resolve to treat anticompetitive conduct in education just like anticompetitive conduct in other industries.

Third, the conduct of the ABA is even more commercial than the conduct of the undergraduate schools that the court in *Brown University* found to be sufficiently commercial to violate the Sherman Act. The ABA fixed prices in the market for law faculty, and boycotted potential competitors. The Supreme Court has held repeatedly that agreements to fix prices for such services, and similar boycotts, are illegal.[467] In addition, in contrast to the relatively noncommercial liberal arts education that *Brown University* addressed, the conduct of the ABA involved professional schools that trained students directly for careers in commerce.[468] Moreover, the ABA system had substantial impacts on price and supply not only in the market for faculty, but also in the markets for legal training and for legal services.[469] That the conduct in *Brown University* triggered the Sherman Act indicates that the ABA's conduct certainly should trigger the Act too.

2. *That the ABA System May Promote High Quality Is No Defense*

The ABA has attempted to justify its fixing of salaries and benefits by asserting that the controls are necessary to maintain the quality of legal education. The ABA argues that, without the restrictions, the quality of legal education would decline, harming both law students and consumers of legal services. For example, the ABA standards indicate that the minimum salary levels are

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467 *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

468 *See* Portinga, *supra* note 3, at 648.

469 *See supra* Parts IV.B-C.

necessary to "establish and maintain conditions adequate to attract and retain a competent faculty."[470] A law school's faculty must receive research, travel, and secretarial support "in order to enable it to develop academically and professionally."[471] Likewise, low student-faculty ratios, summer leaves, and limits on course loads were a form of benefit to teachers; they allowed faculty members to grade fewer exams, to devote less time to students, and to have more free time. The greater free time increased the wage per hour of actual work. The ABA's asserted justifications for requiring these benefits: The benefits would foster "better and more innovative teaching methods, methods which benefit students in ways students do not benefit from larger classes;"[472] they would augment student/faculty contact; they would permit faculty more "time to think, to write, and to serve the community;" and more time for faculty governance.[473]

However, the Supreme Court has been clear that it will not permit a defendant to escape liability for price-fixing or boycotts by claiming that the conduct either serves the public interest or protects consumers and the public. For example, in *Professional Engineers*, the Court addressed a rule of a trade association of engineers that prohibited members from engaging in competitive bidding.[474] The trade association argued that the ban was legal because it served the public interest. In order to offer low prices under competitive bidding, engineers would cut corners and perform shoddy work. Buildings would collapse; competitive bidding "would be dangerous to the public health, safety, and welfare."[475]

The Court rejected this defense. The Court recognized that the agreement was not price-fixing "as such"[476]—indeed, the ABA standards increase faculty pay and benefits and reduce working hours in a far more direct manner than did the limits on competitive bidding in *Professional Engineers*. Nonetheless, the Court indicated that the ban on bidding had the same economic impact as price-fixing, and so was illegal under section 1 of the Sherman Act.[477] Even if price-fixing would protect the public interest—preventing some buildings from collapsing—it was illegal. Recogniz-

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470 ABA STANDARDS, *supra* note 23, std. 405.

471 *Id.* std. 405, interp. 6.

472 *Id.* interp. stds. 201, 401-405, § (B)(2)(b).

473 *Id.* §§ B.3-8.

474 *See* National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 681-82 (1978).

475 *Id.* at 685.

476 *Id.* at 692.

477 *See id.*

ing that "[t]here is some risk, therefore, that competition will cause some suppliers to market a defective product,"[478] the Court nonetheless held that the association's attempt justify the price fixing "on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act."[479] The Court noted:

> The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.[480]

Similarly, in *Trial Lawyers*, a trade association of lawyers argued that the combination of price-fixing and a boycott "was justified because it was designed to improve the quality of representation for indigent defendants"—just as the ABA has argued that its price fixing and boycott are necessary to improve the quality of legal instruction.[481] The Court rejected this justification, and found the price-fixing and boycott to be illegal per se: "The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful."[482] The Court recognized both that representation of indigent defendants was an important constitutional duty and that "[i]t is likewise true that the quality of representation may improve when rates are increased."[483] Nonetheless, the court concluded: "Yet neither of these facts is an acceptable justification for an otherwise unlawful restraint of trade."[484] As in *Professional Engineers*, no justifications for price-fixing would be accepted: "That is equally so when the quality of legal advocacy, rather than engineering design, is at issue."[485]

Likewise, in *Indiana Dentists*, members of a professional asso-

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478 *Id.* at 694.
479 *Id.* at 695.
480 *Id.* at 695-96.
481 FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 420 (1990).
482 *Id.* at 424.
483 *Id.* at 423.
484 *Id.*
485 *Id.* at 424.

ciation of dentists agreed that they would not provide x-rays to insurers; the insurers would have used the x-rays to determine whether to reimburse the dentists for services that they provided.[486] The association argued that the restriction was necessary to maintain the quality of care: If the insurers received x-rays, then they might improperly deny payments for necessary treatments.[487] The Court rejected such "'quality of care' justifications";[488] citing *Professional Engineers*, the Court again noted, "Such an argument amounts to 'nothing less than a frontal assault on the basic policy of the Sherman Act.'"[489]

Just as the danger of collapsing buildings, inferior legal representation, or inadequate medical care does not protect a trade association's price-fixing from the antitrust laws, the purported threat of lower-quality legal education does not protect the ABA system's fixing of prices and benefits. The Sherman Act "does not support a defense based on the assumption that competition itself is unreasonable."[490] Courts may examine only challenged conduct's impact on competition, not competition's merits. An irrebuttable presumption exists that competition is the best means to allocate the economy's goods and services. As the Supreme Court has noted:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.[491]

Instead, only Congress could change the fundamental presumption of competition's merit. Indeed, the Supreme Court has reserved its most categorical pronouncements of this doctrine for price-fixing agreements, such as the ABA system:

> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing

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486 *See* FTC v. Indiana Fed'n of Dentists, 476 U.S. 447 (1986).
487 *See id.* at 461.
488 *Id.* at 462.
489 *Id.* at 463.
490 National Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696 (1978).
491 *Id.* at 695.

> conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice.[492]

3. *State-Action Immunity Does Not Protect the ABA*

The ABA might argue that so-called state-action immunity protects the ABA's conduct because state legislatures and supreme courts have, in effect, approved the conduct, and made it their own; the involvement of the government has transformed the ABA's conduct from illegal private conduct into state action, which is immune from the antitrust laws. The argument should fail.

The Supreme Court has held that, under certain circumstances, private conduct that state law requires is safe from the Sherman Act, even if the conduct would otherwise violate the Act.[493] Private conduct that the state requires is equivalent to conduct by the state, and the Sherman Act does not reach state action.[494]

However, private action does not become state conduct unless the state requires the private action directly and specifically. For example, in *Goldfarb*, the Virginia legislature delegated authority for administering the Virginia Supreme Court's ethical rules to the state bar association, making it a state administrative agency for certain limited purposes.[495] In addition, state law provided authority to the state bar association to issue opinions on infractions by lawyers.[496] Prompted by this authority, state and local bars then established minimum fee schedules.

The Supreme Court held that, despite the state's general delegation of authority to the bar associations, the associations' conduct was not immune from the Sherman Act as state action. For state-action immunity to apply, the state must directly and explicitly authorize the challenged private conduct. The Virginia legislature had granted no such specific authority. Although the legislature had granted general authority to the state bar, the legislature had not specifically permitted the state bar to establish or

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492 United States v. Socony-Vacuum Oil Co., 310 U.S. 151, 221-22 (1940).

493 *See* Parker v. Brown, 317 U.S. 341, 350-51 (1943) (holding that producers' raising of raisin prices, as required by state law, is not subject to Sherman Act).

494 *See id.*

495 *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 776 n.2, 791 (1975).

496 *See id.*

enforce minimum fee schedules.[497] The Court concluded that the state legislature's general grant of authority to the bar association did not immunize the association's individual anticompetitive acts under that authority; only specific authority for specific acts would have created immunity:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. . . . The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act.[498]

Like the bar associations in *Goldfarb*, state-action immunity does not protect the ABA. The ABA has received from the states only general authority to determine which law schools' students qualify to take the states' bar exams. The states have provided the ABA with no specific authority to exercise this general authority in specific ways that constrain competition. For example, the states have not specifically authorized the ABA to require minimum faculty salaries or minimum library budgets. Instead, as in *Goldfarb*, the ABA "has voluntarily joined in what is essentially a private anticompetitive activity"[499] that the Sherman Act prohibits.

Nor does the ABA satisfy the two requirements for state-action immunity that the Court's later decisions have fashioned. Immunity exists only if: (1) "the state has articulated a clear and affirmative policy to allow the anticompetitive conduct"; and (2) "the state provides active supervision of anticompetitive conduct undertaken by private actors."[500] As to the first prong, the states have not, as is required for immunity, "clearly articulated and affirmatively expressed as state policy"[501] the ABA's individual anticompetitive acts; although many states have delegated authority to the ABA to determine which law schools should receive accreditation, none has clearly and affirmatively authorized the ABA to adopt and enforce each of its many anticompetitive procedures

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497 *See id.* at 790-92.

498 *Id.* at 791-92 (citation and footnote omitted).

499 *Id.* at 792.

500 FTC v. Ticor Title Ins. Co., 504 U.S. 621, 631 (1992). Among several other decisions that apply the same test is *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (listing other similar Supreme Court decisions).

501 *Ticor*, 504 U.S. at 633 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 94, 100 (1980)).

and standards.

As to the second prong, for immunity to exist, the states must have participated in determining the details of the ABA's requirements: "[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy."[502] State officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy."[503] State supervision must be sufficiently active so that the ABA's standards "have been established as a product of deliberate state intervention, not simply by agreement among private parties."[504]

The states have not provided the necessary active supervision of both the ABA's accreditation standards and implementation of them. Indeed, the states provide no supervision at all; the states have delegated complete authority and discretion to accredit law schools to the ABA. The states have played no role in establishing the standards that the ABA has developed to exercise its accreditation authority. Nor have the states reviewed the standards. As in cases in which the Court has denied state-action immunity, the ABA standards reflect an "agreement among private parties," and are not "a product of deliberate state intervention."[505]

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502 *See id.* at 635.

503 *Patrick*, 486 U.S. at 101; *accord Ticor*, 504 U.S. at 634-35.

504 *Ticor*, 504 U.S. at 634-35. The leading antitrust treatise notes:

> **State regulation of market behavior**. There have been many antitrust claims against private enterprises claiming a state action immunity based on state regulation of the challenged conduct. As fully discussed in [sections on requirements for state-action immunity], the mere fact of regulation does not confer immunity. Rather, as the Supreme Court reiterated in *Midcal*, the challenged restraint must be the object of a clearly expressed state policy and must be actively supervised.

AREEDA ET AL., *supra* note 5, ¶ 212.9e, at 234 (Supp. 1996).

505 *Ticor*, 504 U.S. at 634-35; *see* AREEDA ET AL., *supra* note 5, ¶ 212.9e, at 234 (Supp. 1996); *see also id.* ¶ 212.2d, at 155 (Supp. 1996) (noting "powerful policy reasons for demanding state authorization before tolerating price fixing by lawyers in their own interest"). The decision in *Hoover v. Ronwin*, 466 U.S. 558 (1984), does not suggest otherwise. There, the Arizona legislature delegated authority for controlling admission to legal practice to the Arizona Supreme Court. In turn, the court created a committee to administer the bar. *See id.* at 560. When a disappointed bar applicant sued the members of the committee, the United States Supreme Court held that state-action immunity applied. The Court held that application of the requirements of clear articulation and active supervision was unnecessary. Satisfaction of the requirements was necessary only when a governmental body approved private conduct. However, the Arizona bar committee was itself a governmental body, and a state governmental body is immune from antitrust liability under the state-action doctrine. *See id.* at 568. In contrast, the ABA is a private body, so that the clear articulation and active supervision requirements do apply.

4. *Causation and State Use of ABA Accreditation*

The ABA has argued that it causes no injury to law schools that it refuses to accredit. Instead, injury to rejected schools flows only from states' decisions to license only those who graduate from ABA-accredited law schools. If the states had ignored the ABA's accreditation decisions and licensed all applicants, then the unaccredited schools would have suffered no injury. The ABA just provides information about the quality of law schools. It is not the ABA's fault that the states use the information in an exclusionary way.[506] The district court and court of appeals in *MSL v. ABA* accepted this argument in granting and affirming summary judgment.[507]

The ABA's argument has two flaws. First, the ABA's standards would cause injury and be unlawful even if the states did not deny licenses to lawyers from non-ABA schools. For example, the ABA system is illegal, probably per se, as an agreement among competitors to fix prices and reduce output.[508] The states' reliance on the ABA allows the ABA system to have a greater harmful impact than it otherwise would have. But even without the states' reliance, the system would be harmful and illegal.

Second, acceptance of the ABA's argument would contradict much of the Supreme Court's state-action jurisprudence. In every case in which a court must determine whether state-action immunity exists, the primary injury results not from the defendants' conduct, but from a state's ratification of the conduct. However, the Court has been clear that, if a state harms competition by enforcing private actors' conduct, the private actors are nonetheless liable for the injury unless they satisfy the standard two-part test for state-action immunity.[509]

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506 *See* Defendant ABA's Motion for Summary Judgment at 11-16, Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435 (E.D. Pa. 1996) (No. 93-6206).

507 *See* Massachusetts Sch. of Law v. ABA, 937 F. Supp. 435, 439-42 (E.D. Pa. 1996), *aff'd*, 107 F.3d 1023, 1035-37 (3d Cir.), *cert. denied*, 118 S. Ct. 264 (1997); *see also* Zavaletta v. ABA, 721 F. Supp. 96, 97-98 (E.D. Va. 1989) (holding that state's use of the ABA's accreditation decisions caused any injury to students at law school that the ABA denied accreditation, not the ABA's accreditation decisions themselves, and granting summary judgment for ABA).

508 *See supra* Part VI.B.4.

509 *See* Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) (holding that bar association's minimum fee schedule violated Sherman Act even though schedule had impact only because it was enforced by state law); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (holding that wine producers' price agreements violated Sherman Act although agreements would have had no impact without state enforcement); *see also supra* text accompanying notes 499-505.

For example, in *Goldfarb*, a county bar association established a list of minimum fees—just as the ABA established minimum salaries and benefits for law faculty.[510] As with ABA accreditation, the county bar association's fee minimums would have had little anticompetitive impact without state enforcement. The anticompetitive impact occurred only because the state enforced the minimums. Just as state governments enforced the ABA's fixing of salaries and benefits, the state supreme court enforced the county bar's fee minimums: the supreme court delegated to the state bar association, itself a state agency,[511] authority to discipline lawyers who offered fees that were below the minimums.[512] The Court noted that "the State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum-fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so."[513] The Court confirmed further the county bar association's inability to enforce the anticompetitive requirements by itself:

> Respondent Fairfax County Bar Association published the fee schedule although, as a purely voluntary association of attorneys, the County Bar has no formal power to enforce it. Enforcement has been provided by respondent Virginia State Bar which is the administrative agency through which the Virginia Supreme Court regulates the practice of law in that State; membership in the State Bar is required in order to practice in Virginia.[514]

That is, just as with ABA accreditation, the power of the state enforced the county bar association's boycott of lawyers who offered to work for less than the fixed minimums.

Although the county bar's fee schedule would have had no impact without the state's enforcement of it, the Court held that the county bar association had violated the Sherman Act: "[F]or here, a naked agreement was clearly shown, and the effect on prices is plain.... On this record respondents' activities constitute a classic illustration of price fixing."[515] The involvement of the state in enforcing the county bar association's fee schedule did not protect the bar association from liability; the state's involvement

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510 *See Goldfarb*, 421 U.S. at 776.

511 *See id.* at 789-80.

512 *See id.* at 776 & n.6.

513 *Id.* at 791 n.21.

514 *Id.* at 776 (footnote omitted).

515 *Id.* at 782-83 (citations and footnote omitted).

did not satisfy the requirements for state-action immunity—specifically, state law did not explicitly require the fee minimums.[516]

Likewise, in *Hydrolevel*,[517] the ASME trade association set engineering standards for products, just as the ABA sets standards for law schools. Like the state governments that grant licenses only to law schools that the ABA accredits, federal, state, and local governments incorporated the ASME standards into their building codes.[518] A competitor of the plaintiff then convinced ASME to issue a standard that rejected the plaintiff's product—just as the ABA has issued standards that reject the product that alternative law schools such as MSL would like to sell. Because of the ASME standard, many governments prohibited sale of the plaintiff's product, and the plaintiff went bankrupt.[519] Although the ASME standards harmed the plaintiff only because governments chose to incorporate the standards in their building codes, the Supreme Court affirmed a $7.5 million judgment against ASME.[520]

Similarly, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, the Supreme Court's leading case on the requirements for state-action immunity, California state law enforced wine producers' price agreements; the privately-set prices would have had no impact without government enforcement.[521] To an even greater degree than with accreditation, state enforcement of the prices, not the private conspiracy to set the prices, caused the injury. Nonetheless, the Court ruled that state-action immunity did not protect the wine producers because California had neither clearly articulated a state policy to permit the price agreements nor actively supervised the agreements.[522]

Likewise, in *FTC v. Ticor Title Insurance Co.*,[523] the state enforced high prices for title insurance services that a group of private insurers had set; again, only the state enforcement permitted the private insurers to enjoy the high prices.[524] Nonetheless, the Supreme Court held that the title insurance companies could be liable under the Sherman Act; no state-action immunity existed

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516 *See id.* at 789.
517 American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).
518 *See id.* at 559.
519 *See id.* at 564.
520 *See id.* at 591 n.16 (Powell, J., dissenting).
521 445 U.S. 97 (1980).
522 *See id.* at 105-06.
523 504 U.S. 621 (1992).
524 *See id.* at 638-39.

because the states did not actively supervise the setting of the prices that the states enforced.[525] Again, in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, the Court imposed liability despite the fact that "the lion's share of the anticompetitive effect" arose from "adoption of the [private party's] Code into law by a large number of state and local governments."[526]

Two decisions from lower courts deny antitrust liability while noting that any injury was caused by state enforcement of private action, not the private action itself.[527] However, these decisions fit comfortably within existing Supreme Court state-action doctrine. In both cases, state-action immunity was appropriate because the states' clearly articulated policies approved the anticompetitive conduct and the states actively supervised the conduct.[528]

The ABA may believe that it merely provides information to consumers about products in the market, and that antitrust liability should not depend on the way that the government uses the information that the ABA supplies. The ABA could make the following argument. *Consumer Reports* magazine gives certain products

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525 *See id.*

526 486 U.S. 492, 502 (1988). Leading treatises concur that the two-pronged test for state-action immunity continues to apply even if governmental action interrupts causation. Areeda et al. note that, under the *Noerr-Pennington* doctrine, if a private person obtains anticompetitive government action, then, under certain circumstances, the government is the proximate cause of the antitrust plaintiff's injury, not the private person who sought the government action. *See* AREEDA ET AL., *supra* note 5, ¶ 201, at 14 (1996 Supp.). However, the treatise is also careful to note that the two requirements for state-action immunity in *Midcal* continue to apply; state action does not break causation unless the state satisfies the clear-articulation and active-supervision requirements. The treatise provides an example:

> Suppose . . . that a private party successfully seeks legislation permitting or even compelling him to act in an anticompetitive way. If the standard *Midcal* requirements are met, the statute will be valid and provide a complete *Parker* shield for everyone. If the statute is invalid because, for example, it confers unsupervised private power, the results would be as follows. . . . (B) The private party is not affirmatively liable for seeking the legislation, for that is protected by *Noerr*, even though the statute turns out invalid. (C) However, *Noerr* provides no shield for the private party's own market behavior. (D) Nor does *Parker* provide any shield . . . .

Id. ¶ 212.8, at 228 (1996 Supp.).

527 *See* Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 17 F.3d 295, 301 (9th Cir. 1994) ("[T]he only anticompetitive injuries that [plaintiff] complains of are the direct result of governmental action . . . ."); Lawline v. ABA, 956 F.2d 1378, 1383 (7th Cir. 1992) (granting antitrust immunity for ABA's ethical rules that prohibited plaintiff from practicing law) ("It is because of [the rules'] adoption by these two governmental bodies that plaintiffs are supposedly restrained from practicing law.").

528 *See Sessions*, 17 F.3d at 296 (governments formally adopted anticompetitive standards as law); *Lawline*, 956 F.2d at 1382 (courts formally adopted specific rules that harmed plaintiff).

unsatisfactory ratings. Suppose that state governments banned from the market any product that *Consumer Reports* found unsatisfactory. The governments' decision to show confidence in the *Consumer Reports* ratings by basing policy decisions on the ratings should not suddenly expose *Consumer Reports* to lawsuits for treble damages by disgruntled manufacturers of the products that *Consumer Reports* faulted. Antitrust law should not punish an information provider just because governments rely on it. This would be to punish information providers for their reliability.

This argument would miss the mark. Market power, whether it comes from competitive success or government grant, brings with it responsibility that those without market power do not bear. In many antitrust contexts, entities with market power can suffer antitrust liability for conduct that would be benign in an entity without market power: "Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist."[529] For example, a defendant's "tying" arrangement violates section 1 of the Sherman Act only if the defendant has "appreciable economic power" in the tying product market.[530]

A body such as the ABA that obtains authority to control entire industries, and to determine whether people can become lawyers and hire lawyers, has a legal responsibility to exercise its authority in a manner that does not harm competition. The ABA fought energetically to obtain authority from the states to control entry to the profession. Along with this authority comes the duty to use the authority fairly and unselfishly to promote competition and consumer choice, rather than stifling competition. As the Supreme Court noted in removing state-action immunity from government enforced price-fixing, "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement."[531] When a government grants regulatory authority to

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[529] Eastman Kodak Co. v. Image Tech. Servs., Inc., 504 U.S. 451, 488 (1992) (Scalia, O'Connor, and Thomas, JJ., dissenting) (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 813, at 300-02 (1978)); *see also* PHILLIP AREEDA, ANTITRUST ANALYSIS 237 (3d ed. 1981) ("Although the antitrust laws may condemn some conduct with little inquiry, power is often crucial in antitrust analysis. The 'reasonableness' of a particular restraint of trade may depend upon defendant's market power.").

[530] *Kodak*, 504 U.S. at 462.

[531] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 106

a private body, the body must exercise the authority in a responsible, unselfish manner; the body may be "neither discriminatory nor capricious."[532] Accordingly, in *Hydrolevel*, the Court held that ASME violated the Sherman Act by promulgating standards that harmed competitors, noting:

> ASME wields great power in the Nation's economy. Its codes and standards influence the policies of numerous States and cities, and, as has been said about "so-called voluntary standards" generally, its interpretations of its guidelines "may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country," as well as entire segments of an industry.... ASME can be said to be "in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce." When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace.[533]

5. *The Federal Government's Reliance on the ABA Does Not Provide Implicit Immunity*

It might be argued that the Department of Education implicitly provided antitrust immunity to the ABA when it designated the ABA as an approved accrediting agency; that is, because Congress explicitly authorized the ABA to accredit law schools, Congress implicitly permitted the ABA to do things that would otherwise be illegal under the Sherman Act.

However, this argument should fail. The Supreme Court has long disapproved of implicit exemption from the Sherman Act. The Court noted in *Goldfarb* that "our cases have repeatedly established that there is a heavy presumption against implicit exemption."[534] Specifically, the Court has noted, "Implied antitrust immunity... can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."[535] Substantial regulation of an industry "does not necessarily

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(1980).

532 Silver v. New York Stock Exch., 373 U.S. 341, 359 (1963) (quoting then-SEC Chairman Cary).

533 American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 568 (1982) (citations omitted).

534 Goldfarb v. Virginia State Bar, 421 U.S. 773, 787 (1975) (citations omitted); *see also* National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 388 (1981) ("Implied antitrust immunity is not favored....").

535 *National Gerimedical*, 452 U.S. at 388.

evidence an intent to repeal the antitrust laws with respect to every action taken within the industry."[536] Instead, the Supreme Court indicates, "Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge."[537] For example, Blue Cross argued that its refusal to deal with the plaintiff hospital was exempt from antitrust scrutiny because a government agency had suggested this course. The Court rejected this argument because the legislation that governed the agency did not specifically permit the agency to authorize the conduct that Blue Cross had undertaken.[538] The Court has upheld implicit exemption from the antitrust laws only of conduct that a public agency specifically authorizes pursuant to a specific statutory grant of authority.[539]

The ABA does not satisfy the tests for implicit immunity. The Higher Education Act of 1963 ("HEA"), which authorizes the Department of Education to designate the ABA, does not empower DOE to authorize anticompetitive conduct.[540] Instead, HEA requires only that designated accreditors both have voluntary memberships and focus principally on their accreditation activities.[541] No "repugnancy" exists between DOE's regulation and the antitrust laws. The ABA could readily comply simultaneously with the requirements of both the HEA and the Sherman Act.

6. *That the ABA System Functions As a Union Is No Defense*

Although the accreditation system has behaved like a labor union to promote the interests of faculty,[542] it was not protected from antitrust liability by the labor exemptions to the antitrust laws. In order to ensure that the antitrust laws do not frustrate the policies of the National Labor Relations Act ("NLRA") to protect union activity, the Clayton and Norris-LaGuardia Acts exempt from antitrust liability union activity that the NLRA covers.[543] In

536 *Id.* at 389.

537 *Id.*

538 *See id.* at 389-90.

539 *See, e.g.*, Gordon v. New York Stock Exch., 422 U.S. 659, 687-90 (1975) (holding stock exchange's fixing of commission rates exempt from antitrust laws because Securities Act authorized Securities Exchange Commission to approve rates); United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 731-35 (1975) (holding restrictions on stock sales implicitly immune from antitrust law because federal law specifically allowed the sales).

540 *See* 20 U.S.C. § 1099b (1994).

541 *See id.*

542 *See supra* text accompanying notes 261-64.

543 *See* Clayton Act, 15 U.S.C. §§ 6, 17, 20 (1994); 29 U.S.C. § 52 (1994); Norris-

addition to this "statutory exemption," the Supreme Court has created a so-called "non-statutory exemption" by interpreting the statutory language and defining the labor exemption's limits.[544] Neither the statutory nor non-statutory exemptions applies to the ABA's accreditation system, for two reasons.

First, the antitrust exemption for labor activity that is covered by the NLRA does not apply because the NLRA's protections do not extend to a university's faculty. The NLRA's protections for collective bargaining apply to a firm's workers, but not to the "managerial employees" who run the firm.[545] The Court classifies all university faculty members as managerial employees who do not enjoy the NLRA's protections.[546] This is because a university's faculty members share great responsibility for running the university: "To the extent the industrial analogy applies, the faculty determines within each school the product to be produced, the terms upon which it will be offered, and the customers who will be served."[547] The Court has noted the policy reason that neither the NLRA nor the antitrust exemption protects labor union activities by managerial employees: "To ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union."[548] The ABA system has inflicted exactly this harm: The accreditation system permits law faculty to serve their own interests at the expense of their law schools, universities, and students.

Second, even if union activity by law faculty could be covered by the exemption, the antitrust exemption does not apply. There

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LaGuardia Act § 1, 29 U.S.C. § 101 (1994).

544 *See, e.g.*, Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616, 622 (1975); *see also* 1A AREEDA ET AL., *supra* note 5, ¶ 255c, at 173 (noting that "non-statutory exemption" is, in fact, statutory based on the meaning of the statutory exemption).

545 *See* NLRB v. Bell Aerospace Co., 416 U.S. 267 (1974).

546 *See* NLRB v. Yeshiva Univ., 444 U.S. 672, 686-88 (1980).

547 *Id.* at 686. In addition, the Court noted in *Yeshiva*:

> The controlling consideration in this case is that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial. Their authority in academic matters is absolute. They decide what courses will be offered, when they will be scheduled, and to whom they will be taught. They debate and determine teaching methods, grading policies, and matriculation standards. They effectively decide which students will be admitted, retained, and graduated. On occasion their views have determined the size of the student body, the tuition to be charged, and the location of a school. When one considers the function of a university, it is difficult to imagine decisions more managerial than these.

Id.

548 *Id.* at 687-88.

is no exemption if an agreement between a union and employers is designed substantially to reduce competition in the employers' product market: The exemption does not apply "when a union agrees with one or more employers (a) to deny competing employers access to the market or (b) expressly to fix rival employers' wage rates with the purpose of destroying them."[549]

Thus, the exemption does not apply to the ABA accreditation system. A major function of the accreditation system is to reduce competition in the market for legal training. Through the ABA accreditation system, faculty members and accredited law schools have agreed not only to raise faculty compensation, but also to protect the faculty members' employers by denying access to the legal training market both to unaccredited schools and to schools that refuse to raise faculty compensation. The system has been able to ensure that schools that do not pay their faculty the system's fixed compensation levels are destroyed.[550]

The courts treat labor groups that are outside the antitrust exemption as horizontal conspiracies to fix prices, enforced by illegal boycotts; the courts view such labor groups as combinations of producers—the union members—who agree to cease competing with each other, and instead agree to demand higher prices for their services. The labor conspirators enforce their price-fixing conspiracy by boycotting both competing employers and workers who agree to accept lower wages. For example, in *Trial Lawyers*, a bar association went on "strike" to protest the low fees that the District of Columbia paid lawyers who represented indigent defendants.[551] The Supreme Court held that this work stoppage was a horizontal conspiracy to fix prices, enforced by a boycott, and

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549 1 AREEDA ET AL., *supra* note 5, ¶ 255, at 170; *see* Connell Constr. Co. v. Plumbers & Steamfitters Local Union 100, 421 U.S. 616 (1975) (holding that exemption did not apply to wage agreement that unduly restricted competition in the product market); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954) (reversing dismissal of complaint alleging agreement among contractors' association and union to eliminate competition among local plastering contractors, to bar entry of new local competitors without special union approval, and to prevent out-of-state contractors from competing in the local market); United Bhd. of Carpenters & Joiners v. United States, 330 U.S. 395 (1947) (holding that antitrust exemption did not apply to agreement between union and employers to raise wages and boycott employers' competitors); Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797, 809-11 (1945) (same).

550 See *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451 n.2 (1986), where, after noting that a federation of dentists initially "styled itself a 'union' in the belief that this label would stave off antitrust liability," the Court indicated that "Respondent no longer makes any pretense of arguing that it is immune from antitrust liability as a labor organization."

551 *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 415 (1990).

was illegal per se.[552] Similarly, faculty from accredited law schools agreed to demand high compensation, and to boycott schools that refused to provide these compensation levels. As in *Trial Lawyers*, the conduct is illegal.

VII. CONCLUSION AND CURES: ENDING RELIANCE ON ABA ACCREDITATION

For many decades, and especially during the past twenty years, the ABA has exerted monopoly power over four related markets: the market for the hiring of law faculty, the market for legal training, the market for legal services, and each university's internal market for funding. The ABA system has imposed inefficiency and unfairness. Although the system has helped existing law faculty, ABA-accredited law schools, and existing lawyers, it has harmed law students, universities, and potential faculty members. Because the system suppresses new schools that would offer cheaper, more-efficient legal education, the system has excluded many from the legal profession. It has raised the cost of legal services, and it has, in effect, denied legal services to whole segments of our society.

We conclude that the system gives effective monopoly power, and that the system's economic costs probably greatly exceed its small benefits. Much of the quality-control gains that the ABA asserts for the system would probably be provided by free-market choice, as seems true in most other professions.

Legal analysis conforms to the economic conclusions. The system is illegal, probably per se, as a horizontal price-fixing agreement among law faculty, enforced by a boycott. Various defenses that the ABA has raised do not seem convincing; the conduct is illegal even though the conduct arises in the context of education and the learned professions, and even though state and federal governments rely on the accreditation system.[553]

Although a recent dip in law school applications and recent challenges have weakened the system, the system still causes large harms. Indeed, because the recession has worsened certain of the harms, it is especially urgent to fix the system now.

We now evaluate various policies that government and the ABA could undertake to reduce the accreditation system's large harms. We conclude that sharp changes are in order. State and

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552 *See id.* at 424, 436 n.19.

553 This Part omits a full summary of our findings in deference to our Introduction, *supra*.

federal governments should no longer limit licenses to practice law to those who graduate from ABA-accredited schools. Likewise, the federal government should not limit federally-subsidized loans to students from ABA schools; the government should extend loans to students from all schools with students with low default rates. Finally, instead of controlling law schools, the ABA should spread information about the schools. Instead of imposing yes-no judgments about each school, the ABA should develop a rating and ranking system that would provide potential law students and consumers of legal services with more useful information. In order to provide consumers with further information, the role of the bar exam might also be changed.

A. *Adjust the Present System?*

Unless policymakers now decide to make fundamental changes, we can expect a period in which the system performs better than before. Chastened by recent controversy and litigation, and pressured by the drop in applicants, ABA accreditors will take pains to be fairer. Schools that the system had deterred from even seeking accreditation will recognize this period of opportunity, and will apply. Indeed, this is already occurring.[554]

However, after public attention shifts away from law school accreditation, the inevitable movement to unfairness and suppression of competition will resume: Those in the accreditation process will, perhaps even without knowing it, begin to interpret and apply the accreditation rules in ways that benefit accreditors, but that harm students and the public. Even accreditation personnel with the best intentions may not impede this tendency. Perhaps the strongest evidence of this is the present system itself. After all the litigation ends, and after all of the ABA committees finish their work, the outcome that will probably occur is some relatively minor adjustments of the present system. The ABA will probably modify some of its accreditation standards to focus more of the benefits of accreditation on students and consumers of legal services, rather than on law faculty. However, the states will continue to license only students from ABA schools.

These changes would be beneficial. But the changes would

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554 Two decades ago, the ABA rejected the application of Western State University College of Law for accreditation. However, Western State is now preparing to apply again because of the ABA's new approach that the DOJ consent decree and other recent focus on accreditation have caused. *See* Ken Myers, *Calif. School Says New ABA Plan Gives Accredit Where It Is Due*, NAT'L L.J., Aug. 14, 1995, at A15.

not alter the present system's fundamental harms.

B. *Establish a New System*

Instead of minor adjustments to the ABA system, major changes are needed. A system in which those who benefit from limiting supply also control the supply inevitably tends, over time, to become anticompetitive. The history of accreditation shows this. Since the turn of the century, legal educators and the existing bar have inevitably tended to use the law school accreditation process to suppress competition: to increase benefits for law faculty and to insulate existing lawyers from new competition. Despite the public-spirited diligence of many participants in the accreditation process, the process has developed into an unfair system that stifles competition and harms the public.

Calls for both piercing the law profession's barricades and permitting greater freedom of access to the profession are not new; during the early part of the nineteenth century, Jacksonian Democrats attacked the "aristocracy" that the elite bar had become, and many states eliminated all barriers to becoming a lawyer, including bar exams and training requirements.[555] The same injustices and inefficiencies that motivated these earlier reforms require change with equal force now.

C. *Eliminate Accreditation As a Barrier to Entry*

A clean solution seems to be needed. States should change the present two-barrier system to a one-barrier system. States should eliminate the accreditation barrier: The states should no longer restrict licenses to practice law to those who possess a diploma from an ABA-accredited law school. States should retain only the bar exam, but perhaps only in the modified form that we discuss below.

The accreditation requirement is unfair and inefficient because it is both overinclusive and underinclusive. It is overinclusive because it excludes students who would become excellent lawyers even without attendance at an ABA-approved school. These students could receive adequate training by private study, by apprenticeship, or by study at cheaper unaccredited schools. The present system would have excluded both Abraham Lincoln and all of our founding fathers and early presidents who were lawyers. Indeed, many recall a golden age of lawyering, when lawyers

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555 *See* STEVENS, *supra* note 28, at 7.

were responsible professionals who delighted in public service. This golden age is instructive, even if the nostalgia may be partly exaggerated. It occurred when most lawyers received no law school training. The recent malaise in the legal profession, in which lawyers have become perceived as greedy parasites, has occurred during the same period that law school training became dominant.

Similarly, the accreditation requirement is underinclusive because it fails to exclude from the profession those who have attended an ABA-approved school, but who nonetheless are not fit for practice. It is inevitable that some students from ABA schools become less effective lawyers than would students who lack the credentials or money to attend an ABA school.

This is partly because of the curious way that most law schools choose students. An ABA law school generally admits the applicants whom the law school predicts will obtain the highest grades in the first year of law school.[556] There are many applicants or potential applicants who would not achieve excellent first-year grades, but who would become excellent lawyers. These people would compensate for lack of academic ability by more complex skills, practical lawyering ability, abilities to deal with people, compassion for others, and commitment to the community.

No evidence exists that those who are skilled at taking first-year law school tests become the best lawyers. Students from top law schools do tend to get the best jobs. But this might continue even if law schools chose students in an entirely different way; law students from elite law schools may get the best jobs, not because they become the best lawyers, but simply because they graduate from elite schools. Indeed, some evidence exists that students from elite schools often are not suited for legal careers: A large fraction of lawyers whom elite law firms hire from elite law schools quickly become miserable and quit,[557] wasting both the law firms' training resources and the lives of the young former lawyers. Permitting legal employers to hire people who have not graduated from ABA schools might well produce better, happier lawyers, at

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556 *See, e.g.*, Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1, 22 n.68 (1994) (describing University of Pennsylvania Law School's admitting of students based primarily on a weighted average of LSAT scores and undergraduate grades).

557 Of the entry-level lawyers who entered a large, successful, elite San Francisco firm from 1986-1990, more than 60% had quit within four years. Most quit because they disliked legal practice; they felt that they were just not suited to it. Experiences at many other top law firms are similar.

all levels of the legal market. Only the market would test this with certainty. However, the system now excludes all except students from ABA schools.

The major policy argument that the ABA asserts in defense of its accreditation monopoly is consumer protection: Without the accreditation process, law students might be exploited by bad law schools, and clients might be exploited by bad lawyers. Few if any law students actually need this protection. They are sophisticated consumers and can protect themselves; they have many alternate sources of information. Instead, the system harms law students, by reducing their choices in legal education and by increasing the costs.

The system may protect a few clients. But it also substantially increases the costs of legal services, and it prices out of the market many of the potential clients who might need protection. Without the system, these people may hire bad lawyers. With the system, they can afford no lawyer at all.

The ABA system is not the only limit on entry into the market for legal services. The bar examination in each state also limits entry. As with the ABA system, proponents of the bar exam argue that it is necessary to protect the public from incompetent lawyers. The bar exam probably serves the public interest better than the existing accreditation system. The bar exam is a more systematic means for ensuring high quality lawyers than is excluding everyone who does not graduate from an ABA-accredited law school. Unlike the accreditation system, the exam tests legal knowledge directly; the bar exam can test whatever material society decides that competent lawyers must know.

However, as with the ABA system, existing lawyers have used the bar exam as a means to limit competition from new lawyers. For example, in response to demands from practicing lawyers during the Great Depression, many bar exam committees reduced their pass rates.[558]

In order to obtain a complete reduction in the price of legal services to competitive levels, the bar exam would need to be eliminated. However, this would eliminate the protection that the bar exam provides for consumers. Instead, the bar exam could be mandatory, but no one would be excluded from the profession based on it. Instead, each lawyer's score would be available to potential clients; presently, clients know only whether the lawyer

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558 *See supra* text accompanying notes 84-89.

passed the exam, not the lawyer's exact score. A client could choose an expensive lawyer from a top school with a top score on the bar exam—as the client can now. However, under the new system, the potential client would also have available $30-per-hour lawyers from lower-ranked schools with lower scores on the bar exam. The consumer would choose between high price/high quality and lower price/lower quality, based on how complicated and important her legal needs were. We think that this approach would be superior, but the debate is not yet complete or based on evidence. The issue calls for further study.

One effect of cutting back the ABA's accreditation controls would be to enlarge the lower-cost echelon of law schools and widen the diversity of entering students. To some, that may seem to condone inferiority. But economic analysis suggests instead that it would merely enhance consumer welfare for a wider range of students, teachers, and ultimate consumers of legal services.

If problems of inadequate quality arose, they could be dealt with by careful actions involving the ABA and public agencies. But many such problems would be self-correcting: Bar examinations would avert any serious lapse in quality, and students from lower-quality programs would generally obtain lower earnings. Accordingly, the demand for genuinely inferior training would shrink or possibly disappear.

The anticompetitive elements of the ABA system could be removed without causing disorder or unfair effects. The shift can begin towards a more open and innovative market for legal training. The shift would also create benefits in the market for legal services and in the judiciaries and legislatures of the country.

D. *Eliminate Accreditation As a Barrier to Subsidized Federal Loans*

The Department of Education should no longer prohibit federal subsidized loans for students from unaccredited law schools. The federal government's sole objective should be to avoid squandering taxpayer money on students who default on their loan obligations.[559] The government should not discriminate among educational philosophies. No evidence exists that students from unaccredited law schools would have any greater tendency to default on federal loans, especially if the restriction on their practic-

559 Under present law, the government may also consider other factors. *See* 20 U.S.C. § 1099(a)(5)(A)-(L); *see also* 34 C.F.R. § 602.10(a)-(b) (1997). Congress should modify this approach.

ing law in most states were eliminated. In fact, the relationship might be just the opposite. Students from cheaper unaccredited schools might accumulate fewer debts and so default less than students from expensive accredited schools.

Instead of providing loans only to students from ABA accredited schools, the federal government should provide loans to students from all law schools with a student default rate that is below a certain limit. This would protect taxpayers' money, while also permitting schools to develop innovative approaches to compete with established schools on an even playing field. In the end, the innovative schools may be cheaper, may prepare students better for certain kinds of careers in the law, and may produce students who default less often on their federal loans.

E. *The ABA Should Provide Information, Not Suppress Competition*

Although the present system imposes major costs, it provides no benefits to most law students and potential clients. The system is only an on-off switch; it indicates only whether or not a law school has achieved the ABA's standards. This may be useful information to law students at the low end of the spectrum who are choosing between a low-ranked ABA school and an unaccredited school. And it may be useful information for someone who is choosing between two lawyers, only one of whom graduated from an ABA-approved school. But the information is of no use for a student who is choosing between two accredited schools—between Georgia State and the University of Georgia.

Likewise, the accreditation system, despite its expense, is useless to the client who must choose between lawyers from Emory and Cornell. The system indicates only that both Emory and Cornell are accredited, but nothing more. The system provides no information about the distance that the schools surpassed each of the accreditation standards; no information about the schools' strengths and weaknesses; no rankings of the schools on any scale; indeed, the ABA prohibits such rankings.[560] For any purpose other than the yes-no accreditation decision, the ABA's expensive information is wasted. Instead, for comparative information, students and clients must rely on other sources, such as the rankings in *U.S. News & World Report.*

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560 "No rating of law schools beyond the simple statement of their accreditation status is attempted or advocated by the official organizations in legal education." ABA POLICIES, *supra* note 121, pol'y 20.

However, the ABA is in an excellent position to provide useful information to consumers, and it should do so. The accreditation process requires law schools to provide extensive information about their programs, finances, and operations. In addition, the site inspectors are legal experts who devote much time to investigating each law school. The ABA could readily use the results of the investigations and inspections to produce extensive information that would be invaluable to consumers. The ABA could offer detailed descriptions of each law school's programs, with discussions of strengths and weaknesses and numerical ratings. It could offer rankings on a broad range of qualities and characteristics. The ratings and rankings would be superior to those offered by publications such as *U.S. News & World Report.* The ABA would have access to detailed inside information. In addition, the ABA devotes large resources to collecting the information—much more resources than for any present ranking survey, such as *U.S. News & World Report.*

Ratings and rankings by the ABA would have several benefits. First, law students and consumers of legal services would have essential information for making wise choices. For example, students with particular interests would be able to choose schools that served those interests. A client who needed a will would benefit from hiring with confidence a lawyer who had graduated from a law school that earned high ABA marks for estate planning.

Second, the ratings and rankings would induce healthy competition among law schools. Now, only a small incentive exists for a law school to improve; potential law students will learn of the improvement only slowly through existing channels of information. A law school has little incentive to improve its teaching, or its clinical program, or its counseling services. Few will hear of the improvements, and the improvements will attract few students. Suppose instead that, each year, the ABA published extensive information, including each law school's improvements and setbacks. A given improvement would now attract more students than before. The benefits to the law school of improving itself, and of offering students better value, would be greater than before. Likewise, the harm to the law school of letting programs slip would also be greater.

Success would come to energetic, efficient law schools that strive to improve and that give students superior value. Lethargic, inefficient, and overpriced schools would suffer. Students and consumers of legal services would benefit, particularly those whom

the system now excludes. Few reforms in any sector would better fit the economic criteria: This reform would foster well-informed markets and full consumer choice, while eliminating illegal and harmful interferences. An obstructive system could be converted to one that informs and enhances.

F. *The Prospects for Fundamental Reform*

Until recently, the prospects for substantial reform were dim. The law faculty who benefited from the system had captured the ABA committees that established accreditation standards. Lawyers, who are powerful in state legislatures, supported this capture because standards that benefited faculty also benefited lawyers by reducing the supply of new lawyers.

Moreover, many law faculty and existing lawyers will oppose elimination of the system fiercely. Although the ABA system has raised wages for both law faculty and lawyers, many of those who entered these professions under the system reaped no windfall. Although the system increased incomes substantially, it also increased the cost of entering the professions, offsetting much or all of the increase in income. Only those who entered these professions before the system tightened struck gold. They benefited from the higher system salaries, but had incurred only the low pre-system costs to enter the professions.

Eliminating the ABA system would not merely eliminate a monopoly windfall; the system provides no windfall to many who became faculty and lawyers under the system. Instead, eliminating the system would devastate many faculty and lawyers, causing them to receive far less than a reasonable market return on their investments in entering their professions.

Nonetheless, a window of opportunity for fundamental change now exists. A severe recession in the market for legal training has caused the accreditation system to come under challenge. Deans from a number of law schools have called for changes; although, before the recession, the system benefited all ABA-accredited schools, the recession has begun now to cause the system to harm some accredited schools, especially lower-ranked schools. External challenges include antitrust suits by the Justice Department and by the Massachusetts School of Law, as well as a review by the Department of Education of its policies that have supported the ABA's controls. The opportunity is there: to cleanse the competitive process of unfair, inefficient controls.