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Law School Branding and the Future of Legal Education.

Michael Ariens

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ESSAY

LAW SCHOOL BRANDING AND THE FUTURE OF LEGAL EDUCATION

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Item: In late January 1998, Texas A&M University in College Station, Texas, and South Texas College of Law in Houston announce their “affiliation.” Although Texas A&M is a state university, the law school is to remain private and in Houston. The institutions announce that the law school will change its name to South Texas College of Law of Texas A&M, and the name of its building to Texas A&M Law Center.¹ A year later, the American

1. Armando Villafranca, *Law School to Bear A&M Name/South Texas College of Law to Remain Independent*, HOUS. CHRON., Jan. 23, 1998, at 27, 1998 WL 3556379; see also *Aggie Lawyers: Board Should OK A&M's Pact with Private Law School*, DALLAS MORNING NEWS, Apr. 20, 1998, at 12A, 1998 WL 2530001 (outlining the proposed partnership and recommending its approval); Ray Bowen, *A&M Reaches Long-Standing Goal with Law School*, DALLAS MORNING NEWS, Apr. 12, 1998, at 6J, 1998 WL 2527822 (discussing the benefits of the affiliation and reasons for pursuing the arrangement between Texas A&M and South Texas College of Law).

The Texas Higher Education Coordinating Board claimed authority to decide whether to approve the affiliation. *S. Tex. Coll. of Law v. Tex. Higher Educ. Coordinating Bd.*, 40 S.W.3d 130, 134 (Tex. App.—Austin, 2001, pet. denied). It refused to approve it. *Id.* South Texas College of Law then filed suit claiming that the Board lacked the authority to bar this arrangement. *Id.* A state district court judge held the affiliation violated Texas law. See *In re S. Tex. Coll. of Law*, 4 S.W.3d 219, 219 (Tex. 1999) (denying petition for writ of mandamus by South Texas College of Law requesting review of district court decision declaring Affiliation Agreement void). The litigation continued. On appeal, the Third Court of Appeals affirmed the judgment of the district court. *Tex. Higher Educ. Coordinating Bd.*, 40 S.W.3d at 132 (affirming the district court judgment declaring the affiliation impermissible without the Board's approval). The Supreme Court has twice refused to hear an appeal from South Texas College of Law. See *Court Blocks A&M-Law School Affiliation/Decision Rests with Coordinating Board*, HOUS. CHRON., Mar. 22, 2002, at 39, 2002 WL 3251090 (referring to the court's ruling that affiliation requires the approval of the Board); Ron Nissimov, *Law School, A&M Get Setback in High Court*, HOUS. CHRON.,

Bar Association (ABA) announces its approval of the affiliation of the two schools, and South Texas notes that its name will be South Texas College of Law affiliated with Texas A&M University.²

Item: Kaplan Educational Centers, a division of the Washington Post Company, announces that it is opening the first cyber law school, Concord University School of Law. Its students will be taught *via* the Internet by faculty employed at ABA-accredited law schools, as well as by its own faculty, and its graduates will be permitted to take the California bar examination.³

Item: The University of Detroit Mercy School of Law announces in late October 1998 that due to a precipitously declining

Nov. 16, 2001, at 48, 2001 WL 23643696 (noting separate refusals of the Texas Supreme Court to overturn decisions holding affiliation requires approval of Coordinating Board).

2. Lydia Lum, *ABA Approves South Texas, A&M Affiliation/Law School's Accreditation Remains Intact*, HOUS. CHRON., Jan. 5, 1999, at 15, 1999 WL 3967569.

3. See William M. Bulkeley, *Education: Kaplan Plans a Law School Via the Web*, WALL ST. J., Sept. 16, 1998, at B1, 1998 WL-WSJ 18984587 (explaining the development of the web based program); see also *Miller's Web?*, WALL ST. J., Feb. 25, 1999, at B4, available at 1999 WL-WSJ 5442102 (reporting that Harvard Law School Professor Arthur Miller will teach a course on civil procedure for Concord). As reported by Fortune Magazine:

Concord may be the only law school to offer all its courses through the Internet. Students can register for the four-year program, which costs about \$17,000, at any time, then log on at their convenience to read course materials and post comments to discussion groups. Because the school is not accredited by the American Bar Association, graduates can practice only in California, but the university has good credentials: It is owned by Kaplan Educational Centers, a unit of The Washington Post Co.

Life on the Web For Matters of Life, Liberty, and the Pursuit of a Nicer Job, There's Help on the Internet, FORTUNE MAGAZINE SPECIAL, Nov. 16, 1998, 1998 WL 21117730.

Concord asked Arthur Miller of Harvard Law School to produce a series of videotaped lectures on civil procedure to be delivered from Concord's web site. See Amy Dockser Marcus, *Seeing Crimson: Why Harvard Law Wants to Rein in One of Its Star Professors*, WALL ST. J., Nov. 22, 1999, at A1, available at 1999 WL-WSJ 24922920 (explaining the controversy surrounding the proposed video lectures). In response, Harvard modified its faculty manual to prevent its professors from teaching, researching, or acting as salary consultants to an Internet on-line school absent special permission. See Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841, 849-50 (2000) (detailing Harvard's reaction to the proposed video lectures). A faculty member may obtain special permission by getting the Dean's consent and then receiving the approval of the corporate body that governs Harvard University. *Id.* See also Jill Schachner Chanen, *Earn a J.D. on Your Home PC*, A.B.A. J., Aug. 1999, at 88 (reporting on Concord University School of Law); Tony Mauro, *Justice Scrutinizes Long-Distance Learning*, TEX. LAW., Sept. 27, 1999, at 43 (reporting on speech of Supreme Court Justice Ruth Bader Ginsburg indicating skepticism concerning ability to learn law solely through distance learning).

student enrollment, it is laying off up to seven of its twenty-five tenured and tenure-track faculty.⁴

Item: In Spring 1999, two schools, the University of St. Thomas and Ave Maria School of Law, announce they will open Roman Catholic faith-based law schools.⁵

Item: In early 2001, Hamline University School of Law announces that it is going to open the second weekend law degree program available in the United States beginning in Fall 2001.⁶

Item: Stanley Fish, holder of a joint appointment at Duke University in the English department and law school, accepts an offer at a salary of \$230,000 to become Dean of the College of Arts and Sciences at the University of Illinois at Chicago.⁷

4. George Bullard, *U-D Law School Downsizes*, DET. NEWS, Oct. 27, 1998, at D1, 1998 WL 3842588; see also Elizabeth Amon, *Detroit Mercy Shrinking to Fit Declining Law School Enrollment*, NAT'L L.J., Mar. 8, 1999, at A23 (detailing the downsizing process); George Bullard, *Teamsters Organizing U-D Profs: School May Claim They're Managers. NLRB Hearing Dec. 1*, DET. NEWS, Nov. 24, 1998, at D1, 1998 WL 3845695 (outlining proposed layoffs); Michael D. Goldhaber, *Anno Domino's: A Catholic Law Firm Crusade*, NAT'L L.J., Mar. 8, 1999, at A4 (noting departure of several junior faculty members from University of Detroit Mercy caused by concern about layoffs).

5. See DAVID T. LINK & PATRICK J. SCHILTZ, *What Makes UST Law a Catholic Law School?*, in BIRTH OF A LAW SCHOOL (2000), available at <http://jurist.law.pitt.edu/idea0800.htm> (last visited Oct. 28, 2002) (discussing the Catholic attributes of the newly formed University of St. Thomas School of Law) (on file with author); Robert F. Drinan, *Pizza Bucks Back Hyper-Catholic Law School*, NAT'L CATH. REP., May 7, 1999, at 18, 1999 WL 8554244 (noting decision of Tom Monaghan to dedicate \$50 million to open Ave Maria School of Law in Ann Arbor, Michigan); Ruth Singleton, *Pizza Magnate Will Fund Catholic Law School in Ann Arbor Area*, NAT'L L.J., May 3, 1999, at A15, available at 1999 WL 8554244 (stating that the Ave Maria School of Law is scheduled to open in Fall of 2000).

6. 53 LAW SCH. NEWS 8 (2001). The first ABA-accredited law school to offer a weekend program leading to a law degree was Thomas Cooley Law School. See THOMAS M. COOLEY LAW SCH., *Academics*, at <http://www.cooley.edu/academics/academicenvironment.htm> (last visited Oct. 5, 2002). Both Hamline University and Thomas Cooley Law School opened weekend law programs after another competitor entered their geographic market.

7. David Yaffe, *The Department That Fell to Earth: The Deflation of Duke English*, LINGUA FRANCA, Feb. 1999, at 24, 31; see also Collin Levey, *Free Agency Goes to College and Profs Cash In*, WALL ST. J., Feb. 19, 1999, at W13, available at 1999 WL-WSJ 5441357 (identifying the \$230,000 salary offer as the incentive for Stanley Fish to join the University of Illinois at Chicago).

Item: In a letter dated December 30, 1998 addressed to “Dear Law Faculty,” seven members of the Harvard Law School faculty⁸ tout “the development of a new, computer-based set of instructional materials, designed (primarily) for teaching first-year law students.”⁹ The authors of the letter note that “[u]ntil at least December 31, 1999, there will be no charge for access to any of the modules.”¹⁰ The sponsor of this project, called *The Bridge*, is Lexis-Nexis.¹¹

I.

Having entered a new millennium, it seems appropriate to engage in a bit of prophesying: The conscious use of “branding” in legal education will utterly transform it.¹² Although product (or service) differentiation among law schools has existed for years,

8. One of the seven is emeritus. *About the Authors, THE BRIDGE*, at <http://web/lexis.com/xchange/content/bridge/introduction/authors.txt.htm#Chayes> (last visited Oct. 28, 2002).

9. Letter from Morton Horwitz, Editor-in-Chief et al., *The Bridge*, Lexis Publishing, to Law Faculty (Dec. 30, 1998) (on file with the author).

10. *Id.*

11. As far as I could tell from the letter, there is no registered trademark for *The Bridge*. I didn’t check at the Patent and Trademark Office. So-called bridge sessions for some first year sections at Harvard Law School were a fixture during the mid-1980s.

12. Hal Lancaster, *Today’s Free Agents Work at Twitch Speed: A Buzzword Glossary*, WALL ST. J., Oct. 6, 1998, at B1, 1998 WL-WSJ 18986897.

During an interview earlier this year, an M.B.A. candidate told me he was working on his “brand.” After a brief image of charred flesh, I realized he was trying to create a brand name for himself, much as marketers do for products.

Further, I discovered, branding is a red-hot career buzzword, promoted even by the great thoughtmeister himself, Tom Peters. Which is why it leads off my fifth annual compilation of business buzzwords that can affect your career. Remember that jargon obfuscates, rather than clarifies. Don’t try these at the office.

Branding has become popular with senior executives trying to distinguish themselves from more generic colleagues. The brand-conscious executive’s resume looks more like a marketing brochure. It chronicles a preference for high-profile projects—called “commercials”—over lofty job titles.

Rose Polidoro-Taylor, executive vice president of marketing for New York’s Channel One Network, which airs educational and news programs to secondary schools, defines personal branding as “the creation of a meaningful presence and a highly visible impression” in the market.

Of course, that means developing a reputation for memorable work. But, it also means doing little things that establish an image. Ms. Polidoro-Taylor, for example, sends out an “enormous number” of handwritten thank you, congratulatory and birthday notes to clients and colleagues. What does that have to do with her brand image? “It says something about service,” she says. “It says you listen and remember.”

those differences have long been downplayed by law schools, the ABA, and the Council of the ABA's Section on Legal Education and Admissions to the Bar, which acts as the accrediting body for American law schools. The fact that the over 180 law schools accredited by the ABA exhibit widely varying strengths and weaknesses seems unobjectionable. But the long-time accrediting body for law schools has refused to assess those differences among law schools.¹³ The one concession by the ABA to differences among law schools, other than the imprimatur of ABA accreditation itself, is hardly a concession at all: "Qualities that make one kind of school good for one student may not be as important to another."¹⁴ Despite noting that before deciding where to attend law school, a "[p]rospective law student [] should consider a variety of factors,"¹⁵ the ABA offers no further guidance.¹⁶ It leaves unstated

Id. The book Lancaster is referring to is TOM PETERS, *THE CIRCLE OF INNOVATION: YOU CAN'T SHRINK YOUR WAY TO GREATNESS* (1997). Among other thoughts, Peters suggests that "in an increasingly crowded market, product/service distinction alone is (increasingly) not enough. IF YOU BUILD IT (A G-R-E-A-T IT), THEY WILL NOT NECESSARILY COME. A/the answer: branding." *Id.* at 335. Although rather difficult to follow Peters's point, he provides the following definition of branding: "Branding means nothing more (and nothing less!) than creating a distinct personality . . . and telling the world about it . . . by hook or by crook." *Id.* at 339 (alteration in original). In addition to institutional "branding," Peters also urges individuals to create their own "brand equity." *Id.* at 191.

13. At its 1999 midyear meeting, the ABA agreed to give up its role as the final arbiter of law school accreditation. *ABA Says Let Independent Counsel Law Die; Tackles Lawyer Discipline, Health Care Issues*, 67 U.S.L.W. 2477, 2478 (1999). Changes in Department of Education regulations implementing the Higher Education Act required a national accrediting agency to be "separate and independent" from its professional association. *Id.* After negotiations with the Department of Education, which threatened an enforcement action, the ABA agreed that the final arbiter of law school accreditation will be the Council of the Section of Legal Education and Admissions to the Bar. *Id.* The ABA's House of Delegates will be permitted to consider all matters related to accreditation, and make specific objections to decisions made by the Council, but the Council will make all final decisions on accreditation matters. *Id.*

14. AM. BAR ASS'N, *A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1994*, at 1 (1995); *see also* OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 11 (Rick L. Morgan & Kurt Snyder eds., 1999) (stating that the aspects of a school that a student is interested in depends upon the situation of the student); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 9 (Rick L. Morgan & Kurt Snyder eds., 2001) (quoting the American Bar Association's Section on Legal Education and Admission to the Bar).

15. AM. BAR ASS'N, *A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1994*, at 1-2 (1995).

16. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 11 (Rick L. Morgan & Kurt Snyder eds., 1999) (offering an "illustrative sampling . . . of some of the variables that applicants find important in choosing a law school"). Although

what particular factors a prospective law student should consider, refuses to rank law schools, and disclaims the validity of any ranking of law schools.

The reason that these homogenizing efforts have largely succeeded until recently is due to the rise and development of the modern (that is, post-1870) law school, the effect of ABA accreditation requirements as a barrier to entry, and the massive increase in those interested in obtaining a legal education in the last thirty years.

These factors tilted the relationship between the law school and the law school applicant in favor of the former. A recent shift in that balance of power to the consumers of legal education has led law schools consciously to brand themselves, claiming an educational distinctiveness in selling their services to those consumers. Branding is an attempt to create a desire in targeted prospective students to join the branded law school. Although a law school may brand itself by claiming it delivers an excellent legal education, branding is about distinctiveness, not quality.

A. *The Development of the Modern Law School*

The law school model successfully championed by Harvard Law School Dean Christopher Langdell and Harvard University President Charles Eliot beginning in 1870 not only triumphed over all other competitors, but it remains with us today.¹⁷ Langdell's vision of law as a science¹⁸ necessitated a "new method of teaching, . . .

printed in the *Official American Bar Association Guide to Approved Law Schools*, these variables are from law school deans, not the ABA. *Id.*

17. See WILLIAM P. LAPIANA, *LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION* 79 (1994) (discussing the developments at Harvard Law School and noting that the likelihood of success of the Harvard model was often in doubt in the late 19th century); see also JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 74-101 (1976) (discussing the basis for Harvard's teaching methods); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 39 (1983) (noting Harvard's leading role in creating the teaching method eventually employed by almost all law schools); Anthony Chase, *The Birth of the Modern Law School*, 23 *AM. J. LEGAL HIST.* 329 (1979) (detailing the rise of the Harvard instructional model).

18. Langdell's understanding of "law as a science" has been the subject of several excellent works. See generally Thomas C. Grey, *Langdell's Orthodoxy*, 45 *U. PITT. L. REV.* 1 (1983) (discussing Langdell's perception of the science of law which consisted of given principles); Michael H. Hoeflich, *Law and Geometry: Law and Science from Leibniz to Langdell*, 30 *AM. J. LEG. HIST.* 95 (1986) (tracing the development of Langdell's concept of

new structural standards, and [a] new type of educator."¹⁹ The case method replaced the lecture method of teaching, and that development required the professionalization of law teaching.²⁰ As Jerold Auerbach put it, "As long as lectures provided the staple of legal education, teaching was an avocation rather than a profession; to qualify, an aspirant displayed credentials earned outside the law school."²¹ The case (or Socratic) method of teaching demanded full-time teachers, not those whose authoritativeness was based on their work as judges or practitioners.²² Further, understanding the science of law required course instruction in professional legal studies. The Harvard model that predominated concerned the study of private law subjects.²³ Instead of a curriculum studying Moral and Political Philosophy, Elementary and Constitutional Principles of the Municipal Law, the Law of Nations, or Civil and Roman Law, as proposed by David Hoffman in 1817,²⁴ the most important subjects a century later were property, equity, contracts, the law of organizations (agency, partnership, corporations), pleading, and evidence.²⁵ Although the legal realist move-

law as science); Marcia Speziale, *Langdell's Concept of Law as Science: The Beginning of Anti-Formalism in American Legal Theory*, 5 VT. L. REV. 1 (1980) (explaining the elements of law as science). Professor LaPiana notes, "What Langdell meant by legal science is easier to paraphrase than understand." WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION 55 (1994). In Professor LaPiana's view, "Langdell was still the Baconian scientist, examining the cases, discriminating between the well and the poorly reasoned, extracting principles from them through inductive reasoning, and then ordering the principles to aid understanding." *Id.* at 56.

19. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 39 (1983).

20. See John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 21 J. LEGAL EDUC. 311, 314-16 (1985) (detailing the development of modern legal studies).

21. JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* 75 (1976). The case method as developed at Harvard Law School was as efficient as the lecture method in terms of economies of scale. A student-teacher ratio of 50-1 existed at Harvard in the early 1900s. ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD: A HISTORY OF IDEAS AND MEN, 1817-1967*, at 215 (1967).

22. See John Henry Schlegel, *Between the Harvard Founders and the American Legal Realists: The Professionalization of the American Law Professor*, 21 J. LEGAL EDUC. 311, 315 (1985) (stating that law schools staffed by academic professors triumphed over schools staffed with lawyers and judges).

23. ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 458 (R.H. Helmholtz & Bernard D. Reams, Jr. eds., William S. Hein Co. 1986) (1921) (comparing the development of curriculum at Harvard from 1835-36 to 1916-17).

24. *Id.* at 456 (charting Hoffman's 1817 curriculum).

25. See *id.* at 454 (tracing changes in the curriculum).

ment helped solidify the teaching of public law subjects,²⁶ Harvard continued to require only private law courses in the late 1930s.²⁷ Even today, nearly all schools teach Property, Contracts, Torts, and Civil Procedure as first-year required courses, and the spine of the law school curriculum remains both remarkably uniform and similar to the curriculum of half a century ago.²⁸ Although it is almost certain that such private law subjects are taught very differently today than they would have been fifty (or even twenty-five) years ago, the apparent similarity of legal instruction of yesterday and today is striking.

B. *The Influence of the ABA in the Development of Legal Education*

When Alfred Z. Reed was commissioned in 1913 by the Carnegie Foundation to study the state of legal education, ABA leaders were convinced his report (the “Reed Report”) would propel efforts to make legal education requirements throughout the states more demanding as well as more uniform, which occurred in medical education after a similar study²⁹ was published.³⁰ As early as 1900, the creation of the Association of American Law Schools

26. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 159-60 (1983) (stating that public law dominated curricular growth).

27. LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 63-64 (1986).

28. The two public law courses that have made their way onto the required course list at most law schools are Criminal Law and Constitutional Law. The bar examination may also play a role in this constancy of subject matter. For example, the Multistate Bar Examination (MBE), which applicants to the bar in over thirty states are required to pass, tests students on the common law subjects of Contracts, Property, Torts, and Evidence, as well as the public law subjects of Criminal Law and Constitutional Law.

29. The Flexner report was published in 1910 and was credited with improving the standards of medical education, in part by reducing greatly the number of medical schools and medical students. See ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA* (1910); see also SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 25 (1993) (noting that “[t]he Flexner report had resulted in reducing the number of medical schools that operated part-time, were poorly equipped, or had inferior faculty”). But see PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE* 118 (1982) (arguing that “changing economic realities, rather than the Flexner report, were what killed so many medical schools in the years after 1906”).

30. *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679 (1921); see SUSAN K. BOYD, *THE ABA’S FIRST SECTION: ASSURING A QUALIFIED BAR* 25 (1993) (describing the request for a study of legal education by the Committee on Legal Education and Admissions to the Bar).

(AALS), which championed higher standards for existing law schools, portended a disaggregation of law schools based on differences in type and purpose.³¹ Instead, when Reed finally published his research in 1921, he called for the formal recognition of a differentiated bar, one stratified based on both the type of legal education obtained and the lawyer's work in the public profession of the law.³²

A year before publication of the Reed Report, the ABA's Section of Legal Education and Admissions to the Bar, prodded by legal academics, created a Special Committee on Legal Education.³³ That committee, called the Root Committee after its chairman, Elihu Root, rejected the idea of a differentiated bar.³⁴ The Root Committee, given advance copies of the Reed Report, published its findings promoting a unitary bar shortly before the Reed Report was published in August 1921.³⁵ Adopting the Root Committee's report, the ABA created several bare-bones standards for law schools and listed the schools that complied with those standards.

In 1927, when the ABA hired H. Claude Horack as an adviser to the Section on Legal Education, no state required its applicants to the bar to have graduated from an ABA-accredited law school.³⁶ All but Indiana required its applicants to pass a written bar exami-

31. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 96 (1983) (citing introduction of requirements by the ABA that those seeking admittance to the bar possess a high school diploma and complete a three year course of study at a law school).

32. ALFRED ZANTZINGER REED, *TRAINING FOR THE PUBLIC PROFESSION OF THE LAW* 238 (R.H. Helmholz & Bernard D. Reams, Jr. eds., William S. Hein Co. 1986) (1921) (opining, for example, that the more highly trained lawyers would "undertake the task of making the law of the community better," while those less highly trained would administer "the law as it is").

33. See *Proceedings of the Section of Legal Education and Admissions to the Bar*, 45 A.B.A. REP. 465, 465-66 (1920) (reporting on the formation of the committee and election of members to serve on the committee).

34. See *Report of the Special Committee to the Section of Legal Education and Admissions to the Bar of the American Bar Association*, 46 A.B.A. REP. 679, 681-83 (1921) (rejecting expressly the proposal for a differentiated bar and recommending instead that all applicants for bar admission be graduates of a law school).

35. See SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 26 (1993) (noting that "[t]he Root Committee was given advance copies of Reed's book").

36. See *id.* at 28-29 (discussing the recognition of law schools that met the Standards set forth by the ABA).

nation.³⁷ Reed issued a second report in 1928, which criticized the ABA's and AALS's desire for uniformity in legal education.³⁸ Within a decade, likely prompted by both the ABA and the consequences of the Great Depression, twenty states required each bar applicant to be a graduate of an ABA-accredited law school.³⁹ In 1930, the ABA sponsored the creation of the National Conference of Bar Examiners,⁴⁰ which was to draft bar examination questions "that looked like exam questions in the 'better' law schools."⁴¹ Despite the efforts of several "night school" deans in the late 1920s and early 1930s, the drive to uniformity, which included the crowding out of proprietary schools, continued.⁴²

By the end of the 1930s, the percentage of law students at law schools not approved by the ABA had decreased to 36.3%, and most states had adopted a requirement that applicants to the bar attend two years of college before attending law school.⁴³ The President of the AALS suggested membership in the AALS was helpful in achieving law school distinction, for "in the competition between schools for students the non-member carries a heavy handicap."⁴⁴

By the late 1970s, nearly all states required their bar applicants to be graduates of ABA-accredited law schools.⁴⁵ The entwine-

37. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION FROM THE 1850S TO THE 1980S* 174 (1983).

38. *See id.* at 174 (citing ALFRED ZANTZINGER REED, *PRESENT DAY LAW SCHOOLS* (Arno Press 1976) (1928)).

39. *See* RICHARD L. ABEL, *AMERICAN LAWYERS* 55 (1989) (noting that the number rose from none in 1927 to nine in 1935, to twenty-three in 1938, to forty-six in 1979, and to forty-eight in 1984); *see also* SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 40 (1993) (noting the Territory of Hawaii was the first governmental entity to adopt such a requirement, followed by New Mexico).

40. Today, the National Conference of Bar Examiners (NCBE) is best known for the Multistate Bar Examination (MBE), the Multistate Professional Responsibility Examination (MPRE), and several other standardized examinations used in testing bar applicants.

41. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION FROM THE 1850S TO THE 1980S* 177 (1983).

42. *See id.* at 175 (quoting Suffolk Law Dean Gleason Archer and John Marshall Law School Dean Edward T. Lee, both deans of large, independent law schools, who expressed dissatisfaction with the effects of ABA Standards).

43. *See id.* at 180. In addition, several states tried to eliminate unapproved law schools. *See* RICHARD L. ABEL, *AMERICAN LAWYERS* 54-55 (1989) (naming California, Ohio, Texas, and Tennessee specifically).

44. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION FROM THE 1850S TO THE 1980S* 180 (1983) (quoting 1940 AALS PROCEEDINGS 14).

45. California is the most notable exception to this claim.

ment of the ABA, as accrediting agency, and state law examining boards, joined by the Harvardization of the content of a student's legal education, had led to an astonishing uniformity in legal education.

C. *Changing Standards and the Baby Boom Generation*

After failed efforts in 1968 and 1969, the ABA's 1921 Standards were supplanted by standards adopted in 1973.⁴⁶ When the revised ABA Standards (Standards) were proposed in the late 1960s, the proposal's most vociferous opponent was John Marshall Law School Dean, Noble W. Lee. Noble Lee was the son of Edward T. Lee, one of the founding lawyers of the John Marshall Law School. Edward Lee offered a populist message in the training of lawyers, a message taken to heart by his son.⁴⁷ John Marshall Law School was an independent law school that prided itself on its practical training for persons of modest means, and Lee believed the new Standards were an attack on John Marshall's existence, a reprise of events over 40 years earlier involving Lee's father Edward. Lee was instrumental in preventing, for a time, the implementation of these proposed Standards, but he eventually accepted the 1973 Standards, apparently after one of Lee's sympathetic acquaintances convinced him that the ABA was not engaged in a conspiracy to destroy John Marshall.⁴⁸ Although at least one of the drafters of the 1973 Standards stated, "The overriding principle guiding our hopes was to avoid both arbitrary limitation on the availability of legal education and restriction on the capacity of the law school to experiment and innovate,"⁴⁹ the percentage increase in the number of law students and applicants to law schools⁵⁰ far

46. See SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 70, 74-75 (1993) (describing how the 1973 Standards were adopted).

47. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION FROM THE 1850s TO THE 1980s* 130 n.62 (1983) (believing that everyone should have access to legal representation regardless of their background "through advocates of their own kind").

48. See SUSAN K. BOYD, *THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR* 70, 73-76 (1993) (recounting how George Leighton helped convince Lee to accept the 1973 Standards).

49. See *id.* at 75 (quoting Richardson W. Nahstoll, a lawyer from Portland, Oregon).

50. I define as "law students" those persons enrolled in a program leading to the first degree in law, ordinarily the juris doctor, or J.D. I do not mean to include other students enrolled in law schools. The percentage of students enrolled in law schools other than J.D. students has never exceeded 6% of the entire law student population. See OFFICIAL

outpaced the increase in the number of law schools between 1973 and the early 1990s.⁵¹

Several standards adopted in 1973 by the ABA made it more difficult for institutions to establish a law school. Standard 402(a) required a law school to employ at least six full-time faculty members, as well as a dean and full-time law librarian. Other standards mandated relatively expansive law school library requirements, and required the existence of adequate physical facilities under the exclusive control, and reserved for the exclusive use of the law school.⁵² These Standards and others were formidable, but not insurmountable, barriers to entry into the market.⁵³ However, the Standards were sufficiently high that some institutions decided to forego establishing law schools.⁵⁴ Three applicants were denied ABA accreditation in the late 1980s.⁵⁵ On the other hand, the number of accredited law schools increased by twenty-eight between 1972, the year before the Standards were adopted, and 1994,

AMERICAN BAR ASSOCIATION GUIDE TO LAW SCHOOLS 453 (Rick L. Morgan & Kurt Snyder eds., 2001) (noting that in 1999 the percentage of non-J.D. students was 5.31%).

51. The increase in the number of ABA-accredited schools between 1973-74 (151) and 1997-98 (178) was 27, approximately 18%, and the increase in students during that same time was 24,211 (125,886-101,675), or about 24%. See OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999) (analyzing the Legal Education and Bar Admissions Statistics, 1963-1998 table).

52. AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 601-04, 701-02 (1991).

53. See AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 701 (1991) (requiring that the law school have a physical plant adequate for its program and its anticipated growth). Standard 701 was interpreted in 1977 to require a law school, or its parent university, to own its physical plant. See *id.* A recent statement by South Texas College of Law Dean Frank T. (Tom) Read indicates the cost of opening a new law school is quite substantial. Read is quoted as saying: "I would think that starting a law school from scratch, meaning building new buildings, hiring staff and doing all the things involved with that would cost anywhere from \$40 to \$60 million." See Chris Gibson, *Texas Christian U.: TCU Law School Talks Resemble Past Cases*, DAILY SKIFF (Texas Christian University), Apr. 16, 2001, 2001 WL 18398445.

54. See Harry First, *Competition in the Legal Industry (II): An Antitrust Analysis*, 53 N.Y.U. L. REV. 1049, 1053, 1070 n.128, 1074 (1979) (concluding eight universities decided not to open law schools in the late 1960s when they realized the cost of the tightened Standards). The ABA granted a two-year grace period for those accredited law schools not in compliance with the Standards when they were adopted in February, 1973. SUSAN K. BOYD, THE ABA'S FIRST SECTION: ASSURING A QUALIFIED BAR 76 (1993).

55. See RICHARD ABEL, AMERICAN LAWYERS 57 (1989) (citing Old College, Nevada School of Law, Western State University, and St. Thomas University College of Law as institutions rejected for accreditation).

the year before the ABA settled an antitrust suit filed by the Justice Department.⁵⁶

Finally, law schools were willing to bind together because business was booming. In 1970, the first members of the baby boom generation generated a 21% increase in law students, a population that increased by another 17% the next year.⁵⁷ The number of women enrolled in J.D. programs at ABA-accredited law schools in Fall 1963 was 1,739, or 3.7% of all such students.⁵⁸ That number rose to 62,476, or 48.9%, in Fall 2001.⁵⁹ The total number of minority law students rose from 5,568 in 1971 to 26,257 in 2001.⁶⁰ In 1990, the number of law school applicants peaked at just below 100,000.⁶¹ One result of this voracious demand for a legal education was a doubling of the number of law students between 1970 and 1991.⁶²

56. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999) (citing Table, Legal Education and Bar Admissions Statistics, 1963-1998). On the antitrust litigation between the ABA and the United States, see *infra* text and accompanying notes.

57. *Id.* The number of law students at ABA-approved law schools in 1969-70 was 64,416, and increased to 78,018 and 91,225 students the following two years. *Id.* Less than 15% of that increase was accounted for by women. The increase appears equally due to a rise in the admission of students to law school and a decrease in student attrition.

58. *Id.*

59. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 816 (Wendy Margolis et al. eds., 2003).

60. Compare OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 458 (Rick L. Morgan & Kurt Snyder eds., 1999) (stating that the total minority enrollment for 1971 was 5,568), with OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 816 (Wendy Margolis et al. eds., 2003) (reporting that the total minority enrollment for 2001 was 26,257). This number excludes Puerto Rican students enrolled at any of the three ABA-approved law schools in Puerto Rico. *Id.* Apparently there is no data on minority law school enrollment prior to 1971.

61. See Law Services History Information, prepared for the author by Robert Carr, Law School Admissions Council (Jan. 29, 1999) (on file with author) (reporting the total number of ABA applicants for 1990 was 99,300).

62. See OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999) (illustrating the number of law students in 1970 was 78,018 and 129,580 in 1991). The law student population totaled 59,498 in 1968-69. *Id.* A doubling of *that* population took place in 1980-81, a mere 12 years later, when the law student population reached 119,501. *Id.* If you begin with the year 1963-64, just before the first baby boomers reached college age, the number of law students was 46,666, a figure doubled in 1972-73, nine years later. *Id.* Although this increase in the number of students enrolling in J.D. programs was accounted for largely by enrollment increases at existing law schools, the number of ABA-accredited law schools increased by fourteen. *Id.* The number of ABA-approved law schools offering a first degree in law (usually the Juris Doctor) increased from 136 in 1967 to 186 in 2002. See AM. BAR ASS'N, *ABA Approved*

D. *The End of La Dolce Vita*

During the time of plenty, law schools increased substantially the number of faculty and administrators. Over one thousand full-time law faculty members were added between 1984 and 1991, yet the total increase in the law school student population during that time was slightly less than 10,000 students.⁶³ More startling is that between 1991 and 1996, when the number of law students remained constant, the number of deans and administrators increased from 1,358 to 3,028.⁶⁴ Although the number of law students has remained roughly the same since 1991, the number of applicants

Law Schools, at <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited Sept. 9, 2002) (identifying a total of 188 institutions, including one offering an officer's resident graduate course and another with a branch campus approved by the American Bar Association as of August 13, 2002). That increase, however, narrows considerably when looking at the period 1970-91. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999). The number of ABA-accredited law schools was 146 in 1970, and 176 in 1991. *Id.*

63. Compare A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1984, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS 66 (1985) (reporting full-time teachers in approved law schools in 1984 totaled 4,461), with AM. BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1991, at 67 (1992) (reporting that the number of teachers in approved law schools was 5,555). The number of full-time teachers largely remained stable during the 1990s. See, e.g., OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 451 (Rick L. Morgan & Kurt Snyder eds., 2001) (indicating that the total number of full-time professors was 5,586 in 1999); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 455 (Rick L. Morgan & Kurt Snyder eds., 1999) (indicating that there were 5,395 full-time professors in 1997). The number of J.D. law students as of Fall 1984 was 119,847 and 129,580 in 1991. *Id.* at 456. That number has remained largely stable since 1991, with 125,184 students in J.D. programs in Fall 1999, and 132,276 total students, including post-J.D. and other students. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 454 (Rick L. Morgan & Kurt Snyder eds., 2001). No law school currently has a student-teacher ratio of less than 10 to one, even though Interpretation 402-1 of the STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS now permits a school to include persons other than full-time tenured or tenure-track professors in computing this ratio. See AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 402-1, <http://www.abanet.org/legaled/standards/chapter4.html> (last visited Sept. 9, 2002) (allowing that those teachers employed full-time on a tenure track or its equivalent to count in computing the student/faculty ratio). During the 1984-91 period, when the student-teacher ratio was more strictly interpreted, such ratios were higher. Thus, the addition of over 1,000 full-time professors cannot be explained simply as accounting for the additional number of students.

64. AM. BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1991, at 67 (1992); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 451 (Rick L. Morgan & Kurt Snyder eds., 1998). That number continued to rise between 1996 and 2001. In Fall 2001, the number of deans and administrators had risen to 3,788, an increase of 24% from 1996, and a stunning increase of 179% since 1991. See

dropped by approximately 28,000 by the latter part of the 1990s.⁶⁵ During the same time, the number of ABA-accredited law schools increased from 175 in 1990 to 186 by August 2002.⁶⁶

As the number of applicants began plummeting, two important developments occurred: the ABA settled an antitrust suit filed by the Justice Department, and *U.S. News & World Report* found a profitable niche in publishing rankings of graduate institutions in law and other fields.

1. The Consent Decree

In June 1995, after a year-long investigation, the Justice Department filed suit against and announced a proposed settlement with the ABA.⁶⁷ The Department of Justice alleged in its complaint that the ABA's accreditation of law schools violated the Sherman Act.⁶⁸ The proposed consent decree barred the ABA from (1) conditioning accreditation on compensation to law school faculty and administrators; (2) collecting or disseminating data on salaries of faculty and administrators; (3) using faculty or administrator compensation in connection with any review of a law school; and (4) enforcing any rules that prohibited a law school from (a) enrolling a member of the bar or graduate of a state-accredited law school in an LL.M. or other post-J.D. program, (b) accepting a student trans-

OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 816 (Wendy Margolis et al. eds., 2003). This in a decade in which student population barely changed.

65. See Law Services History Information, prepared for the author by Robert Carr, Law School Admissions Council (Jan. 29, 1999) (on file with author) (reporting that the total number of applicants in 1990-91 was 99,300 and 72,300 in 1996-97); see also Christine Riedel, *The Big Squeeze*, NAT'L JURIST, Sept. 1996, at 20-22. The decline in the number of applicants, forecast as continuing for the short-term, appears to have ended for those applicants applying to law school for admission in 2002-03.

66. This number of ABA accredited law schools counts the two law campuses of Widener University as one school, and excludes the Judge Advocate General School of Law, which does not offer a first degree in law. AM. BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1991, at 67 (1992); AM. BAR ASS'N, *ABA Approved Law Schools*, at <http://www.abanet.org/legaled/approvedlawschools/approved.html> (last visited on Nov. 14, 2002). Whether this unusual turn is related to the settlement by the ABA of the antitrust suit filed against it by the Department of Justice is discussed below.

67. See 60 Fed. Reg. 39,421 (Aug. 2, 1995) (reporting the proposed final judgment in a suit against the ABA for violating the Sherman Act); see also *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 435 (D.D.C. 1996) (entering modified final judgment).

68. 60 Fed. Reg. at 39,424 (Aug. 2, 1995). See generally Andy Portinga, Note, *ABA Accreditation of Law Schools: An Antitrust Analysis*, 29 U. MICH. J.L. REFORM 635 (1995-96) (reviewing Massachusetts School of Law's antitrust claim against the ABA).

ferring from a state-accredited law school and crediting that student with up to one-third of the credits necessary to graduate, and (c) organizing as a for-profit entity.⁶⁹ In addition, the ABA agreed to revise the membership of its Council of the Section of Legal Education and Admissions to the Bar and its Accreditation and Standards Review Committees, reducing the percentage of law school deans and faculty in each body to less than 50%.⁷⁰ Finally, the ABA agreed to create a Special Commission, the Wahl Commission, to assess whether to revise its Standards, Interpretations, and Rules in several areas. This assessment included evaluating Standards that (1) placed a limit on the number of weekly faculty teaching hours, (2) may have mandated an institutional duty to provide sabbaticals and leaves of absence, (3) required stringent limitations on the calculation of student-faculty ratios, (4) required the school to own its physical facilities, (5) limited university efforts to draw operating funds from law school resources, and (6) prohibited offering bar preparation courses for credit.⁷¹

The Wahl Commission's suggestions, nearly all of which were adopted by the ABA,⁷² were as follows: accreditation requirements limiting the maximum number of weekly teaching hours for faculty members were eliminated; language in the Standards concerning leaves of absence or sabbatical leaves was also eliminated; a revised manner of calculating a student-faculty ratio was sug-

69. 60 Fed. Reg. at 39,422 (Aug. 2, 1995); see also *Am. Bar Ass'n*, 934 F. Supp. at 436 (entering modified final judgment).

70. 60 Fed. Reg. at 39,422; see also *Am. Bar Ass'n*, 934 F. Supp. at 437.

71. 60 Fed. Reg. at 39,423; see also *Am. Bar Ass'n*, 934 F. Supp. at 437-38. See generally Peter James Kolovos, Note, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689 (1996) (discussing ABA's agreement under the consent decree to establish a special committee to review the challenged standards).

72. See REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS (1995) (discussing the review process and resolutions adopted by the ABA); SUPPLEMENTARY REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS (1995) (addressing the issues raised in the antitrust suit); see also *Am. Bar Ass'n*, 934 F. Supp. at 437-38 (reviewing guidelines set by the special commission). The Wahl Commission's conclusion that a law school must continue to have and own its physical facilities was not adopted by the ABA.

gested and adopted by the ABA;⁷³ and the Standards demanding law schools maintain adequate resources to remain accredited were weakened.⁷⁴ The Wahl Commission additionally concluded bar preparation courses may be offered by law schools, but no credit may be given to a student who takes such a course.⁷⁵ The ABA rejected the Commission's conclusion that a law school must own or have the exclusive control of its physical facilities.⁷⁶

2. Ranking Law Schools

The second development of the 1990s was the emergence of an influential⁷⁷ annual report published by *U.S. News & World Report*

73. See AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 402-03, <http://www.abanet.org/legaled/standards/chapter4.html> (last visited Sept. 9, 2002) (listing guidelines set out by Standards 402 and 403).

74. See AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 201, 209(c), <http://www.abanet.org/legaled/standards/chapter2.html> (last visited Sept. 9, 2002) (discussing the policy on resources in maintaining a sound legal education program).

75. SUPPLEMENTARY REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 14-16 (1995); see AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 302(b), <http://www.abanet.org/legaled/standard/chapter3.html> (last visited Sept. 9, 2002) (emphasizing prohibition against granting credit for bar exam review courses).

76. See SUPPLEMENTARY REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 9-12 (1995) (recommending a new standard relating to law school facilities). The ABA rejected this recommendation. See AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 701, 701-4, 701-5, <http://www.abanet.org/legaled/standards/chapter7.html> (last visited Sept. 9, 2002) (requiring that law school facilities be under the direct control of the law school and for its exclusive use).

77. See Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar., 1998, at 46, 48 (quoting Laurence M. Rose, Vice Dean of the University of Miami School of Law, as saying, "I wish I had a nickel for every student who's come up to me and asked where we rank in *U.S. News*. . . . I could stop teaching and retire"). Compare *Frequently Asked Questions About the U.S. News Graduate School Rankings*, U.S. NEWS & WORLD REPORT, at <http://www.usnews.com/usnews/edu/beyond/gradrank/gbfaq.htm#faq7> (last visited Mar. 9, 1999) (providing an explanation for the presentation of the law school rankings), with *Frequently Asked Questions-Rankings*, U.S. NEWS & WORLD REPORT, http://www.usnews.com/usnews/edu/grad/rankings/about/faq_meth.htm (last visited Sept. 9, 2002) (explaining why the magazine ranks law schools, but does not rank other disciplines). *U.S. News* has made an effort to explain its rankings.

Why do the law school rankings have tiers while none of the other categories do? It is because we publish rankings for all of the law schools. For that particular degree, prospective students seem to have the greatest interest in the relative merits of individual schools. It's also an area in which, regarding the basic information that's availa-

ranking America's best professional and graduate schools, including law schools.⁷⁸ This ranking of schools was first published in 1987,⁷⁹ but came to prominence in 1990, in part due to criticism of the survey. Shortly before publication of the annual guide that year, the leaders of the ABA's Section on Legal Education, Association of American Law Schools (AALS), Law School Admissions Council (LSAC) and National Association for Law Placement (NALP), attacked *U.S. News* for publishing a survey "designed more to sell magazines than to inform the public about the relative merit of law schools."⁸⁰ When the editors responded a month later, they claimed that the purpose of its report was not simply commercial. According to the magazine, "The sad truth is that those who face the daunting prospect of raising upwards of \$75,000 to finance a legal education often can find more information on the relative merits of two \$200 compact-disk players than on the relative merits of law schools where a single course can cost [ten] times

ble and the nature of the program, there's the greatest homogeneity among schools. We rank each of the top 50 schools and put the rest in tiers because we believe the distinctions among the top schools are the clearest.),

Frequently Asked Questions About the U.S. News Graduate School Rankings, U.S. NEWS & WORLD REPORT, at <http://www.usnews.com/usnews/edu/beyond/gradrank/gbfaq.htm#faq7> (last visited Mar. 9, 1999).

Why does *U.S. News* rank certain disciplines and not others? Because we cannot survey every area of study, we make our decisions on the disciplines to rank on the basis of our judgment of how to best serve the greatest number of readers. We look at enrollment figures to determine the most popular areas of study. The disciplines we survey every year are the "big five" areas of law, business, medicine, engineering, [] and education. In these areas we collect peer assessments as well as "hard numbers" on entering students, faculty, finances, and job placement that we use to calculate quality indicators.).

Frequently Asked Questions-Rankings, U.S. NEWS & WORLD REPORT, http://www.usnews.com/usnews/edu/grad/rankings/about/faq_meth.htm (last visited Sept. 9, 2002).

78. *U.S. News & World Report* was not the first organization to rank law schools. The Gourman Report existed before 1987, but was not influential, in part because its ranking was inexplicable. In addition, the PRINCETON REVIEW STUDENT ACCESS GUIDE TO THE BEST LAW SCHOOLS, INSIDE LAW SCHOOLS, THE BUYER'S GUIDE TO LAW SCHOOLS, and PETERSON'S LAW SCHOOLS all offer law school guides. See generally David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249, 251 (1997) (noting use and existence of different ranking services).

79. See *Brains for the Bar*, U.S. NEWS & WORLD REP., Nov. 2, 1987, at 72 (establishing rankings based on responses from 183 law school deans).

80. Carl Monk, *The AALS Role in Opposing Rankings of Law Schools*, AALS NEWSL., Apr. 1997 (quoting the 1990 joint statement of ABA, AALS, LSAC and NALP).

as much.”⁸¹ In 1991, in addition to ranking the top twenty-five schools, the report included a separate list of five up-and-coming law schools.⁸² One of those schools, the Illinois Institute of Technology's Chicago-Kent College of Law, reported a 30% increase in applications following its being named to the list.⁸³ But this occurred at a time when applications were increasing at most law schools, and when the number of applicants nationally had reached a record high.⁸⁴ Possibly more indicative of the influence of *U.S. News & World Report* is that in 1994, *U.S. News* reported that approximately one in four law schools gave different (that is, more inflated) admissions data to *U.S. News* than to the ABA.⁸⁵ One law school dean speculated that some schools were spending over \$100,000 in an effort to improve their ranking.⁸⁶ When overall applications to law school were in decline in the mid-1990s, Stetson University School of Law reported an increase in applications after *U.S. News* declared that Stetson possessed the nation's best trial advocacy program.⁸⁷

81. *Top 25 Law Schools*, U.S. NEWS & WORLD REP., Mar 19, 1990, at 50, 1990 WL 3577254.

82. *America's Best Graduate and Professional Schools*, U.S. NEWS & WORLD REP., Apr. 29, 1991, 1991 WL 5154525.

83. Terry Carter, *Ranked by the Rankings*, A.B.A. J., Mar. 1998, at 46, 48.

84. See Law Services History Information, prepared for the author by Robert Carr, Law School Admissions Council (Jan. 29, 1999) (on file with author) (reporting the total number of ABA applicants for 1990 was 99,300).

85. See Ted Gest, *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 21, 1994, at 65, 70, available at 1995 WL 3113497 (reporting that 42 schools provided different data to it than to the ABA); Ted Gest, *America's Best Graduate Schools*, U.S. NEWS & WORLD REP., Mar. 18, 1996, 1996 WL 7801396 (stating there were only 13 discrepancies in the data submitted to the ABA and to *U.S. News*); see also Frank T. Read, *Legal Education's Holy War over Regulation of Consumer Information: The Federal Trump Card*, 30 WAKE FOREST L. REV. 307, 318-19 (1995) (noting that in 1995, 29 law schools reported different admissions to the ABA than to *U.S. News*, but concluding that “most of the differences were slight”).

86. See Jim Kirk, *Magazines' Rankings Rankle, Marketing Tool Draws Fire*, CHI. TRIB., Mar. 1, 1998, at 1, 1998 WL 2830400 (referring to then St. John's University law school dean Rudolph Hasl's statement that some law schools are spending up to \$100,000 annually to market themselves).

87. See Chris Klein, *Lower Tier-Dwellers Boost Their Notability by Carving out Niches*, NAT'L L.J., Mar. 31, 1997, at A12 (reporting the increase in applications received by Stetson); see also OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 51, 373 (Rick L. Morgan & Kurt Snyder eds., 2001) (reporting 1,943 applicants for the 1999 entering class); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 61, 377 (Rick L. Morgan & Kurt Snyder eds., 1999) (reporting 1,564 applicants for the 1997 entering class).

Attempting to stanch the hemorrhaging effect of law schools currying favor with *U.S. News*, NYU Law School Dean John Sexton, then-President of the AALS, organized the signing by 150 law school deans of a letter criticizing the methodology used by *U.S. News* in its ranking of law schools.⁸⁸ Before publication of *U.S. News*' 1998 edition, a number of law school deans held a press conference at which they requested that *U.S. News* discontinue its ranking of law schools.⁸⁹ In addition, the AALS sponsored an independent study testing the validity of the factors *U.S. News* used in creating its rankings.⁹⁰ The authors concluded that the *U.S. News* ranking system was deeply flawed.⁹¹

Other than provoking a rather defensive response, this rearguard action had little effect on *U.S. News*. At the time, *U.S. News* acknowledged on its web site that "rankings should not be applicants' main source of information,"⁹² but then defended the rankings and its system of rankings. In particular, the web site responded to the charges of the law school deans:

The magazine also believes that any debate about rankings should be based on an accurate description of how they are compiled. The ed-

88. Terry Carter, *Rankled by the Rankings*, A.B.A. J., Mar., 1998, at 46, 46. A later missive criticizing law school rankings was signed by 164 law school deans. See OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 8 (Rick L. Morgan & Kurt Snyder eds., 1999) (explaining that the memorandum was signed by Law School Deans to law school applicants decrying commercial ranking systems).

89. See Jim Kirk, *Magazines' Rankings Rankle, Marketing Tool Draws Fire*, CHI. TRIB., Mar. 1, 1998, at 1, 1998 WL 2830400.

90. See Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, at <http://www.aals.org/validity.html> (last visited Oct. 24, 2002) (attacking the survey's validity on several grounds); see also Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 452 & n.2 (2000) (noting problems with methodology, but also stating, "The proliferation of rankings of law schools during the 1990s is the predictable expression of the commodification of distinction and the continuing expansion of market norms in to all arenas of life in the United States").

91. See Stephen P. Klein & Laura Hamilton, *The Validity of the U.S. News and World Report Ranking of ABA Law Schools*, at <http://www.aals.org/validity.html> (last visited Oct. 24, 2002).

92. *FYI*, U.S. NEWS & WORLD REP., Mar. 2, 1998, at 80. But see *Best Graduate Schools, Law Methodology*, U.S. NEWS & WORLD REP., at http://www.usnews.com/usnews/edu/grad/rankings/about/03law_meth.htm (last visited Nov. 14, 2002) (noting "[t]he rankings of 175 accredited law schools are based on a weighted average of the [twelve] measures of quality described here," and providing percentages allocated to "quality assessment," "selectivity," "placement," and "faculty resources").

ucators make incomplete or misleading references to the U.S. News rankings, which the magazine would like to correct:

The deans say that the rankings “ignore” important factors like faculty quality and curricula. In fact, in its surveys, U.S. News asks that academics and lawyers take such factors into account.

The deans cite the magazine’s use last year of bar passage data that may have reflected differing exam dates. In fact, this year U.S. News used standardized data for this factor, which accounts for only [two] percent of a school’s overall ranking.

The deans fault U.S. News estimates for some placement data, calling them an “invention.” [In fact, the rankings make standard adjustments in accounting for graduates who don’t report their status, to provide valid comparisons among schools.⁹³

The action of the law school deans and the AALS did not succeed in binding law schools in the short term, and it most certainly will fail in the long run. The rankings are a commercial hit and *U.S. News* delights in the fact that law school applicants appear more interested in rankings than any other group of graduate school applicants.⁹⁴ In a market that is more and more competitive, law schools will continue to attempt to improve their position in those *U.S. News* rankings, including efforts that might be regarded as deceitful. One law school apparently writes to persons whose credentials are below the school’s admission standards encouraging them to apply by implying they stand a good chance of being admitted.⁹⁵ It then denies admission to most of these applicants, but the effect is that the school’s admissions “selectivity ratio” in *U.S. News* ranking is enhanced.⁹⁶ Another selective law school reduces the size of its first year class in order to maintain high LSAT and undergraduate GPA numbers, which allows it to

93. *FYI*, U.S. NEWS & WORLD REP., Mar. 2, 1998, at 80.

94. *See Rankings Reflect How the World Works*, U.S. NEWS & WORLD REP., Mar. 2, 1998, at 7 (relating the sentiments of Dean Pamela Gann of Duke University’s law school). Dean Gann was quoted as saying: “The rankings clearly matter. They are extremely widely read and extremely widely relied upon.” *Id.*; *see also* Mitchell Berger, *Why the U.S. News and World Report Law School Rankings are both Useful and Important*, 51 J. LEGAL EDUC. 487, 488 (2001) (commenting that law school applicants may ignore some important factors and focus only rankings when selecting a law school).

95. Dale Whitman, *Doing the Right Thing*, AALS NEWSL., Apr. 2002, at 1, 1 (offering an illustration of a law school’s admission process without identifying the school).

96. *Id.*

maintain its elite status.⁹⁷ Then, in order to make up for the reduction in revenues from first-year students, it encourages successful students from other, less elite law schools to transfer to the law school as second-year students.⁹⁸ Particularly for nonelite private law schools, based on the current level of private law school tuition, the decision to spend \$100,000 to move to a higher tier means as little as the annual revenue obtained from four or five students. If applicants form their decisions about where to attend law school by analyzing the rankings by *U.S. News*, as both the magazine and law school deans appear to believe, it makes much greater sense for nonelite law schools to join *U.S. News* rather than fight it.

The number of applicants still exceeds the number of seats law schools must fill. But the decline in applicants, joined by the recent increase in the number of ABA-accredited law schools, has affected law school admissions. Although there may have been little or no impact on the qualifications of students at elite law schools, it appears that the decline in number and quality of applicants has had its greatest effect on the admissions profiles at nonelite⁹⁹ schools.¹⁰⁰ Law schools have used a number of approaches to attract students, including aggressive marketing of a school's brand.

II.

A. *Student Quality and Applicant Pools*

Administrators at law schools faced with an applicant pool shrinking in both number and quality must choose among the following options: (1) reduce the size of the student body and hope to

97. *Id.* at 1-2.

98. *Id.* (describing the tactics used but not identifying school).

99. I leave to you to decide whether your alma mater (or, if you are a law teacher, your home institution) is an elite law school. I believe a substantial majority of ABA-accredited law schools fit broadly within this category. *U.S. News* ranks fifty law schools. In my view, the list of elite law schools is considerably smaller, consisting of certainly no more than fifteen schools.

100. See Patricia G. Barnes, *Cutting Classes: Many Law Schools are Shrinking Along with the Job Market*, A.B.A. J., Dec. 1995, at 26, 26 (citing as one reason law schools have given for reducing class size the desire "to protect the quality of the student body in light of a drop in law school applications"); cf. Jagdeep S. Bhandari et al., *Who Are These People? An Empirical Profile of the Nation's Law School Deans*, 48 J. LEGAL EDUC. 329, 346 n.56 (1998) (noting that "[u]nlike the upsurge in law school applications during the late 1980s, the decline during the 1990s was unevenly distributed with more serious declines at less prestigious institutions").

avoid any significant decline in the perceived quality of the student body; (2) maintain the size of the class and hope that the decline in quality is not an actual decline; or (3) take steps to maintain both the size of the class and the quality of the student body.

A law school's reduction in the size of the student body may allow it to avoid any steep decline in the perceived quality of its matriculating students.¹⁰¹ Even if it does,¹⁰² however, this option has dramatic revenue consequences for private law schools, most of which are heavily dependent on tuition.¹⁰³ Assuming a constant (and relatively modest!) tuition of \$15,000/year, reducing an entering class by 10 students will result in a decline of \$900,000 in revenue over the course of three years, and \$450,000 in revenue each year thereafter. Thus, if a law school is reducing its moderately-sized student population from 630 students to 600 students (that is, from 210 entering students per year to 200 entering students per year), that change, after the three years it takes fully to implement it, will reduce gross tuition income by 5%.¹⁰⁴

101. See Patricia G. Barnes, *Cutting Classes: Many Law Schools are Shrinking Along with the Job Market*, A.B.A. J., Dec. 1995, at 26, 26 (noting that over thirty-five law schools decreased 1994 incoming student enrollment by more than ten students).

102. All law schools have a yield rate (number of entering students divided by number of admitted students) of less than 100%. Only fourteen law schools, including the three law schools in Puerto Rico, reported a yield rate better than 50% in a recent *Guide to Approved Law Schools*. Of the non-Puerto Rico schools (University of Alabama, Brigham Young University, Campbell University, Harvard University, North Carolina Central University, University of Oklahoma, Regent University, University of South Carolina, Southern University, West Virginia University, and Yale University) claiming a yield rate above 50%, only Harvard, South Carolina, and Yale had more than 900 applicants, and only Harvard, North Carolina Central, and Yale had an admissions rate (number of admitted students divided by number of applicants) of less than 25%. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 96-451 (Rick L. Morgan & Kurt Snyder eds., 1999). Because any reduction in the number of applicants per law school seat makes the competition for seats slightly less competitive, and because it appears that the number of applications per applicant decreases when the number of applicants declines, a law school attempting to reduce the number of enrollees by reducing its number of admitted applicants may reduce its class size by more than anticipated. To avoid that consequence, admissions personnel may reduce the yield rate, the correctness of which can only be determined after the fact.

103. This course of action may also have a significant impact on the budget of a state-financed law school, if, as is often the case, the state subsidy is tied to enrollment.

104. For example: 600 students paying tuition of \$15,000 generates \$9 million in tuition. Thirty additional students would generate an additional half million in tuition. This example assumes that every student remaining pays full tuition, which is not accurate. The impact on tuition, then, may be greater than suggested in the text. Of course, law schools

One way to limit the cost of this option is to attract students interested in something other than the first degree in law. A school may be able to attract law students attending other law schools to its summer program, at home or abroad, or may offer to those already practicing law the opportunity to earn a graduate law degree (ordinarily, the LL.M.). In addition, the law school may offer some other law-related certificate or degree (e.g., the M.S.L. offered by Yale University Law School).¹⁰⁵ The difficulty for law schools is that the percentage of law students other than J.D. candidates has for a long time been less than 5%.¹⁰⁶ It is extremely unlikely that these revenue generators will replace the lost tuition. By reducing its size in order to protect its reputation for quality, a school risks a financial crisis.¹⁰⁷

The second option is to maintain the current size of the student body and hope that the decline in the LSAT and undergraduate GPA scores of enrollees does not affect the *actual* quality of the student body. This option has the distinct advantage of allowing the school to maintain current revenue streams. The National Longitudinal Bar Passage Study confirmed a statistically significant relation between LSAT score and bar examination outcome, and a lesser, but significant relation between undergraduate GPA and bar examination outcome.¹⁰⁸ However, even after combining the two most significant factors correlated with passing the bar examination, LSAT and law school GPA (which correlates somewhat

generate revenue other than through tuition, which can lessen the actual percentage decline in revenue.

105. YALE LAW SCH., *The Degree of Studies in Law, Including Fellowships in Law for Journalists (M.S.L.)*, at <http://www.law.yale.edu/outside/html/Academics/acad.msl.htm> (last visited Nov. 2, 2002) (creating a masters of studies of law program for students who do not desire a law degree but are interested in gaining better understanding of law and legal thinking).

106. The percentage of non-J.D. students enrolled in ABA-accredited law schools was 4.5% in 1997-98. See OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999) (interpreting information contained in the tables for the years 1963 through 1998).

107. See Patricia G. Barnes, *Cutting Classes: Many Law Schools Are Shrinking Along with the Job Market*, A.B.A. J., Dec. 1995, at 26, 27 (citing Case Western Reserve University law school Dean Peter Gerhart for the proposition that “the law school downsized after a one-point drop in applicants’ [LSAT] scores . . . to protect the quality of its student body”).

108. See LINDA F. WIGHTMAN, LSAC NATIONAL LONGITUDINAL BAR PASSAGE STUDY 37 (1998) (showing the “[c]orrelation of selected factors with bar examination pass/fail outcome”).

with LSAT score), the study found that “a considerable amount of unexplained variance remains even after these two factors are taken into account.”¹⁰⁹ This hope, then, is not wholly misguided. The Bar Passage Study also noted that students entering law school in Fall 1991 who scored at or above the mean LSAT score for all entering law students are extremely likely to pass the bar examination on the first attempt.¹¹⁰ Consequently, even a relatively substantial decline in the undergraduate GPA and LSAT scores at the 75th percentile of enrollees at most law schools (i.e., not just a one point drop on the LSAT at that percentile) is unlikely to substantially affect the first time bar passage rate. If the undergraduate GPA and LSAT scores of entering law students at the median or even the 25th percentile indicates only a slight decline compared with similarly situated second and third year law students, it also seems unlikely that classroom or bar examination performance would be materially affected. This, of course, is a very big “if.”

The problem of the decline in number and quality of applicants is at the margin. When law schools were choosing from 100,000 applicants in the late 1980s and early 1990s, the difficult decision for most law schools was which clearly qualified applicants were to be denied admission. When the pool of applicants drops to 72,000 or 75,000, and when 10 additional law schools have been accredited by the ABA, the difficult decision for some schools is which “at-risk” applicants should be admitted. The fact that some students with LSAT and undergraduate GPA scores substantially below the median of all law students will perform well in law school is clear. It is also clear that some will pass a bar examination on their first attempt. My anecdotal view is that many of those same students will make very good lawyers. And even if the “at-risk” student performs poorly while in law school, some will pass a bar examination on the first try. The likelihood of that happening, of course, diminishes as those factors (low LSAT, poor undergraduate and law school GPA) and other unquantifiable factors are combined. The greater the number of “at-risk” students entering the pipeline,

109. *Id.* at 39.

110. *See id.* at 30 (showing the “[n]umber and percentage of applicants with LSAT scores at or above, and below the grand mean of the fall 1991 entering class who passed and failed their first bar examination, separately by ethnic group”). The first-time bar passage rate for students at or above the LSAT mean was 94.88%. *Id.*

the more likely that a school's bar passage rates (albeit three years hence) will decline. One consequence of a decline in bar passage rates may be a claim by observers (both informed and uninformed observers) of a drop in institutional and student quality.

Thus, the possibility remains that a law school, maintaining the size of its student body as LSAT and undergraduate GPA are falling in comparison with prior classes, will suffer from an actual decline in the quality of its students, in terms of law school and bar examination performance.¹¹¹

What if student quality remains relatively constant, despite a decline in LSAT scores and undergraduate GPA? The apparent (though not actual) decline in law school reputation may cause a decline to its alumni/ae in the perceived value of that school's law degree, possibly making fund raising more difficult. If that occurs, the school's dependence on tuition income is reinforced. In addition, whether or not student quality *actually* declines, the *perception* of a decline may create a Catch-22 effect: some otherwise interested and qualified prospective applicants may shy away from applying to the school based on this perception of decline, which leaves the school in the position of attempting to fill a class from a smaller pool of qualified applicants, which may lead to a further perception of decline in quality, and so on. Finally, the perception of a decline in student quality may lead some law firms to look elsewhere in their hiring, which may further discourage some well-

111. Measuring the quality of lawyering by those graduates is well beyond my capacity. There is some related empirical research on achievement after law school and LSAT score by Professor Richard Lempert of the University of Michigan. In *Grutter v. Bollinger*, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd*, 288 F.3d 732 (6th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3154 (Aug. 9, 2002) (No. 02-241), a case concerning the affirmative action admissions policy at the University of Michigan Law School, Professor Lempert testified that a study of University of Michigan Law School graduates found "no significant relationship between the LSAT or UGPA and what matters more—the achievement of students after graduation." *Id.* at 863; *cf.* Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 409 & n.24 (1998) (noting that the "highest quality law students . . . tend to wish to work for the most prestigious legal employers" who "are, generally speaking, the largest law firms"). I am not convinced that lawyering ability is strongly correlated with the size of the firm one joins upon graduating law school. In the interest of full disclosure, I was an associate in a satellite office of a large law firm before entering law teaching.

qualified prospective applicants from applying to the law school in the first instance.¹¹²

The third option is clearly the most attractive. A law school may attempt to maintain both the size and quality of its student body by “buying” some applicants with attractive financial packages, and by expanding the search for qualified applicants through intensified recruiting efforts. These methods require the law school to redirect some of its resources, but each appears to cost less than reducing class size. Initial efforts to buy some well-qualified applicants who might otherwise choose to attend another law school may cost the school some tuition dollars, but not nearly as much as eliminating those seats, unless the school offers those applicants full tuition plus a stipend. Intensifying recruiting efforts by assigning more personnel time to the admissions office also appears unlikely to cost as much as reducing enrollment. The problem with both of these approaches is that the law school is (ordinarily) engaged in a zero-sum game.

Except for those admitted applicants whose decision is either to attend a particular law school or do something other than attend law school, each applicant induced to matriculate at a given law school is someone who has decided to forego attending another law school. As the competition for well-qualified students intensifies, the savvy applicant who gains admission to two or more law schools may force schools into a bidding war. If the school strongly desires the matriculation of that admitted applicant,¹¹³ it must be willing to engage in such a bidding war unless it is clear that its contenders are likely to be judged less desirable than it by the ad-

112. See Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 TEX. L. REV. 403, 408 (1998) (suggesting that law school rankings may serve a “coordinat[ing] function, matching ‘high quality’ students first with each other and then with the most sought-after employers.”).

113. Like airlines, law schools oversubscribe. Therefore, as long as the yield rate holds relatively steady, some admitted applicants are welcomed but not strongly desired by the law school. What increases the law school’s desire for a particular person is that person’s distinct advantages compared with other admitted applicants. A very high LSAT is relatively common among persons admitted at Yale, which makes that factor of relatively little value to Yale. At a nonelite school, such a score may be a relatively rare event, causing the school to desire that admitted applicant more than Yale. Of course, it is not only a high LSAT score that can create an intense desire for an admitted applicant. Other characteristics, including race and ethnicity, prestige of undergraduate institution, graduate schooling, and geography (where the admitted applicant is from), can cause some schools to desire some persons more than others.

mitted applicant. Because collusion among law schools regarding financial packages offered common applicants likely violates anti-trust law,¹¹⁴ the school may be forced to guess who its competitors are when first making a “bid” for the student.¹¹⁵ If it does not know against whom it is bidding, particularly whether one of its competitors has a better reputation than it has, the school may make a high bid for the admitted applicant.¹¹⁶ One consequence of attempting to maintain quality and numbers through competitive bidding is that the more the balance of power shifts away from schools and toward admitted applicants, the more likely it is that the bidding process will become very expensive to the institution.

B. *Competition Among Law Schools*

Although a school may both upgrade its admissions office and disburse more in scholarship monies, these efforts seem unlikely to protect fully a school from a decline in either quality or number of students. A student may apply to a law school for a number of reasons, including its general reputation, cost, geographic location, or its particular claim of training expertise. What attracts many (maybe even most) students to law school is access to professional markets. Even those students interested in law school for its intellectual stimulation are likely to acknowledge the value of law school as a form of professional credentialing.¹¹⁷

For many decades, law schools were largely insulated from competition. This was due to a combination of the difficulty in ob-

114. *Cf.* *United States v. Brown Univ.*, 5 F.3d 658, 678-79 (3d Cir. 1993) (holding that the overlap agreement between Ivy League schools and MIT equalizing funding for commonly admitted applicants is permissible under Sherman Antitrust Act only if MIT can show competitive and social welfare justifications for the policy and the Department of Justice is subsequently unable to prove by a preponderance that other reasonable noncompetitive alternatives do not exist).

115. Law School Data Admissions Services (LSDAS) annually provides an overlap report, which provides information to law schools about their competitors.

116. On the other hand, if you learn that the admitted applicant is likely to choose your school rather than your competitors, because of location, or excellent general or specific reputation, you are likely to make a low bid for that person.

117. See Russell Korobkin, *In Praise of Law School Rankings: Solutions to Coordination and Collective Action Problems*, 77 *TEX. L. REV.* 403, 408 (1998) (noting the importance of class ranking in regard to future employment); Richard S. Markovits, *The Professional Assessment of Legal Academics: On the Shift from Evaluator Judgment to Market Evaluations*, 48 *J. LEGAL EDUC.* 417, 422-23 (1998) (criticizing the implicit goal of course offerings when limited to narrowly defined self-interests of students).

taining ABA accreditation as an initial matter and the limitations of geography.¹¹⁸ Although law schools and the legal profession were less able to limit supply than the medical profession, the number of applicants to law school between 1970-95 was always substantially greater than the number of seats available, thus allowing all law schools to be quite selective.¹¹⁹ The adoption of the 1973 Standards for law schools made it difficult, though not impossible, for institutions to enter the legal education market. The fact that the Standards were adopted when law schools were enjoying a boom in applicants provided an extraordinary opportunity for those law schools already approved by the ABA.

Today, law schools are less able to take advantage of these insulating factors. Since the ABA entered into the consent decree, it is no longer effective in limiting access to the legal education market. Although the Council of the Section on Legal Education and Admissions to the Bar still exercises some power in determining whether to accredit an institution, it appears unlikely that this power will be exercised with much gusto, when push comes to shove.

Barry University's quest for ABA accreditation may be an instructive example. In 1999, Barry University, a Catholic university located in south Florida, purchased a law school established as the University of Orlando School of Law, an independent for-profit

118. It has long been believed by law school administrators that accreditation is both difficult to obtain but hard to lose:

John Sebert, who oversees the ABA's accreditation program, issued a statement saying it is 'very typical' for the association to find existing schools out of compliance, but it almost never revokes accreditation. Instead, Sebert said, the ABA 'informs the school of its finding and asks the school to report back . . . within a reasonable period of time, typically a year, on its efforts to come into compliance.'

Scott Powers, *Barry Isn't Alone in ABA Clash: Two Other State Law Schools Have Ongoing Fights with the American Bar Association*, ORLANDO SENTINEL, Aug. 7, 2001, at A1, 2001 WL 9201397 (discussing Florida State University and University of Florida accreditation battles with the ABA).

119. RICHARD L. ABEL, *AMERICAN LAWYERS* 60 (1989) (noting that "[s]ince 1972, the number of students who completed the centralized application forms sent to all ABA-approved law schools has been approximately double the number who entered law school the following year"). Abel was writing in the late 1980s, shortly before the number of law school applicants peaked. Abel also noted that "all 163 ABA-approved schools were as selective in 1975 as the 27 most competitive schools had been in 1961." *Id.* at 60.

institution in Orlando, Florida.¹²⁰ That law school began operating in 1995 and had not obtained ABA accreditation when purchased by Barry.¹²¹ The ABA rejected the application of the University of Orlando School of Law in September 1998, and Barry's application for provisional accreditation was denied in May 2000.¹²² In early 2001, Barry obtained a positive vote of the Accreditation Committee, but the recommendation was rejected by the Council.¹²³ Barry threatened to appeal the decision of the Council to the ABA House of Delegates, and a group of students sued the ABA in federal court claiming antitrust violations.¹²⁴ In July 2001, the Council and Barry reached an agreement permitting Barry to reapply for accreditation without having to wait the required ten months.¹²⁵ Shortly thereafter, Barry again applied for provisional accreditation, and in November 2001, the Accreditation Committee of the Section recommended that Barry not be provisionally accredited.¹²⁶ In February 2002, the Council again rejected the recommendation of the Accreditation Committee, and granted Barry University provisional accreditation.¹²⁷ Either the Council is deter-

120. Scott Powers, *Law School Gets Bar's OK; Spirits Soared as Faculty and Students Learned Barry Won Its Long Battle for Accreditation*, ORLANDO SENTINEL, Feb. 3, 2002, at B1, 2002 WL 3028169.

121. *Id.*

122. Scott Powers, *Barry Granted Another Chance the ABA Will Reconsider the Law School's Application for Accreditation*, ORLANDO SENTINEL, July 17, 2001, at D1, 2001 WL 9197461.

123. Tere Figueras, *Barry Law School Accredited*, MIAMI HERALD, Feb. 5, 2002, at 3B, 2002 WL 12665438; Lori Horvitz, *Barry Law School Hears 'No' Yet Again*, ORLANDO SENTINEL, Dec. 5, 2001, at D1, 2001 WL 28427532; Scott Powers, *Barry Gave Easy Grades, Judge Hears*, ORLANDO SENTINEL, Oct. 13, 2001, at C1, 2001 WL 28416638.

124. Scott Powers, *Barry Gave Easy Grades, Judge Hears*, ORLANDO SENTINEL, Oct. 13, 2001, at C1, 2001 WL 28416638. The court refused to issue an injunction in November 2001 and the case was set for trial. *Staver v. Am. Bar Ass'n*, 169 F. Supp. 2d 1372, 1380 (M.D. Fla. 2001).

125. Scott Powers, *Barry Granted Another Chance the ABA Will Reconsider the Law School's Application for Accreditation*, ORLANDO SENTINEL, July 17, 2001, at D1, 2001 WL 9197461.

126. Lori Horvitz, *Barry Law School Hears 'No' Yet Again*, ORLANDO SENTINEL, Dec. 5, 2001, at D1, 2001 WL 28427532; see also Scott Powers, *Florida College Seeks to Ease Objections to Law-School Accreditation*, ORLANDO SENTINEL, Dec. 17, 2001, 2001 WL 31598387 (discussing the ABA panel's opposition to Barry Law School's application for accreditation); Holly Stepp, *Barry's Law School in Orlando, Fla., Fails to Win Bar Accreditation*, MIAMI HERALD, Dec. 6, 2001, 2001 WL 31009577 (discussing Barry's reaction to its accreditation denial).

127. Tere Figueras, *Barry Law School Accredited*, MIAMI HERALD, Feb. 5, 2002, at 3B, 2002 WL 12665438.

mined to be contrary, which seems unlikely, or it feared that its secretive process would not pass muster when looked at in the light of day.¹²⁸

In addition to the protection accorded law schools by the ABA, law schools were protected from competition by the irreducible physical fact of geography. The barrier to entry created by the stringent nature of ABA Standards gave a number of law schools something of a geographic monopoly, at least with regard to students unwilling or unable to relocate to attend law school. An institution took a much greater economic risk in opening a new law school in a city in which an ABA-accredited school was already located, rather than in a location where no law school was located. Of the approximately forty law schools to open since 1970, most opened in locations in which there was no other competitor.¹²⁹ Those that did open in markets in which at least one law school already existed were located predominantly in the two largest population centers in the United States, metropolitan New York and metropolitan Los Angeles.¹³⁰

This geographic monopoly may be demonstrated by St. Mary's University. The School of Law at St. Mary's University is the only legal education institution in San Antonio, Texas ever to obtain ABA accreditation. During the 1990s, two unaccredited schools began offering instruction in law in San Antonio, one of which advertised its existence fairly regularly on radio.¹³¹ Neither law

128. See Myriam Marquez, Editorial, *In Barry-FAMU Flap, ABA Plays Divide and Conquer*, ORLANDO SENTINEL, Dec. 16, 2001, at G3, 2001 WL 28429444 (criticizing the ABA's unpredictable rules and standards when denying Barry's accreditation); Scott Powers, *Lots of Objections to Law Accreditation; Barry University, Again Rejected by the American Bar Association, Isn't Alone in Questioning Its Fairness*, ORLANDO SENTINEL, July 9, 2001, at B1, 2001 WL 9195925 (discussing objections to the ABA's law school accreditation process).

129. See AM. BAR ASS'N, *ABA Approved Law Schools: By Year Approved*, at <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited Sept. 9, 2002) (listing the order of law schools accredited by the ABA). For example, the first ABA-approved law schools in New Hampshire, Vermont, Rhode Island, Delaware, Hawaii, and Nevada have opened since 1970. *Id.*

130. *Id.* Law schools accredited by ABA after 1969 that opened in metropolitan Los Angeles include Southwestern University, Pepperdine University, Whittier University (which has recently moved to Orange County), and Chapman University. *Id.* Those schools opening in greater metropolitan New York include Hofstra University, Yeshiva University, Pace University, City University of New York, and Touro College. *Id.*

131. I heard several of those commercials.

school was able to secure accreditation with the ABA or the Supreme Court of Texas, and both eventually folded.

Although it is inaccurate to claim that the Consent Decree has eliminated the ABA as a barrier to entry into the law school market,¹³² the increase in the number of law schools appears related to the Consent Decree. In the 1970s, as law school enrollment surged, twenty-one law schools were accredited by the ABA.¹³³ In the 1980s, when law school enrollment increased only modestly, the number of newly accredited law schools increased by seven.¹³⁴ Although just four new law schools were accredited between 1990 and 1996,¹³⁵ eight law schools have been accredited by the ABA since 1997, when student population has been flat or slightly declining.¹³⁶ The University of St. Thomas in Minnesota will apply for ABA accreditation in 2003. John Marshall Law School in Atlanta,

132. For example, John Marshall Law School in Atlanta, Georgia, was denied ABA accreditation in June 1999. Bill Rankin, *Marshall Law School Sanction Averted*, ATLANTA J. & ATLANTA CONST., Aug. 8, 1999, at E5, 1999 WL 3789637. The school then appealed the decision to the ABA House of Delegates. *Id.* Days before the vote, the school and the ABA reached a compromise: John Marshall withdrew its application and the ABA withdrew its decision to deny accreditation. *Id.* See generally Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 142 F.3d 26, 32 (1st Cir. 1998) (recounting the history of litigation by MSL against the ABA and others and dismissing claims by MSL); Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026 (3d Cir. 1996) (dismissing Sherman Act claim of unaccredited law school against ABA and others); Scott Powers, *Lots of Objections to Law Accreditation; Barry University, Again Rejected by the American Bar Association, Isn't Alone in Questioning Its Fairness*, ORLANDO SENTINEL, July 9, 2001, at B1, 2001 WL 9195925 (describing the criticism of the accreditation process as arbitrary and monopolistic).

133. AM. BAR ASS'N, *ABA Approved Law Schools: By Year Approved*, at <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited Sept. 9, 2002).

134. See *id.* (excluding the approval of the Harrisburg campus of Widener University).

135. AM. BAR ASS'N, *ABA Approved Law Schools: By Year Approved*, at <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited Sept. 9, 2002); see also OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999) (indicating that the number of J.D. students during this time remained fairly constant with 127,261 students enrolled in 1990-91 and 128,623 in 1996-97).

136. Compare OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 456 (Rick L. Morgan & Kurt Snyder eds., 1999) (reporting 125,886 total J.D. students in 1997), with OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 804 (Rick L. Morgan & Andrew Arnone eds., 2002) (indicating 125,173 total J.D. students in 2000). This count does not include Pennsylvania State University, which affiliated with the previously independent Dickinson School of Law. See AM. BAR ASS'N, *ABA Approved Law Schools: By Year Approved*, at <http://www.abanet.org/legaled/approvedlawschools/year.html> (last visited Sept. 9, 2002).

Georgia may decide to apply for ABA accreditation by 2003.¹³⁷ Finally, two state-supported law schools in Florida began classes in Fall 2002,¹³⁸ and Stetson University School of Law, also located in Florida, plans to open a part-time night school in Fall 2002 at a site other than its main law campus.¹³⁹

Concord University School of Law, the first cyber law school, has demonstrated another concern facing law schools: geography is at best a limited barrier when competing for consumers of legal educational services. Although graduates of Concord are not presently permitted to sit for the bar examination in any state other than California, it is unclear whether this will continue to be the case.¹⁴⁰ Concord touts the diverse geographic location of its students: "Students hail from all U.S. states and 13 other countries and 78% reside outside of California."¹⁴¹ Concord also makes it more difficult for law schools to declare their geographic location as their distinctive brand, making the marketing efforts of nonelite law schools more difficult: "The school serves working professionals, family caretakers and others whose circumstances may prevent them from pursuing a legal education at a fixed facility law school."¹⁴² In 1999, the ABA convened a "Distance Education

137. Graduates of John Marshall Law School in Atlanta, Georgia, are permitted by the Georgia Supreme Court to take the Georgia bar exam through 2003. Bill Rankin, *Marshall Law School Sanction Averted*, ATLANTA J. & ATLANTA CONST., Aug. 8, 1999, at E5, 1999 WL 3789637. John Marshall is permitted to apply for ABA accreditation at its discretion. *Id.*

138. They are Florida A&M University, which will be located in Orlando, and Florida International University, located in South Florida. See Karla Schuster, *Cuts Could Delay Law Schools' Openings; Legislature Plans Less Money for FAMU, FIU*, S. FLA. SUN-SENTINEL, Mar. 17, 2001, at 9B, 2001 WL 2665705 (noting that the limited budget allocated to the schools, at approximately five million less than requested, may delay the openings of both schools).

139. Laura Kinsler So, *Stetson To Lay Down Law On Old Police Station Site; Construction of Campus to Start by April 30*, THE TAMPA TRIB., Sept. 6, 2001, at 1, 2001 WL 26690849.

140. See Jeffrey S. Kinsler, *Correspondence Law School Grads May Practice in Wisconsin*, WIS. LAW., Nov. 2001, at 4, 5 (noting amended language of Supreme Court Rules concerning eligibility of persons to sit for Wisconsin bar examination may permit Concord University graduates to take examination).

141. CONCORD LAW SCH., *School Information*, at <http://www.concordlawschool.com/info/custom/concord/schoolinfo/index.asp?> (last visited Sept. 9, 2002).

142. *Id.*

Conference,”¹⁴³ and in August 2002 the ABA adopted Standard 306, which permits distance learning credit with some limitations.¹⁴⁴ Although 45,000 of the 56,000 minutes of education required for a J.D. degree must be residence credit, and a student is limited to a total of twelve credit hours,¹⁴⁵ some distance education credit may now be counted in the 45,000 minutes.¹⁴⁶ The lure of distance education is great, for the monetary rewards are likely to be substantial.¹⁴⁷ Location is no longer enough.

143. *Distance Education Conference*, SYLLABUS, Fall 1999, at 1, 1. See generally Charlene L. Smith, *Distance Education: A Value-Added Model*, 12 ALB. L.J. SCI. & TECH. 177 (2001) (discussing the history and background of distance education).

144. Standard 306(a), adopted by the ABA in August 2002, is titled “Distance Education” and states, “A law school may offer credit toward the J.D. degree for study offered through distance education consistent with the provisions of this Standard and Interpretations of this Standard.” AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 306(a), <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Sept. 23, 2002). This Standard is an acknowledgment of changes already underway at a number of law schools. By the late 1990s, several schools granted credit for distance learning study. See INST. FOR LAW SCH. TEACHING, FRESH LOOKS AT TEACHING AND LEARNING LAW, SESSION ON NET TEACHING: DO’S AND TABOOS (1999) (on file with author) (describing a presentation offered during its 1999 conference). In addition, Cornell Law School Professor Peter Martin, a trailblazer concerning distance learning, taught a course via distance learning in Fall 1996. See Memorandum from Peter Martin, Legal Information Institute, Cornell Law School to John A. Sebert, ABA Consultant on Legal Education, at <http://www.abanet.org/legaled/distanceeducation/lii.html> (last visited Sept. 9, 2002) (discussing history of distance learning courses taught by Prof. Martin). Catholic University of America Columbus School of Law hosted a distance learning course with an Australian law school in 2001-02. Telephone Interview with Robert A. Destro, Professor, Catholic University of America (Apr. 5, 2002).

145. See AM. BAR ASS’N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 306(d), <http://www.abanet.org/legaled/standard/chapter3.html> (last visited Sept. 23, 2002).

146. See *id.* at 306(c) (setting forth the conditions under which such credit may be earned); see also Memorandum D9697-59 from James P. White, Consultant on Legal Education, to the ABA, at <http://abanet.org/legaled/distanceeducation/distance.html> (last visited Sept. 9, 2002) (detailing Temporary Distance Education Guidelines in effect until passage of new Standard 306).

147. The stories concerning efforts by for-profit entities to create on-line universities are numerous. See, e.g., William M. Bulkeley, *Internet’s Jones International to Grant Degrees*, WALL ST. J., Mar. 9, 1999, at B6, at 1999 WL-WSJ 5443580 (indicating that Mr. Glenn Jones has agreed to sell his controlling interest in the accredited internet college for \$200 million); John Hechinger, *Textbook Publisher Lays Plans for an Internet University*, WALL ST. J., July 2, 1999, at B1, at 1999 WL-WSJ 5459026 (illustrating that textbook publishers are entering the on-line education market); Patrick McGeehan, *Unext.com, 4 More Schools Agree to Deals*, WALL ST. J., June 23, 1999, at B2, at 1999 WL-WSJ 5457480 (announcing Unext.com’s agreement with schools to begin offering on-line classes); Thomas E. Weber, *Allen is Wooing Elite Colleges to Teach Online*, WALL ST. J., July 28, 2000, at B1, 2000 WL-WSJ 3038236 (bringing elite universities into the on-line education world). Non-

More generally, it is no longer enough to be an "ABA-accredited law school." Instead, law schools will survive or thrive on the basis of their "brand." Branding is necessary because law schools will continue to face economic pressures.

C. *Branding*

While Dean at NYU Law School, John Sexton seared into the consciousness of applicants, lawyers, judges and law professors the idea that "things were happening" at NYU.¹⁴⁸ At the same time he excoriated the law school rankings of *U.S. News*, he managed to nudge NYU up the ladder of those rankings.¹⁴⁹ He had NYU's jaw-droppingly thick alumni magazine sent to all legal academics, a development imitated by other law schools (e.g., the University of Michigan and Washington University). He raised an extraordinary amount of money, a fact that was regularly publicized. He initiated something called the Global Law School, a vague, but rather intriguing concept suggesting a law school no longer provincial in any

profit universities are also looking to the Internet to extend their reach and "excess" of revenues over costs. See, e.g., Ronald Alsop, *Business Schools Expand M.B.A.s for Executives*, WALL ST. J., Sept. 11, 2001, at B9, 2001 WL-WSJ 2875168 (showing top business schools expanding to offer distance learning services); Patrick McGeehan, *Columbia University's Business School Signs on with Internet Education Firm*, WALL ST. J., Apr. 2, 1999, at C1, available at 1999 WL-WSJ 5446875 (establishing Columbia University's venture into distance learning by offering business school classes via the internet); Daniel McGinn, *College Online*, NEWSWEEK, Apr. 24, 2000, at 54, 56 (illustrating a school's expansion into distance learning by offering courses through the internet); John Palattella, *May the Course Be with You: Universities Claim the Right to Sell Classes on the Internet. The Faculty Strikes Back*, LINGUA FRANCA, Mar. 2001, at 50, 52 (explaining that distance learning over the internet may be a cost-effective means of delivering high quality education). The related issue of the ownership of course materials prepared by a teacher is also at issue. See Georgia Holmes & Daniel A. Levin, *Who Owns Course Materials Prepared by a Teacher or Professor? The Application of Copyright Law to Teaching Materials in the Internet Age*, 2000 B.Y.U. EDUC. & L.J. 165, 188 (2000) (concluding that the instructor probably owns the rights to materials he/she prepares for internet instruction).

148. Sexton recently became President of NYU. See Daniel Golden, *Opening Arguments: As Law School Begins, It's Columbia vs. NYU*, WALL ST. J., Aug. 28, 2001, at A1, available at 2001 WL-WSJ 2873947 (mentioning that John Sexton was the incoming president of NYU).

149. In the most recent *U.S. News* survey, NYU is ranked fifth, just behind Columbia and ahead of the University of Chicago. *Best Graduate Schools, Top Law Schools*, at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php (last visited Sept. 9, 2002).

sense of the word.¹⁵⁰ And, maybe most importantly, he made Columbia Law School, long considered the “top” law school in New York, respond and change as a result of NYU’s actions.¹⁵¹

Most law schools do not possess the resources that NYU possessed when John Sexton became Dean of the Law School, and most law school administrators do not possess the moxie, charisma, or energy of John Sexton. A law school looking to entice well-qualified applicants to attend its institution rather than another law school needs some “hook” to aid applicants in justifying their decisions. Only a few schools can claim to be the “best,” at least in some all-encompassing sense,¹⁵² and based on number of applicants, admission percentage rate, and yield rate, only Harvard and Yale seem permitted to make that claim.¹⁵³ But other law schools can use niche marketing to create a distinctive identity or reputation, which can attract more applicants, happier and more charitable alumni/ae, and so on.

150. See generally John Sexton, *The Academic Calling: To Global Common Enterprise*, 51 J. LEGAL EDUC. 403 (2001) (suggesting law be viewed through a “global lens”).

151. Daniel Golden, *Opening Arguments: As Law School Begins, It's Columbia vs. NYU*, WALL. ST. J., Aug. 28, 2001, at A1, available at 2001 WL-WSJ 2873947 (noting that NYU reduced its incoming class in Fall 2001 by 41 students, which “his uptown rivals call . . . a transparent bid to leapfrog Columbia in the influential U.S. News & World Report law-school rankings”). In 1999, Columbia broke its tradition of need based aid by offering a small merit scholarship program in response to NYU’s merit aid awards. *Id.*

152. As will be noted below, one can claim to be the “best” in a particular field of law.

153. Based on other rankings using different criteria, the University of Chicago and Stanford University might also be permitted to make such a claim. Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 459, 462, 464 (2000). This Harvard bias extends much further back in time. See, e.g., *THE PAPER CHASE* (20th Century Fox 1973) (presenting numerous references to the illustrious reputation of Harvard Law School); SCOTT TUROW, *ONE-L 10* (Warner Books 1988) (1977) (explaining that Harvard Law School is the oldest law school in the nation and had, at least in the 1970s, the largest full time enrollment and sixty-five of perhaps the most illustrious law professors in the country, and that one of the author’s friends, in an attempt to persuade the author to enroll there, had described Harvard Law School simply as “el numero uno”). For example, a conversation in *THE PAPER CHASE* between the protagonist and his girlfriend not twenty minutes into the film where Hart, in describing Harvard Law School, says to Susan;

You’re up against some incredible minds here. I look at this student and I can’t help think he is going to be a Supreme Court Justice, and this guy is going to run Wall Street, and this guy might be the President of the United States. What it is is this incredible sense of power. . . . It’s just that when I walk down those streets I get the feeling that behind those doors minds are being formed to run the world.

THE PAPER CHASE (20th Century Fox 1973).

1. The Rebranding of Independent Law Schools

In the mid-1990s, two independent law schools merged or affiliated with universities to enhance their branding effort.¹⁵⁴ In early 1994, Detroit College of Law proposed affiliating with Oakland University in Michigan, and also held talks with Western Michigan University, Lawrence Institute of Technology, and Walsh College.¹⁵⁵ A year later, the school accepted an offer to affiliate with Michigan State University, and in 1997 moved its entire operations to East Lansing, Michigan.¹⁵⁶ Sixth Circuit Judge Richard Suhrheinrich, a member of Detroit College of Law's Liaison Committee noted, "[W]e honestly believe the affiliation with Michigan State University is the only reasonable solution to the school's continuing to provide an excellent legal education, while assuring its long-term survival."¹⁵⁷ Although the school remains independent, it is housed in a new building in the heart of the Michigan State University campus.¹⁵⁸ Detroit College of Law found itself in a difficult market, for it was one of three law schools located in Detroit, and the only one without a university affiliation.¹⁵⁹ In addition, the University of Michigan, one of the elite public law schools in the

154. Additionally, another independent law school was involved in discussions concerning a merger or affiliation in the mid-1990s. William Mitchell School of Law in St. Paul, Minnesota held talks with the University of St. Thomas, also located in St. Paul, in 1994. The talks fell apart when the parties failed to agree on who would manage and operate the law school. See Allie Shah, *Expansion Plan Has St. Thomas Taking Up Law*, STAR TRIB. (Minneapolis-St. Paul), May 15, 1999, at 01A, 1999 WL 7497725.

155. Kenneth Cole, *Law School May Leave Detroit Area*, DETROIT NEWS, Feb. 9, 1994, at 1, 1994 WL 5301011; Laurie Kipp Klecha, *Detroit College of Law Comes to MSU*, GREATER LANSING BUS. MONTHLY, at 12, 1996 WL 9413507.

156. Associated Press, *Merger to Bring Law School to Michigan State Campus: The Detroit College of Law Will Be Brought to the East Lansing University*, GRAND RAPIDS PRESS, Feb. 28, 1995, at A9, 1995 WL 3010066.

157. *Id.*

158. Laurie Kipp Klecha, *Detroit College of Law Comes to MSU*, GREATER LANSING BUS. MONTHLY, at 12, 1996 WL 9413507. It is formally known as Detroit College of Law at Michigan State University, and for reasons having to do with Michigan state politics and Detroit College of Law's relationship with the YMCA (which required it remain an independent law school), it did not attempt to obtain re-accreditation from the Council of the Section on Legal Education and Admissions to the Bar of the ABA. Cf. Christopher Anglim, *South Texas College of Law: Houston's Gateway to Opportunity in Law*, 39 S. TEX. L. REV. 919, 920-46 (1998) (discussing the history of South Texas College of Law and its accreditation).

159. Kenneth Cole, *Law School May Leave Detroit Area*, DET. NEWS, Feb. 9, 1994, at 1, 1994 WL 5301011 (identifying the other two schools as the University of Detroit Mercy and Wayne State University).

United States, is located less than 50 miles from Detroit in Ann Arbor.

The varying fortunes of Detroit College of Law and University of Detroit Mercy School of Law may demonstrate the value of branding. Even after the departure of Detroit College of Law from Detroit, the University of Detroit Mercy found it difficult to admit students it considered qualified to undertake a legal education and deliberately reduced its size.¹⁶⁰ In contrast, Detroit College of Law increased its applicant pool. In 1996, shortly after affiliating with Michigan State University, Detroit College of Law received 740 applications to the full-time division of the school, while University of Detroit Mercy received 481.¹⁶¹ Although Detroit College of Law received fewer applicants the next year,¹⁶² after it moved its operations from Detroit to East Lansing, the school zoomed to 929 full-time applicants for those students entering law school in Fall 1999.¹⁶³ One reporter, assessing the impact of the

160. See George Bullard, *U-D Law School Downsizes*, DET. NEWS, Oct. 27, 1998, at D1, 1998 WL 3842588 (stating that U-D rejected lowering admission standards to boost enrollment, by sacrificing the quality of the student body, and noting the failure of the school to enhance its attractiveness to potential applicants by building on its Catholic tradition); see also Elizabeth Amon, *Detroit Mercy Shrinking to Fit Declining Law School Enrollment*, NAT'L L.J., Mar. 8, 1999, at A23 (noting that due to the declining numbers of applicants, Detroit Mercy deliberately cut its entering class size to maintain its competitive edge and maintain a high caliber student body); Michael D. Goldhaber, *Anno Domino's: A Catholic Law Firm Crusade*, NAT'L L.J., Mar. 8, 1999, at A4 (noting departure of several junior faculty members from University of Detroit Mercy in response to concern about layoffs). According to Sixth Circuit Judge James L. Ryan, the steep decline in the number of students at the University of Detroit Mercy School of Law was in part due to the perception among young law school students that the school was not a desirable place to be. In addition, "[t]he simple truth is our law school, for some reason, has either overlooked or declined to develop a distinctive Catholic identity. And that would be it's [sic] natural strength and its attractiveness." George Bullard, *U-D Law School Downsizes*, DET. NEWS, Oct. 27, 1998, at D1, 1998 WL 3842588.

161. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 159, 161 (1998) (GPA & LSAT Scores Tables). University of Detroit Mercy did receive 302 applicants to its part-time program, while Detroit College of Law received 141 to its part-time program, less than half of Detroit Mercy. *Id.*

162. Detroit College of Law received 627 applicants, and Detroit Mercy received 552 applicants. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 157, 169 (Rick L. Morgan & Kurt Snyder eds., 1999) (reporting the number of applicants and admissions for each school).

163. Detroit College of Law went from 793 applicants to its full-time program for its Fall 1998 entering class to 929 full-time applicants for Fall 1999. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 159 (Rick L. Morgan & Kurt Snyder eds., 2001); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS

affiliation between Detroit College of Law and Michigan State, wrote, "Law students said they chose this school strictly because the MSU name can boost their careers. They credit MSU ties with getting internships at high-profile Washington, D.C., firms and federal agencies. Law school officials say students never secured such positions before the affiliation."¹⁶⁴

Two years later, The Dickinson School of Law, one of the oldest law schools in the country, decided to merge with Pennsylvania State University.¹⁶⁵ One of the trustees at Dickinson School of Law concluded that the merger with Penn State was caused by "a 'sea of change' in the dynamics of the legal business."¹⁶⁶ Dickinson School of Law President Robert Frey was quoted as saying, "In the face of increasing demand for high-cost technology, for costly, labor-intensive clinical education, and high-quality faculty to cover ever-expanding fields of law, it is especially difficult for smaller, independent schools to keep their tuition low."¹⁶⁷ Additionally, Dickinson trustee Dale F. Shughart Jr. noted that "[o]ver time, Penn State's academic reputation has enhanced considerably This became attractive to The Dickinson School of Law at the point that Penn State became one of the top universities in the country."¹⁶⁸ The number of applicants at Dickinson College of Law entering law school in Fall 1996, the year before the merger

157 (Rick L. Morgan & Kurt Snyder eds., 2000). Meanwhile, University of Detroit Mercy went from 481 full-time applicants for Fall 1996, down to 410 full-time applicants for its Fall 1999 class. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 161 (Rick L. Morgan & Kurt Snyder eds., 2001); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 161 (Rick L. Morgan & Kurt Snyder eds., 1998). Detroit Mercy's enrollment fell further in Fall 2000 after the Roman Catholic Ave Maria School of Law in Ann Arbor opened. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 159 (Rick L. Morgan & Andrew Arnone eds., 2002).

164. Lydia Lum, *A&M-South Texas Issue Mirrors Michigan Law School Pact*, HOUS. CHRON., July 12, 1998, at 29, 1998 WL 3587898.

165. Elizabeth Gibson, *Penn State Quietly Merges with Dickinson Law School*, HARRISBURG PATRIOT, July 2, 1997, at B01, 1997 WL 7523275; Charles Thompson, *Dickinson Trustees Felt Now Was the Time/Changes in Legal Business Helped Prompt Merger with Penn State*, HARRISBURG PATRIOT, Jan. 19, 1997, at B3, 1997 WL 7504843.

166. Charles Thompson, *Dickinson Trustees Felt Now Was the Time/Changes in Legal Business Helped Prompt Merger with Penn State*, HARRISBURG PATRIOT, Jan. 19, 1997, at B3, 1997 WL 7504843.

167. *Id.*

168. *Id.*

with Penn State, totaled 1,287.¹⁶⁹ Although there was a drop in applications for two years following the merger,¹⁷⁰ the number of applicants to The Dickinson School of Law of the Penn State University for Fall 2000 totaled 1,803,¹⁷¹ an increase of 28.6% in applications at a time when applications nationwide were flat.¹⁷²

Both Penn State and Michigan State are well known public universities that are known to some more for their athletic accomplishments (both are members of the Big Ten athletic conference) than their academic reputation.¹⁷³ Of the eleven members of the Big Ten conference, only Purdue remains without a law school.¹⁷⁴

South Texas College of Law, founded as a YMCA law school in the 1920s,¹⁷⁵ looked to follow the path taken by Detroit College of Law and Dickinson School of Law when it proposed an affiliation with Texas A&M University. Although "Aggie" jokes are legendary in Texas, Texas A&M University is the second largest university in Texas, and its graduates are known for their fierce loyalty to the institution.¹⁷⁶ An affiliation with Texas A&M would create an

169. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 163 (Rick L. Morgan & Kurt Snyder eds., 1998) (showing 1287 applications received for Fall 1996 admission).

170. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 305 (Rick L. Morgan & Kurt Snyder eds., 2000) (showing 1,150 applicants seeking admission for Fall 1998); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 313 (Rick L. Morgan & Kurt Snyder eds., 1999) (indicating 1054 applications received for Fall 1997 admission). This mirrored the national trend of decreased applications to law schools. Law Services History Information, prepared for the author by Robert Carr, Law School Admissions Council (Jan. 29, 1999) (on file with author) (reporting statistics showing a decrease in the number of applicants to ABA law schools beginning with the 1991-92 school year).

171. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 531 (Rick L. Morgan & Andrew Arnone eds., 2002) (showing 1,803 applications received for admission to the Fall 2000 class).

172. Law Services History Information, prepared for the author by Robert Carr, Law School Admissions Council (Jan. 29, 1999) (on file with author) (detailing a decrease in the number of applicants to ABA approved law schools from 1996 through 1998).

173. This is not a criticism of either university's academic standing. It is a criticism of those who think first about athletics when a university is named.

174. And this may be inaccurate in some respect, for Indiana University-Purdue University at Indianapolis houses a School of Law in Indianapolis.

175. See Christopher Anglim, *South Texas College of Law: Houston's Gateway to Opportunity in Law*, 39 S. TEX. L. REV. 919, 920-21 (1998) (recounting the founding of the law school).

176. David King, *Subtitle of Well-Researched 'Brawl' a Reach*, SAN ANTONIO EXPRESS-NEWS, Oct. 27, 2002, at H7, 2002 WL 100211372 (reviewing W.K. STRATTON, BACKYARD BRAWL: INSIDE THE BLOOD FEUD BETWEEN TEXAS AND TEXAS A&M (2002)). See

immediate brand for South Texas College of Law, which is one of three law schools in Houston, and the only independent law school in the state.¹⁷⁷ As stated by Lydia Lum, who reported on the affiliation, "The deal gave A&M a law school without building one and South Texas greater name recognition without moving to College Station."¹⁷⁸ Lum noted, "The two schools formed a partnership that's supposed to give the law school a *brand name* for free and A&M a law school without buying one."¹⁷⁹ For students at South Texas, the affiliation put the school on the map and enhanced the value of their degrees.¹⁸⁰ As stated by one student, "Perception is everything."¹⁸¹

The brand value of the A&M name may explain why South Texas has continued this sojourn despite numerous obstacles. As stated by South Texas Dean Frank (Tom) Read, commenting on the purchase by a university of a law school other than South Texas, "[A merger] is a positive thing for the students and the law school In most cases it brings instant notoriety [sic] to the law school, gives students better options for ultimate employment and gives them access to a large university network."¹⁸² After Texas A&M University was denied permission by the Texas Higher Education Coordinating Board to affiliate with South Texas College of Law,¹⁸³ South Texas sued the Board.¹⁸⁴ The district court dismissed South Texas's case, and the Coordinating Board returned to court

Rivalries, at http://mackbrown-texasfootball.com/mackbrownsgdm/ut/trad_rivalries.html (last visited Oct. 22, 2002) (quoting Texas football players' descriptions of the rivalry).

177. In that sense, South Texas College of Law finds itself in much the same position as Detroit College of Law. South Texas College of Law did not suffer, as did Detroit College of Law, from the difficulty of a deteriorating physical facility, and population growth in Houston and Texas far outpaces that in Detroit and Michigan.

178. Lydia Lum, *Judge Refuses to Excuse Law School Suit/South Texas Hopes to Keep A&M Bond*, HOUS. CHRON., Dec. 1, 1998, at 24, 1998 WL 16785420.

179. Lydia Lum, *Putting South Texas on the Map*, HOUS. CHRON., July 25, 1998, at 35, 1998 WL 3590024 (emphasis added). See also Lydia Lum, *Judge Orders a Hearing over Law College's Name/Link to Texas A&M University at Issue*, HOUS. CHRON., June 29, 1999, at 15, 1999 WL 3998214 (emphasis added) (noting that "the law school's academic affiliation with A&M . . . was supposed to give the law school name-brand recognition").

180. Lydia Lum, *South Texas Law Students Back A&M /Name Recognition Will Aid Their Careers*, HOUS. CHRON., Mar. 26, 1998, at 33, 1998 WL 3568144.

181. *Id.*

182. Chris Gibson, *Texas Christian U.: TCU Law School Talks Resemble Past Cases*, DAILY SKIFF (Texas Christian University), Apr. 16, 2001, 2001 WL 18398445.

183. Lydia Lum, *Board Rejects A&M Alliance with Law School /Latest Blow in Quest for Program*, HOUS. CHRON., July 17, 1998, at 1, 1998 WL 3588768.

for an injunction barring South Texas from using the A&M name in its materials.¹⁸⁵ South Texas requested the Texas Supreme Court to issue a writ of mandamus reversing the district court's judgment.¹⁸⁶ The Third Court of Appeals affirmed the judgment of the district court on appeal,¹⁸⁷ and the Texas Supreme Court has twice refused to hear an appeal from South Texas College of Law.¹⁸⁸ The extent to which South Texas College of Law has fought the decision by the Texas Higher Education Coordinating Board in refusing to permit A&M to issue a law degree may suggest both its desire to reconstitute its brand¹⁸⁹ and the boon of publicity accorded the school during this litigation.¹⁹⁰ According to Dean Read, "We could never have paid for all this publicity We have just gotten tons of free publicity."¹⁹¹

2. Distinction and Competition

In Spring 1999 two new law schools, both of which emphasized their Catholic nature, announced their future opening.¹⁹² Ave Ma-

184. Lydia Lum, *Judge Orders a Hearing over Law College's Name/Link to Texas A&M University at Issue*, HOUS. CHRON., June 29, 1999, at 15, 1999 WL 3998214.

185. *Id.*

186. *See In re S. Tex. Coll. of Law*, 4 S.W.3d 219, 227 (Tex. 1999) (denying petition for writ of mandamus by South Texas College of Law requesting review of district court decision declaring Affiliation Agreement void).

187. *S. Tex. Coll. of Law v. Tex. Higher Educ. Coordinating Bd.*, 40 S.W.3d 130, 132, 139 (Tex. App.—Austin 2001, pet. denied) (affirming district court judgment declaring affiliation impermissible without the Board's approval).

188. *Court Blocks A&M-Law School Affiliation/Decision Rests with Coordinating Board*, HOUS. CHRON., Mar. 22, 2002, at 39, 2002 WL 3251090; *see also* Ron Nissimov, *Law School, A&M Get Setback in High Court*, HOUS. CHRON., Nov. 16, 2001, at 48, 2001 WL 23643696 (noting separate refusals of Supreme Court of Texas to overturn decisions holding affiliation requires approval by the Coordinating Board).

189. South Texas was best known for its moot court and mock trial advocacy program prior to seeking affiliation with Texas A&M. *See S. TEX. COLL. OF LAW, Welcome from the Dean*, at <http://www.stcl.edu/01welcome/index.htm> (last visited Sept. 9, 2002) (stating that "the school's most decorated program, the Advocacy Program, sends dozens of teams a year to competitions all over the United States").

190. *See* Lydia Lum, *Putting South Texas on the Map*, HOUS. CHRON., July 25, 1998, at 35, 1998 WL 3590024 (noting that South Texas has received national attention from its well publicized struggle to affiliate with Texas A&M).

191. *Id.*

192. *See generally* Pamela Schaeffer, *Wanted: Different Kind of Lawyer*, NAT'L CATH. RPTR., Aug. 13, 1999, at 3, 1999 WL 8554493 (discussing newly formed law schools at Ave Maria and St. Thomas, as well as law schools at Barry University and Seattle University, both of which purchased existing law schools).

ria School of Law in Ann Arbor, Michigan, announced its fidelity to Roman Catholic church teachings.¹⁹³ The other, the University of St. Thomas School of Law, called itself a “faith-based” institution.¹⁹⁴ Each school is backed by large financial commitments, and each has hired as Dean someone with prior decanal experience at an ABA-accredited law school.

Ave Maria School of Law was founded through a \$50 million commitment by former Domino's Pizza owner, Tom Monaghan.¹⁹⁵ At the time of the announcement of the establishment of the school, there were twenty-four law schools affiliated with Roman Catholic universities.¹⁹⁶ The mission statement of Ave Maria makes very clear that it is intended for those students interested in a legal education strongly influenced by Roman Catholic teachings. It states,

Inspired by Pope John Paul II's encyclical *Fides et Ratio*, Ave Maria School of Law offers a *distinctive* legal education—an education characterized by the harmony of faith and reason. Formed by outstanding professional training and a *distinctive* educational philosophy, Ave Maria's graduates are equipped for leading positions in law firms, corporate legal offices, the judiciary, and national, state, and local government.¹⁹⁷

193. Ruth Singleton, *Pizza Magnate Will Fund Catholic Law School in Ann Arbor Area*, NAT'L L.J., May 3, 1999, at A15, available at 1999 WL 8554244; AVE MARIA SCH. OF LAW, *Mission Statement*, available at <http://www.avemarialaw.edu/prospective/phil1.cfm> (last visited Sept. 9, 2002) (emphasis added).

194. See Allie Shah, *Expansion Plan Has St. Thomas Taking Up Law*, STAR TRIB. (Minneapolis-St. Paul), May 15, 1999, at 01A, 1999 WL 7497725 (claiming that the school would emphasize ethics and social responsibility and focus on educating lawyers for moral leadership roles); Mary Jane Smetanka, *St. Thomas Hires Notre Dame Dean to Run New Law School*, STAR TRIB. (Minneapolis-St. Paul), July 3, 1999, at 02B, 1999 WL 7503838 (quoting Dean David T. Link as saying “there aren't enough faith-based law schools . . . we want to be . . . exploring the moral questions without dictating the answers”). After Dean Link resigned, St. Thomas hired Dean Thomas M. Mengler, the outgoing dean of the University of Illinois College of Law. Mary Jane Smetanka, *St. Thomas Taps Illinois Dean to Run its Law School; A \$31 Million Building to House the School Will Open Next Year*, STAR TRIB. (Minneapolis-St. Paul), Jan. 4, 2002, at 04B, 2002 WL 5366372.

195. Robert F. Drinan, *Pizza Bucks Back Hyper-Catholic Law School*, NAT'L CATH. REP., May 7, 1999, at 18, 1999 WL 8554244 (noting decision of Tom Monaghan to dedicate \$50 million to opening the Ave Maria School of Law in Ann Arbor, Michigan).

196. Ruth Singleton, *Pizza Magnate Will Fund Catholic Law School in Ann Arbor Area*, NAT'L L.J., May 3, 1999, at A15, available at 1999 WL 8554244.

197. AVE MARIA SCH. OF LAW, *Mission Statement*, <http://www.avemarialaw.edu/prospective/phil1.cfm> (last visited Sept. 9, 2002) (emphasis added).

The statement continues, “[Our mission is to offer] an outstanding legal education in fidelity to the Catholic Faith as expressed through Sacred Tradition, Sacred Scripture, and the teaching authority of the Church.”¹⁹⁸ The announcement of Ave Maria’s opening was criticized by the Reverend Robert Drinan, S.J., a Georgetown University Law School professor, who complained that “Ave Maria will almost certainly continue its boast that it is more Catholic than any other Catholic law school.”¹⁹⁹

The University of St. Thomas announced it was opening a law school shortly after Ave Maria’s announcement. The University was able to open a School of Law through the assistance of a \$50 million gift, payable over five years and divided between the law and business schools, by Best Buy CEO Richard Schulze.²⁰⁰ Shortly after this announcement, the University announced the appointment of former Notre Dame Law School Dean David T. Link as Dean of the University of St. Thomas School of Law.²⁰¹ Although Link accepted the proposition that there were too many lawyers and law schools, he commented that “there aren’t enough faith-based law schools that really have a meaningful balance between being secular and being kind of dogmatic.”²⁰² Although less “dogmatic” than Ave Maria, it also attempts to distinguish itself from other existing law schools, including other Catholic law schools:

198. *Id.*

199. Robert F. Drinan, *Pizza Bucks Back Hyper-Catholic Law School*, NAT’L CATH. REP., May 7, 1999, at 18, 1999 WL 8554244.

200. Terry Fiedler, *St. Thomas Inc. The University of St. Thomas is Known for its Graduate School of Business. Now, with the Help of an Expanding Endowment, It Seeks National Recognition for Its Law School, Set to Open in 2001*, STAR TRIB. (Minneapolis-St. Paul), June 4, 2000, at 01A, 2000 WL 6975451.

201. Mary Jane Smetanka, *St. Thomas Hires Notre Dame Dean to Run New Law School*, STAR TRIB. (Minneapolis-St. Paul), July 3, 1999, at 02B, 1999 WL 7503838. Dean Link resigned in Fall 2001, shortly after the School of Law opened. Mary Jane Smetanka, *St. Thomas Taps Illinois Dean to Run Its Law School; A \$31 Million Building to House the School Will Open Next Year*, STAR TRIB. (Minneapolis-St. Paul), Jan. 4, 2002, at 04B, 2002 WL 5366372. The University then hired Thomas Mengler to become dean beginning in Summer 2002. *Id.* Mengler was hired from the University of Illinois College of Law, where he had been dean since 1993. *Id.*

202. Mary Jane Smetanka, *St. Thomas Hires Notre Dame Dean to Run New Law School*, STAR TRIB. (Minneapolis-St. Paul), July 3, 1999, at 02B, 1999 WL 7503838 (quoting Dean David T. Link).

At a Catholic law school, however, teaching and research are focused on questions of ethics and morality. And in pursuing such questions, the faculty and students at a Catholic law school are guided by the wisdom of faith—not just Catholic faith, but all faith. Integrating faith and reason is at the heart of the scholarship done at a Catholic law school.²⁰³

But the reason justifying the creation of another Catholic law school at the University of St. Thomas was the failure of existing Catholic law schools:

[W]hatever it is that Catholic law schools do differently should have some impact on their students; otherwise, it would hardly be worth doing. Thus, one test of whether a law school is Catholic is whether its graduates behave differently—make different choices—than the graduates of non-Catholic schools. On this score, I think, Catholic law schools are failing.²⁰⁴

As new, unaccredited law schools, each institution needs to create some separate niche in the market, some distinctiveness about its program in law to attract students. Indeed, St. Thomas is explicitly marketing the law school as serving a “niche” unfilled by non-religious and religious schools.²⁰⁵ Further, each program soft pedals its impact on other institutions with which it may compete for students. Ave Maria is located in Ann Arbor, Michigan, a short distance from Detroit. The University of Detroit Mercy, a Roman Catholic law school, has seen its applications continue to decline

203. UNIV. OF ST. THOMAS SCH. OF LAW, *Faith-Based Legal Education*, at http://www.stthomas.edu/lawschool/mad/mad_fb.htm (last visited Apr. 15, 2002).

204. Patrick J. Schiltz, *Does the World Really Need Another Catholic Law School?*, UNIV. OF ST. THOMAS SCH. OF LAW, at http://www.stthomas.edu/lawschool/mad/mad_cls1.htm (last visited Sept. 9, 2002).

205. Mary Jane Smetanka, *St. Thomas Hires Notre Dame Dean to Run New Law School*, STAR TRIB. (Minneapolis-St. Paul), July 3, 1999, at 02B, 1999 WL 7503838 (quoting Dean David Link, upon his appointment, as saying, “I’m coming here because there’s a niche to be filled, and together we’ll make legal education stronger”); see Patrick J. Schiltz, *Does the World Really Need Another Catholic Law School?*, UNIV. OF ST. THOMAS SCH. OF LAW, at http://www.stthomas.edu.lawschool/mad/mad_cls1.htm (last visited Sept. 9, 2002) (discussing things a Catholic law school must do in order to distinguish itself from secular law schools). Hamline University School of Law Dean, Ed Butterfoss, is quoted at the time of St. Thomas’s announcement that “[i]t’s always been our strong mission to train lawyers with a commitment to public service . . . We instill values and ethics in them as we train them. We’ve done a good job, and we’re well-known for it.” Allie Shah, *Expansion Plan Has St. Thomas Taking Up Law*, STAR TRIB. (Minneapolis-St. Paul), May 15, 1999, at 01A, 1999 WL 7497725.

from the mid-1990s, to 410 full-time applicants for Fall 1999, when Ave Maria opened, and 371 full-time applicants for Fall 2000.²⁰⁶ One of the reasons for this decline, according to Sixth Circuit Judge James L. Ryan, was “[t]he simple truth is our law school, for some reason, has either overlooked or declined to develop a distinctive Catholic identity. And that would be its [sic] natural strength and its attractiveness.”²⁰⁷ The explicit Catholic distinctiveness at Ave Maria bodes ill for Detroit Mercy if Judge Ryan’s supposition is accurate. The University of St. Thomas notes that it intends to be a small law school, that its program will be available only to full-time students, and that it intends to recruit students nationally.²⁰⁸ At the time of St. Thomas’s announcement, Harry J. Haynsworth, William Mitchell School of Law president and dean, was quoted as saying, “I think it’s going to increase the competition for basically the same pool of student applicants It’s just going to make it tougher for all of us to be able to get the full complement of the kinds of students we want to have.”²⁰⁹ St. Thomas’s initial class of students was largely drawn from Minnesota.²¹⁰ It seems reasonably clear that St. Thomas’s decision to open a law school precipitated the decision at Hamline University

206. OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 161 (Rick L. Morgan & Kurt Snyder eds., 2001); OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 227 (Rick L. Morgan & Andrew Arnone eds., 2002). Applications by persons desiring admission to the fulltime program rose to 445 at Detroit Mercy in Fall 2001. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 239 (Wendy Margolis et al. eds., 2003).

207. George Bullard, *U-D Law School Downsizes*, DET. NEWS, Oct. 27, 1998, at D1, 1998 WL 3842588.

208. PATRICK J. SCHILTZ, UNIV. OF ST. THOMAS, AMERICA’S NEWEST LAW SCHOOL: THE UNIVERSITY OF ST. THOMAS SCHOOL OF LAW 3 (on file with author); see Mary Jane Smetanka, *St. Thomas Hires Notre Dame Dean to Run New Law School*, STAR TRIB. (Minneapolis-St. Paul), July 3, 1999, at 02B, 1999 WL 7503838 (downplaying the competition for local students by St. Thomas); see also Allie Shah, *Expansion Plan Has St. Thomas Taking Up Law*, STAR TRIB. (Minneapolis-St. Paul), May 15, 1999, at 01A, 1999 WL 7497725 (noting school plans to recruit half of its student body from outside the state of Minnesota).

209. Allie Shah, *Expansion Plan Has St. Thomas Taking Up Law*, STAR TRIB. (Minneapolis-St. Paul), May 15, 1999, at 01A, 1999 WL 7497725.

210. UNIV. OF ST. THOMAS, UNIVERSITY OF ST. THOMAS SCHOOL OF LAW: STATISTICAL REPORT ON FALL 2001 ENTERING CLASS (on file with author) (noting that 80 of the 120 applicants enrolling at the school listed Minnesota as their permanent state of residence, followed by Wisconsin with 9, and Iowa with 7).

School of Law to open a weekend law program beginning in Fall 2002.²¹¹

III.

A. *Thinking About Branding*

1. Difference Distinction

Branding is, of course, nothing new in legal education. The creation of the AALS in 1900 was an effort by its original members to distinguish themselves from the ever increasing number of proprietary law schools.²¹² What is new is the explicit manner in and extent to which law schools seek to distinguish themselves from other law schools.

Northwestern University School of Law provides an excellent example. In a *Chicago Tribune* article on obtaining work experience before entering law school, the author noted that most Northwestern University School of Law students possessed work experience before going to law school. Northwestern Dean David Van Zandt is quoted as saying, “‘We basically reached a decision a few years ago that it is not a good idea for kids to come straight from college,’” a decision that showed “‘how we’re different from every other major law school . . . We are leading in this area.’”²¹³ Claiming a leading position among major law schools in urging applicants to work after college rather than attend law school is qualitatively different from staking a claim in an academic program, or in claiming one is “student friendly.” It is difficult to discern why this distinction makes Northwestern a better law school than other major law schools, for it seems a stretch to claim that law students who worked for one, two, or three years before entering law school

211. 53 LAW SCH. NEWS 8 (2001). Relatedly, the move of Detroit College of Law to East Lansing, Michigan may have precipitated the decision at Thomas Cooley Law School, an independent law school, to offer classes seven days a week. See THOMAS M. COOLEY LAW SCH., *Academics*, at <http://www.cooley.edu/academics/academicenvironment.htm> (last visited Oct. 5, 2002) (noting that classes are offered seven days a week).

212. See ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* 96-97 (1983) (outlining the requirements for membership in the Association of American Law Schools).

213. Hal Dardick, *Seeking Seasoned Students for Law School Applicants, Work Experience a Valuable Asset*, CHI. TRIB., Oct. 1, 2000, at 22, 2000 WL 3715127.

will make better lawyers or law students than those who attended law school immediately after graduating college.²¹⁴

The point of distinguishing oneself from others may be understood not as saying “we’re better,” but simply, “we’re different.” Difference itself may be the point of these efforts, just as difference is one option in the marketing of consumer goods. The new VW Beetle may or may not be better (in performance, average annual repair costs, or resale value) than similarly priced automobiles. However, it certainly is different, and it is that difference that is being marketed.

The *U.S. News* annual graduate school rankings publication provides both an overall ranking of schools and a ranking of schools in particular fields of law.²¹⁵ Because the overall ranking of law schools in *U.S. News* largely remains static, schools not included in the first tier often strive for distinction in the *U.S. News* or other published rankings by focusing on a specialty area.²¹⁶ If Stetson University can achieve an extraordinary increase in applications shortly after obtaining the top ranking in the field of trial advocacy,²¹⁷ then other schools will attempt the same. The problem, of course, is that these rankings also become static over time.²¹⁸

Distinction may also be obtained by offering a post-J.D. and one or more joint law-master’s degree programs. However, half of all ABA accredited law schools now offer a post-J.D. degree,²¹⁹ and a

214. In the interest of full disclosure, I attended law school immediately after graduating college.

215. See *Best Graduate Schools*, at <http://www.usnews.com/usnews/edu/grad/rankings/law/lawindex.htm> (last visited Sept. 9, 2002) (listing rankings in clinical training, dispute resolution, environmental law, healthcare, intellectual property, international law, trial advocacy, and tax law).

216. See Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 455 & n.10 (2000) (noting that “as the old saying goes: ‘Reputations die hard and are long in being born’”). Leiter also notes that the vast majority of schools listed in the top fifteen remain there. *Id.*

217. See Chris Klein, *Lower Tier-Dwellers Boost Their Notability by Carving out Niches*, NAT’L L.J., Mar. 31, 1997, at A12 (explaining the increase in admissions due to the trial advocacy program).

218. See *Best Graduate Schools, Law Specialties: Trial Advocacy (New! Ranked in 2002)*, at http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawsp7_brief.php (last visited Sept. 9, 2002) (listing Stetson University and Temple University as tied for first in trial advocacy rankings).

219. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 809-13 (Rick L. Morgan & Andrew Arnone eds., 2002) (totaling ninety-two law schools, excluding the Judge Advocate General’s School).

number of those schools offer more than one type of LL.M. or other post- J.D. degree.²²⁰ This attempt to achieve distinctiveness may be found in the fact that the ABA lists forty-four different fields in which a student can obtain a degree other than the J.D.²²¹ Additionally, although the ABA bars law schools from offering a “specialized” J.D. degree, Standard 301 permits schools to “offer an educational program designed to emphasize certain aspects of the law or the legal profession.”²²² Thus, a number of law schools now offer a “certificate of concentration” or other indicator that a student has received some value in addition to the diploma conferred.²²³ As stated by Professor Brian Leiter, “distinction is a commodity and, thus, quantifiable in tuition dollars, application volumes, alumni donations, and faculty salaries.”²²⁴

2. Seeking Distinction Through Faculty and Scholarship

The greatest opportunity and the greatest difficulty a law school has in obtaining distinctiveness in its academic program are the academics themselves. University of Minnesota Law School Dean Thomas Sullivan, when asked about competing against the newly-created University of St. Thomas School of Law, was quoted as saying, “‘It takes a very long time to acquire a national reputation because of the financial support that is needed as well as the excellence in recruiting distinguished faculty and student body.’”²²⁵ Until the arrival of baby boomers in law school beginning in 1970,

220. *Id.*

221. *Id.* at 813-16 (listing 41 law schools).

222. AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 301(d), <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Sept. 9, 2002).

223. St. Mary's University School of Law offers a “certificate of concentration” in criminal law, which has been available to students since 1996. ST. MARY'S UNIV. SCH. OF LAW, *Programs & Focus Areas*, <http://www.stmarytx.edu/law/index.php?group=program&page=generic.php>; see generally Larry Cata Backer, *Toward General Principles of Academic Specialization by Means of Certificate or Concentration Programs: Creating a Certificate Program in International, Comparative and Foreign Law at Penn State*, 20 PENN ST. INT'L L. REV. 67 (2001) (discussing certificate programs in general and the creation of a specific certificate program at Pennsylvania State University's Dickinson School of Law).

224. Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 451 (2000).

225. Terry Fiedler, *St. Thomas Inc. The University of St. Thomas is Known for Its Graduate School of Business. Now, with the Help of an Expanding Endowment, It Seeks National Recognition for Its Law School, Set to Open in 2001*, STAR TRIB. (Minneapolis-St. Paul), June 4, 2000, at 01A, 2000 WL 6975451.

many law schools retained a distinctive local or regional flavor in the composition of their law faculty.²²⁶ The growth and specialization of the legal profession at this time,²²⁷ and the adoption by the ABA of its revised law school accreditation standards in 1973, led accrediting bodies to encourage nonelite law schools to diversify their faculties by engaging in national hiring searches.²²⁸ The suggestion that nonelite law schools hire faculty through national searches was intended to create an environment in which scholarship was even more valued than before.

The creation of this environment made more important the criterion of scholarly promise and achievement in tenure applications. Although faculty members obtain tenure based on a measure of the tenure applicant's teaching, scholarship, and service, the first among equals of these three tenure criteria at the vast majority of law schools is scholarship.²²⁹ Indeed, at a substantial number of law schools, scholarship is the only meaningful criterion for obtaining tenure.

As law schools substantially expanded the size of their faculty during the 1980s,²³⁰ newly hired tenure-track faculty at all law

226. The two law schools with which I am most familiar, Marquette University and St. Mary's University, both hired local attorneys until the late 1970s and early 1980s. See generally ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s* (1983) (discussing the development of legal education and the legal profession).

227. See, e.g., Michael Ariens, *Know the Law: A History of Legal Specialization*, 45 S.C. L. REV. 1003, 1054-60 (1994) (discussing specialization in the legal profession from 1970). The adoption by the ABA of its Code of Professional Responsibility in 1969, which supplanted the 1908 Canons of Professional Ethics, and the drive of large firms in the 1970s to open offices in more than one state also affected the local or regional nature of much of legal education. See generally Michael Ariens, *Modern Legal Times: Making a Professional Legal Culture*, 15 J. AM. CULTURE 25 (1992) (discussing evolution of the modern legal profession).

228. St. Mary's University was strongly encouraged by the ABA in its 1979 inspection to hire faculty from outside the state of Texas. Most of its current faculty was hired as a result of this strong suggestion. See generally Donna Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501, 507 (1980) (reporting that as of 1975, five law schools—Harvard, Yale, Columbia, Michigan, and Chicago—conferred the first law degree upon 33.2% of all faculty members, and that 60% of all faculty members were graduates of fewer than 15% of accredited law schools). I have not counted, but I believe these percentages have increased since Fossum's study.

229. I have not undertaken any empirical research concerning the proposition stated here, and confess this claim is based on anecdotal information.

230. Compare AM. BAR ASS'N, *A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1984, LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS* 66 (1985) (re-

schools were required to publish in order to obtain tenure.²³¹ Because the length of the tenure track term at many law schools was shorter than the seven year period existing in other parts of the university, a significant percentage of law school faculty enjoyed tenure by the early to mid-1990s. Throughout the 1990s, the number of full-time law faculty barely budged.²³² And, beginning in 1994, it was a violation of the Age Discrimination in Employment Act (ADEA) for a university to mandate the retirement of any tenured faculty member.²³³

Some tenured faculty continue to publish. There are a number of reasons to continue to write, including writing one's way to another law school, obtaining higher than average salary increases or a lightened teaching load, receiving a named professorship or chair, enjoying a local reputation as "the scholar of the faculty," or benefiting from its psychic rewards. Scholarship that catches someone's eye may allow the writer the opportunity to obtain a position at another law school, one offering the writer better pay, greater prestige, proximity to a particular urban center, better weather, or some other benefit. But in a flat market, one in which cheaper

porting that the number of teachers in approved law schools was 4,461 in 1984), *with* AM. BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1987 LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS 66 (1988) (reporting 4,973 teachers in approved law schools in 1988), *and* AM. BAR ASS'N, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1991, at 67 (1992) (reporting an increase to 5,555 instructors in law schools in 1991). The number of J.D. law students as of Fall 1984 was 119,847, and 129,580 in 1991. *See id.* at 65 (reporting on Law School Attendance Figures for 1984); *id.* at 66 (giving attendance figures for 1991).

231. *See generally* Michael Ariens, *The Politics of Law (Teaching)*, 13 LAW & SOC. INQUIRY 773 (1988) (discussing credentialism in legal education).

232. *See* OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 804 (Rick L. Morgan & Andrew Arnone eds., 2002) (reporting 5,788 full time teachers in 2000 at ABA approved law schools); OFFICIAL AMERICAN BAR ASSOCIATION GUIDE TO APPROVED LAW SCHOOLS 453 (Rick L. Morgan & Kurt Snyder eds., 2001) (showing 5,586 full time teachers in approved law school for fall 1999). That number has remained largely stable since 1991, with 125,173 students in J.D. programs in Fall 2000, and 132,464 total students, including post-J.D. and other students. OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS 804 (Rick L. Morgan & Andrew Arnone eds., 2002).

233. In 1986, Congress amended the Age Discrimination in Employment Act (ADEA) and eliminated the exemption accorded universities from the ban on mandatory retirement. The exemption was repealed for academic employees as of December 31, 1993. *See* Act of Oct. 31, 1986, Pub. L. 99-592, § 6(b) (repealing 29 U.S.C. § 631(d) as of Dec. 31, 1993). The ADEA makes it illegal "for an employer [to] . . . discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1) (1999).

options²³⁴ become available every year, even an enhanced academic reputation may not result in a move to another law school.²³⁵

For those whose scholarship has not caught another's eye, there is a great temptation after obtaining tenure to quit the game.²³⁶ One may have the best of reasons for doing so: aiding students by becoming a master teacher, and performing service for the law school and community that redounds to the school's benefit are laudatory activities. On the other hand, one may have less than honorable reasons to quit writing: the desire to use the time formerly spent on scholarship to make money as a consultant or paid expert, or to improve one's golf game.

A reputation as a great teacher may allow someone to sleep better at night, but it won't result in an "upward" move to another law school. Most law schools will not offer a better than average salary increase to a tenured faculty member for good teaching. Law schools continue to indicate their bias towards scholarship in the number of credit hours law faculty teach. I am aware of just one ABA-approved law school at which faculty members teach more than approximately twelve credit hours during an academic year,²³⁷ or about six hours per week during each semester, and a number of law schools have reduced the teaching load of tenured and tenure-track faculty to approximately nine credit hours per academic year.²³⁸ This bias exists because institutional reputation and dis-

234. The hiring of new faculty may offer something of a futures market for law schools looking to enhance reputation through the prestige of their faculty.

235. See Michael Ariens, *The Politics of Law (Teaching)*, 13 LAW & SOC. INQUIRY 773, 784-86 (1988) (discussing credentialism in law teaching).

236. See, e.g., Philip F. Postlewaite, *Life After Tenure: Where Have All the Articles Gone?*, 48 J. LEGAL EDUC. 558, 566 (1998) (reporting statistics that suggest senior faculty publish fewer articles, symposium pieces, and other items than junior faculty members).

237. Baylor University School of Law, which operates on a quarter system, requires its faculty to teach approximately twenty-four quarter-hours per academic year. Telephone interview with Professor Brian Serr, Baylor University School of Law (Apr. 22, 2002). After every twelve quarters, a faculty member receives a leave for a quarter. *Id.* Because a credit quarter-hour at Baylor is sixty-five minutes in length for ten weeks, the number of minutes in a standard three-quarter-hour class is approximately 1,900 minutes, only slightly less than the 2,100 minutes found in a standard (forty-two classes times fifty minutes per class) three-credit-hour semester course. *Id.* Thus, Baylor faculty teach the equivalent of twenty-one or twenty-two semester hours per academic year. *Id.*

238. E.g., The George Washington University Law School. The Wahl Commission, created after the consent decree, recommended eliminating Standard 404(a), which stated the maximum number of weekly faculty teaching hours required by a law school, a recommendation accepted by the ABA. See REPORT OF THE COMMISSION TO REVIEW THE SUB-

inction are tested by the scholarly output of a law school's faculty.²³⁹ When Professor Brian Leiter, a trenchant critic of the methodology and criteria applied by *U.S. News*, looked at another way of understanding academic distinction among the top fifty or so law schools, he turned to a measurement based on scholarly productivity.²⁴⁰

The need for distinction, and acceptance of the idea that scholarship is the path to distinction, has led to the emergence of the professorial "star."²⁴¹ It's not Stanley Fish's teaching that has taken

STANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 3, 53 (1995) (stating that the most hours a law professor can teach per week is eight if, "repetitions during the same academic period" are counted on a one-half basis; 10 hours per week if repetitions are counted at "full value"; see also SUPPLEMENTARY REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 3-5, 53 (1995) (delineating the various responsibilities and activities of law professors, and proposing changes to the current language of Standard 404).

239. It seems unlikely that a law school can either make or lose its reputation based on a snapshot of faculty scholarly productivity: "[A]s the old saying goes: 'Reputations die hard and are long in being born.'" Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 455 (2000). However, the opportunity to make the case seems irresistible to law school administrators. Interestingly, Leiter concluded that Harvard Law School was an "overvalued school" in terms of scholarly productivity. See Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 466 (2000) (noting, in Table 5, that Harvard was the eighth most productive faculty, but enjoyed the best reputation for scholarship). Harvard has attempted to refocus the distinctiveness of its academic program by announcing "a fundamental overhaul" of its first-year program. See Michael Armini, *Changes to First-Year Program Greet New Students: Smaller Sections and More Course Options Mark the Beginning of a New Era at Harvard Law*, HARV. L. TODAY, Sept. 2001, at 1. Harvard Law School Dean Robert Clark was quoted as saying, "Rarely has such a significant change received so much support from both the student and faculty ranks . . . [T]his proposal has truly caught the imagination of the students—both current and prospective." *Id.*; see also Letter from Dean Robert C. Clark, Dean of Harvard Law School, to Alumni and Friends (May 2002) (on file with author) (concluding that these changes have been strongly supported by both the school's students and faculty).

240. Brian Leiter, *Measuring the Academic Distinction of Law Faculties*, 29 J. LEGAL STUD. 451, 461-68 (2000); see Brian Leiter, *New Educational Quality Rankings of US Law Schools 2000-02*, at <http://www.utexas.edu/law/faculty/bleiter/rankings/> (last visited Sept. 9, 2002) (offering judgments of top forty law schools, begun in 1997).

241. Kent D. Syverud, *The Dynamic Market for Law Faculty in the United States*, 51 J. LEGAL EDUC. 423, 424 (2001). Syverud asserts that

[n]umerous law schools have sought to become more prominent, and to assemble a better faculty, by recruiting the best tenured faculty from competitors above and below them in law school rankings. This has led to schools' offering salaries and other benefits . . . far in excess of traditional amounts to a small class of the most sought-after faculty.

him to the University of Illinois-Chicago at \$230,000 per year, it's his scholarly reputation.²⁴² Law school administrators rationally have concluded that enhanced reputation will result if they hire academic stars. The law and economics-oriented George Mason University School of Law, a relatively new law school, touts its high ranking in Professor Leiter's measurement of scholarly output,²⁴³ which is in part a result of its decision to hire "stars."²⁴⁴

If the measure of a faculty member's value is that faculty member's scholarly productivity, and if the measure of a law school's distinctiveness is in that same productivity, then there exists an amicable convergence of individual and institutional interests. When assessing which of the top fifty or fifty-five law schools are *really* in the top forty schools, one may be able to argue effectively that an (over) emphasis on faculty scholarship is necessary for the long-term interests of the institution and its current students and graduates. Of course, law school ranking remains a zero-sum game, which is why the ABA and law school deans have worked so hard to disparage all published rankings. As already discussed, this effort at disparagement has failed. What is likely to happen?

B. *The Future of Branding*

There are at least two paths that a school may take in branding itself. First, the school may continue to strive to improve its ranking (or at least offer the pretense of attempting to strive to reach a more selective tier of law school) *via* the traditionally accepted method of accomplishment and prominent faculty scholarship. Alternately, a law school may attempt to make its institutional reputation outside the control and direction of its faculty. The former case is eloquently made by Professor David Gregory:

Very few, if any, law schools—or the universities of which law schools are important parts—will consciously repudiate these historic benchmarks of excellence, for by doing so, a law school would reduce itself suicidally to market extinction as fifth-tier trade school,

Id.

242. I have no personal knowledge of Fish's teaching methods or ability. He may be a great teacher, and he may be a great administrator, but he wasn't offered that salary for either of those reasons.

243. Letter from Mark F. Grady, Dean of the George Mason University School of Law, to Friend (Sept. 27, 1999) (on file with author).

244. *See id.* (noting lateral hires).

teaching law students to do little more than become scriveners of complaints. In market terms, such a law school would kill its competitive credibility and reputation. Law is an especially hierarchical business, exquisitely sensitized to the powerful primacy of those most ephemeral, yet indispensable, determinants of every legal institution's and every lawyer's professional viability—credibility and reputation. Law school credibility and reputation, and the credibility and reputation of law school graduates, are not achieved by teaching facility in the performance of low-skill clerical functions.²⁴⁵

1. Branding Through Faculty Scholarship

Most law school faculty will prefer traditional methods of accomplishment. Although stated in market terms, Professor Gregory's evaluation echoes the justifications traditionally made by the ABA. The restrictions on the number of hours taught by law faculty were necessary for the production of scholarship, which was an intrinsic aspect of an ABA-approved school.²⁴⁶ Even if it is nearly impossible for a law school to improve substantially its rank in *U.S. News*, use of the "historical benchmarks of excellence," i.e., scholarship, teaching, and service, allows the law faculty to retain the surplus value created by the ABA's regulatory system.²⁴⁷ Law faculty, particularly tenured law faculty, have for several decades acted as independent contractors.²⁴⁸ Within those broad historical benchmarks, they choose how to perform their job, and, outside of the six hours devoted to class time, when, where, and how to perform their work. Using the protections afforded by the concept of academic freedom, law faculty at many law schools exercise nearly complete freedom in the manner in which they define their work.

245. David L. Gregory, *The Employment Relation of the Law Professor in the Consent Decree Era*, 30 GA. L. REV. 259, 262 (1995).

246. REPORT OF THE COMMISSION TO REVIEW THE SUBSTANCE AND PROCESS OF THE AMERICAN BAR ASSOCIATION'S ACCREDITATION OF AMERICAN LAW SCHOOLS 5, 53 (1995) (discussing load requirements for faculty and proposing changes to the Standards).

247. See George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2094, 2110-13, 2135-36 (1998) (asserting that "[e]xisting 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").

248. See *id.* at 2110-11 (concluding that most law schools are organized on the "partnership model," in which "[a]ny excess of income over costs goes not to an entrepreneur, but to the faculty; the faculty, not shareholders nor an entrepreneur, are the residual claimants to any profits from the law school's operations"). *Id.* at 2110-11.

Yes, a dean may have the authority to freeze the salary of the obdurate faculty member, and there presently exists the “threat” in some law schools of senior faculty review, but these negative incentives are slight indeed.²⁴⁹ Those faculty members tenured by the mid-1990s benefited from the ABA’s now-proscribed efforts to ensure all schools paid handsome law faculty salaries, particularly in comparison with the rest of the university.²⁵⁰

Professor Gregory speculates that a positive outcome of the consent decree will be that faculty wages and benefits will be market-driven: “Market expectations, demonstrated performance (or lack thereof) and merit principles will govern and drive compensation-related arrangements between the law professor as employee and the law school as employer. The market—and merit principles defined by the market—will reign supreme.”²⁵¹ Although this might be a welcome trend, it is highly unlikely this will occur. Inertia will likely play a substantial role.

For many deans, there is little to be gained and much to be lost in attempting to impose a market-based system of pay, particularly in a tenure-saturated institution. Those receiving the merit increases may perceive them as payment for past services, a form of reparations, rather than an advanced payment for future accomplishments. Those who fail to receive merit pay increases will little appreciate being judged by another as lacking in merit. It is unclear whether either group will perceive such judgments as incentives to produce more scholarship. Additionally, at a time when intensified competition for students has lessened the ability of law schools simply to impose greater-than-inflationary tuition increases, it is extremely difficult to incorporate any plan calling for

249. St. Mary’s University instituted senior faculty review in 1997. Faculty are subject to review every five years. A committee of three senior faculty (the subject of the review strikes one of four nominees to perform the review) assesses whether the subject of the review has performed his or her job in a satisfactory fashion. It is possible, after a decade long procedure, for a tenured faculty member to be fired. No one in the School of Law has received a negative evaluation. See ST. MARY’S UNIV., FACULTY HANDBOOK § 2.5.5 (1995) (on file with author) (describing the procedures for committee selection and senior faculty review).

250. See George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2135-36 (1998) (noting that, prior to the consent decree, ABA standards ratcheted up faculty pay).

251. David L. Gregory, *The Employment Relation of the Law Professor in the Consent Decree Era*, 30 GA. L. REV. 259, 261 (1995).

raises beyond cost of living increases, much less any substantial merit pay increases. Further, should any additional pool of money become available, particularly through fund raising, it is much more economically efficient to use those funds to buy an academic star from another school rather than increase the salaries of most of the current faculty, no matter how productive those persons are.²⁵² The benefit generated in “buzz” and reputational enhancement by hiring someone like Stanley Fish may be worth much more to an institution than reallocating those monies to faculty members who believe they are poorly paid, at least in comparison with colleagues perceived as “deadwood.” Finally, the rational law school administrator will not pay more than he or she must in order to keep a current member of the faculty.²⁵³

2. Branding Independent of Law School Faculty

Attempting to make an institutional reputation outside the control and direction of faculty is a second option. Instead of relying on faculty to produce scholarship that *may* generate academic distinction, which *may* in turn redound to the benefit of the institution “hosting” the members of the law faculty, a school may choose more directly to remake its image. A law school can focus its resources on a few fields of law.²⁵⁴ It may become more “consumer-friendly” by offering classes throughout the day and week, and in different locations, including cyberspace.²⁵⁵ It may focus on the

252. Surely some faculty members remain at an institution for reasons of loyalty, for family, or for other nonsalary related reasons, which limits that faculty member's bargaining power. By contrast, hiring someone from another school will often require paying a premium for that person.

253. Unless someone is considered the only “star” at a particular school, a school rarely suffers a decline in reputation when one or more of its faculty members departs to take another position. At some point, a law school must avoid the appearance of losing “too many” of its standouts, in which case the law school administrator may be forced to pay a premium to keep current faculty.

254. See JOHN MARSHALL LAW SCH., *Academic Programs*, at <http://www.jmls.edu/catalog.cfm?dest=dir&linkon=section&linked=12> (last visited Sept. 12, 2002) (noting curriculum focused on “hot” areas of law).

255. Current ABA Standards permit up to about one-fifth of one's education at an ABA-accredited school to be taken as “non-resident” credit. See AM. BAR ASS'N, STANDARDS FOR APPROVAL OF LAW SCHOOLS AND INTERPRETATIONS 304(b), 304-2, <http://www.abanet.org/legaled/standards/chapter3.html> (last visited Sept. 25, 2002) (stating that at least 45,000 of the required 56,000 minutes of instruction time must be in courses in residence at the law school conferring the degree).

practice of law.²⁵⁶ Law school administrators may think more cogently about the best manner in which to transmit skills training and information about law to its students.²⁵⁷ It may choose to take advantage of its geographic location by emphasizing the law of the state in which it is located.

This transformation of a law school requires an abolition of the independent contractor model, particularly at a law school at which most faculty are tenured. Faculty members will be required to learn new fields of law. They will have to become more flexible in the subjects they teach. Faculty members will not be free to inform the administration of the courses and the times of day they will or will not teach, and may be required to teach substantially more than twelve credit-hours each academic year. Instead of separate courses in Contracts, Torts, Criminal Law and Criminal Procedure, courses may be repackaged as structural rather than doctrinal subjects, and taught in teams of faculty rather than by individual instructors. The institution may demand that faculty teach the law of the state in which the school is located.²⁵⁸

This transformation of the law school substantially increases the demands on faculty. Faculty time, the most precious of resources, will be expended on behalf of the institution and the students at the law school rather than on the faculty members themselves. Because the production of scholarship is unlikely to be abandoned by any institution, faculty members may be required to produce scholarship in addition to the other increased demands made on them. In that regard, like barristers and solicitors, law faculty may be segregated as specialists in teaching or scholarship. As suggested by Professor Gregory, the standards of the market will prevail.²⁵⁹ Those whose market value is not found in scholarship will be asked

256. See Alan Watson, *Legal Education Reform: Modest Suggestions*, 51 J. LEGAL EDUC. 91, 92 (2001) (noting upper-level students in his class all “felt that law school education should be much more geared towards a training for the practice of law”).

257. See David M. Becker, *Some Concerns About the Future of Legal Education*, 51 J. LEGAL EDUC. 469, 473 (2001) (arguing that the first stage of training in law is skills training, not delivery of information).

258. Many faculty members may claim this violates individual academic freedom. Whether requiring one to teach state law rather than “general” law is a violation of academic freedom is beyond the thesis of this article. Even if such a mandate violates individual academic freedom, whether such a violation is actionable conduct is unclear.

259. David L. Gregory, *The Employment Relation of the Law Professor in the Consent Decree Era*, 30 GA. L. REV. 259, 261 (1995).

to teach even more hours, or undertake more burdensome committee or other administrative tasks in order for the law school to remain competitive when the entrepreneurial model reaches the legal education market.²⁶⁰ Those who fail to react before this model takes hold will face even more fierce competition.

C. *The Cyber Law School—An Entrepreneurial Model*

An entrepreneur may market a law school that has both a location in cyberspace and a physical location (“clicks and bricks”), much like Barnes & Noble.²⁶¹ Concord University School of Law represents one approach to a more entrepreneurial model in delivering legal education services. Another is suggested by *The Bridge*.²⁶² One may attract students by marketing an attractive package of distinguished faculty as lecturers in cyberspace, joined by “teaching assistants” found at the geographic location at which the law school is located. The teaching assistants, like teaching assistants found at most research universities, are present to interact with students in small groups or outside of class, to explain the lectures, to grade examinations and papers, and to modify the lecture content in light of the needs of students at that location (e.g., understanding a particular state law doctrine for bar examination purposes). The distinguished lecturers will prepare computer-based instructional materials that can be modified to suit the needs of students in different locations. The cost of such a program would be substantially less than the cost of current bricks and mortar schools. The entrepreneurial law school would enjoy the distinction of its faculty, and the instructional and student counseling productivity of its teaching assistants.

This entrepreneur may be a for-profit entity, for the ABA Standards no longer require a law school be owned by a nonprofit en-

260. See George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2110 (1998) (noting that “[a]n entrepreneur operates these law schools in order to maximize profit—that is, to maximize the difference between gross income and costs”).

261. Cornell University Law School, with its web-based Legal Information Institute, might offer such an example.

262. See Letter from Morton Horwitz, Editor-in-Chief et al., *The Bridge*, Lexis Publishing, to Law Faculty (Dec. 6, 1999) (on file with author) (describing new computer-based instructional materials created chiefly for first-year law students).

tity.²⁶³ It may also be an existing law school interested in expanding its brand name. Just as one can pay for, and take courses and receive a degree from an Extension of most elite universities, elite law schools may decide to add law school extension campuses, and confer “extension” law degrees. Although ABA Standards currently prohibit such an effort, I doubt whether those Standards will survive legal scrutiny.

IV.

I remain ambivalent about whether these possible developments are to be feared or welcomed. I greatly benefit from the surplus value given me by my position as a tenured faculty member at an ABA-approved law school, but I expect that surplus value to disappear, and sooner rather than later.

For a long time law schools have been able to avoid the prospect of change. The mantra, “the only constant is change,” a refrain heard in most discussions concerning the future of the legal profession, has long been absent from discussions of the future of legal education. This day of reckoning can be postponed for some time, perhaps as long as a decade. The ability of law school graduates to repay the debt incurred in obtaining a law degree remains difficult but manageable, and so long as interest rates remain low and the market for lawyers remains sound, law schools can avoid change. But the difference between Concord University School of Law tuition and average private law school tuition continues to grow. The current absence of more than one entrepreneur in the legal education market is not likely to last. For those who plan to retire in less than a decade, that hope may drive efforts to hold out against change for as long as possible. The longer the wait, however, the greater the danger that change will be imposed from without.

263. 60 Fed. Reg. 39,422 (Aug. 2, 1995); *see also* United States v. Am. Bar Ass’n, 934 F. Supp. 435, 436 (D.D.C. 1996) (enjoining and restraining the ABA from prohibiting a law school from being organized as a for-profit institution).

