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Royce de R. Barondes & Thomas A. Lambert, Should Antitrust Education Be Mandatory (for Law School Administrators)?, 38 U.C. Davis L. Rev. 1299 (2005)

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Should Antitrust Education Be Mandatory (for Law School Administrators)?

Royce de R. Barondes[*] *& Thomas A. Lambert*[**]

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INTRODUCTION

Lawyers who oversee law school administration seem to flout antitrust law, which is somewhat ironic. A few years ago, the American Bar Association ("ABA") settled a government lawsuit alleging that its law school accreditation procedures collusively increased faculty salaries.[1] The Justice Department maintained that an ABA rule requiring each law school's faculty compensation to be comparable to that of other ABA-approved law schools "restrained competition among professional personnel at ABA-approved law schools" and "had the effect of ratcheting up law school salaries."[2] This Essay examines a current practice, recommended by the Association of American Law Schools ("AALS"), which artificially suppresses faculty salaries.

Shortly before classes start for an academic year, an aggressive faculty member might like to approach his or her dean and threaten to resign, and perhaps teach elsewhere, unless his or her salary is increased. Law school deans might dislike this strategy for a number of reasons. It would increase some salaries. It might increase transaction costs, because addressing problems at the last minute may not be as efficient as following a planned process. It also might foster dissension among faculty members, for those whose teaching responsibilities could easily be covered (or lost) might receive relatively lower compensation.

The law schools might, therefore, seek to limit professors' bargaining power by agreeing not to engage in the sort of competition that would drive up faculty salaries. A statement issued by the AALS identifies such a process. The statement memorializes an expectation that law schools generally will not extend offers of indefinite employment to

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[1] *See* United States v. Am. Bar Ass'n; Proposed Final Judgment and Competitive Impact Statement, 60 Fed. Reg. 39,421 (Aug. 2, 1995) (discussing consent decree settling litigation) [hereinafter ABA Consent Decree], *final judgment entered*, United States v. Am. Bar Ass'n, 934 F. Supp. 435 (D.D.C. 1996), *modified*, 135 F. Supp. 2d 28 (D.D.C. 2001), No. 95-1211 (RCL), 2001 U.S. Dist. LEXIS 2279 (D.D.C. Feb. 16, 2001). Other recent litigation has also raised antitrust issues concerning law school accreditation. *E.g.*, Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026 (1st Cir. 1997); W. State Univ. of S. Cal. v. Am. Bar Ass'n, 301 F. Supp. 2d 1129, 1132 (C.D. Cal. 2004); Staver v. Am. Bar Ass'n, 169 F. Supp. 2d 1372 (M.D. Fla. 2001). Those in medical education also recently faced allegations of antitrust violations in *Jung v. Association of American Medical Colleges*, 300 F. Supp. 2d 119 (D.D.C. 2004) (denying motion to dismiss against certain, but not all, defendants in lawsuit alleging antitrust violation in process of matching students with medical resident positions), which prompted recent legislation. Pension Funding Equity Act of 2004, Pub. L. No. 108-218, § 207, 118 Stat. 596, 611-13 (2004) (codified at 15 U.S.C. § 37b (LEXIS through Pub. L. No. 109-1, Jan. 7, 2005)) (confirming federal and state antitrust laws do not prohibit conduct of graduate medical education residency matching program).

[2] ABA Consent Decree, *supra* note 1, at 39,424-25.

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sitting law professors after March 1.[3]

This Essay analyzes the antitrust implications of the arrangement memorialized in the AALS statement. We find the issue interesting for three reasons: *First*, one would have expected the recent settlement of the ABA antitrust litigation regarding accreditation procedures to have focused attention on the antitrust implications of other aspects of law school administration. The continuation of this hiring policy is, therefore, curious. *Second*, the AALS statement reflects an arrangement among buyers, for law schools purchase teaching services from faculty members. Antitrust challenges to potentially collusive arrangements among buyers are increasingly common,[4] and this apparent agreement among law schools provides an interesting context in which to examine buyer arrangements. *Finally*, we find it interesting that the arrangement in question was promulgated by an organization of legal educators. That fact says something about the ease with which sophisticated persons can (one supposes inadvertently) create serious antitrust problems.

The purpose of this Essay is merely to examine the pertinent antitrust issues. The Essay proceeds on the assumption that the AALS policy, whose terms are precatory,[5] speaks to what is in fact an agreement among law schools. As noted below, the policy itself contemplates that law school deans will seek waivers, in individual cases, extending the time periods for up to two months. Were the policy to be litigated, law schools might dispute the existence of an agreement. We believe, though, that the nature of the policy strongly suggests that it represents an agreement among law schools and that any litigation would yield consistent evidence. Nothing in our individual experiences as faculty members suggests otherwise.[6] Reviewing the policy on that basis, we

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[3] *See infra* notes 10-11 and accompanying text. The statement further provides that offers for visiting positions must be extended by March 15, and it recommends that faculty members not resign to accept another indefinite (nonvisiting) law school teaching position later than March 15. *See infra* notes 10-11 and accompanying text.

[4] *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001) (denying motion to dismiss antitrust action based on purported collusion among employers); John R. Wilke, *How Driving Prices Lower Can Violate Antitrust Statutes*, WALL ST. J., Jan. 27, 2004, at A1 (reporting on growth in number of antitrust lawsuits based on monopsony and buyer collusion).

[5] *See infra* text accompanying note 10.

[6] To the extent law schools follow the policy, one could infer an agreement among compliant law schools, for compliance with the policy (i.e., refusing to extend an offer to a competitor's employee after a certain date) would be economically irrational for a law school acting unilaterally. Such behavior would make economic sense only if there were an agreement among the competing law schools to abide by the same policy. As such, in litigation, the law schools' consciously parallel behavior would give rise to an inference of agreement for purposes of the antitrust laws. *Cf.* Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939) (holding that consciously parallel behavior among competing movie

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conclude that the policy violates federal antitrust law.

I. THE AALS STATEMENT

The AALS is a not-for-profit corporation organized for the "improvement of the legal profession through legal education."[7] The members of the corporation include 166 law schools.[8] In 1979, the Executive Committee of the AALS[9] adopted a Statement of Good Practices for the Recruitment and Resignation by Full-Time Faculty Members, which (as revised in 1984 and 1986) states:

> **Offer of Appointment.** To permit a full-time faculty member to give due consideration to an offer and timely notice of resignation or request for leave of absence to his or her law school, a law school should make an offer of an indefinite appointment as a teacher during the following academic year no later than **March 1** and of a visiting appointment no later than **March 15.**
>
> **Resignation or Request for Leave of Absence.** A full-time faculty member should not resign to accept an indefinite appointment as a teacher at another law school during the next academic year later than March 15 nor request leave of absence to accept a visiting appointment as a teacher later than April 1. A law school should not offer an indefinite appointment or visiting position that contemplates that the faculty member resign or request leave of absence at a later date.
>
> **Consent of the Dean of the Law School.** Even if the dean of the law school on whose faculty the person serves has acquiesced, a law school should not make an offer of an appointment as a teacher to a full-time member of the faculty of a law school more than two months later than the dates stated above and the faculty member

distributors implied agreement because behavior at issue made economic sense only if all parties acted in concert).

[7] Bylaws of the Association of American Law Schools, Inc. (Jan. 6, 2000) [hereinafter AALS Bylaws], *reprinted in* ASSOCIATION OF AMERICAN LAW SCHOOLS, 2003 HANDBOOK 25 (2003) [hereinafter AALS HANDBOOK].

[8] *See* Association of American Law Schools, Inc., What Is the AALS?, *at* www.aals.org/about.html (last visited March 16, 2005).

[9] Since 1977, the AALS's Bylaws have provided for an Executive Committee consisting of nine members. AALS HANDBOOK, *supra* note 7, at 11. The Committee is comprised of six faculty members of AALS-member law schools, who are elected at annual meetings on staggered three-year terms, and the three officers of the AALS, who are also on the faculty of AALS-member law schools. AALS Bylaws, *supra* note 7, §§ 4-1, 5-1.a, 5-1.b.

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> should not resign or request leave of absence two months later than the dates stated above.[10]

The policy indicates that its purpose is to give the institution sufficient time to arrange a replacement for a departing professor, and that it is designed to "serve the best interests" of both the school a professor is leaving and the school to which the professor is moving.[11] Interestingly, the policy does not purport to limit retirements after March 15 or post-March 15 resignations to take positions outside law school teaching. The disruption occasioned by such departures would, of course, be the same. The exclusion of recommendations regarding forms of departure other than those regulated by the policy is consistent with the view that the arrangement is designed to inhibit competition among law schools for incumbent faculty members (although one might argue that this limitation reflects other factors, e.g., the infrequency of departures for other reasons).[12]

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[10] AALS HANDBOOK, *supra* note 7, at 93-94. The policy does not purport to be binding. The policy states that the AALS "urges" that the practices be followed and states that the timeframes are "to provide those who wish to proceed responsibly a guide to appropriate conduct." *Id.* at 93. Although the AALS's bylaws contemplate that law schools may be censured or excluded from membership for material failures to comply with obligations of membership, AALS Bylaws, *supra* note 7, § 7-1, the bylaws provide that statements of policy and regulations "are not meant to be taken as implying . . . that departure from any of their specific terms is automatically demonstrative of qualitative failure." AALS Bylaws, *supra* note 7, § 2-2.b; *cf., e.g.*, Bill L. Williamson, *(Ab)Using Students: The Ethics of Faculty Use of a Student's Work Product*, 26 ARIZ. ST. L.J. 1029, 1032 n.7 (1994) (making similar point about another Statement of Good Practices).

A similar kind of policy, which sets forth the pertinent times for decisions by faculty members, is provided for universities, generally, by the American Association of University Professors. *See* American Association of University Professors, Recommended Institutional Regulations on Academic Freedom and Tenure, *at* http://www.aaup.org/statements/Redbook/Rbrir.htm (last visited March 16, 2005) ("Faculty members may terminate their appointments effective at the end of an academic year, provided that they give notice in writing at the earliest possible opportunity, but not later than May 15, or thirty days after receiving notification of the terms of appointment for the coming year, whichever date occurs later.").

[11] AALS HANDBOOK, *supra* note 7, at 93.

[12] One might wonder whether the AALS is, in fact, a captive of law professors and, therefore, this policy memorializes some form of ethical statement among law professors (not law schools). That the policy does not limit late retirements to go into law practice is consistent with the notion that the policy is not the product of an agreement among law professors acting as law professors.

A separate AALS policy, however, could be more easily characterized in that way. Three years after this Statement was last amended, a different Statement was adopted addressing, inter alia, the timing of notice of a faculty member's resignation to "assume another position," taking a leave of absence to teach, and assumption of "a temporary position in practice or government." Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities, *in* AALS HANDBOOK, *supra*

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The simplicity of the AALS Statement belies the intricacy of mutual assent to academic employment contracts. At some institutions, the initial written agreements setting forth salary terms may condition the institution's acceptance on approval by the university system's board of regents.[13] It would be inaccurate, then, to consider academic institutions as universally helpless economic actors otherwise powerless when confronted by last-minute negotiation by individual faculty members.

II. ANALYSIS OF THE AALS STATEMENT

By its terms, section 1 of the Sherman Act condemns agreements in restraint of trade.[14] Recognizing that a literal interpretation of the statute would condemn practically all commercial contracts, courts have interpreted the provision to preclude only *unreasonable* restraints of trade.[15] Specifically, section 1 creates liability where: (i) two or more economic actors[16] have entered an agreement; (ii) that agreement unreasonably restrains trade or commerce; and (iii) the restraint affects interstate commerce.[17] With respect to the AALS restraint, the third

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note 7, at 95, 99.

[13] *E.g.*, Todd Ackerman, *Why Take the Risk?: Professor Who'd Taken UH Job Reneges, Citing Instability*, HOUSTON CHRON., Apr. 15, 1993, at A18 (noting that written employment agreement for political science professor signed by university's President was subject to Board of Regents approval).

[14] 15 U.S.C. § 1 (2000 & Supp. I 2001) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

[15] Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition."); Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911) (interpreting section 1 to condemn only unreasonable restraints).

[16] The reference is to "economic actors," as opposed to "persons," because, for example, a business entity can only act through agents, 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 2.02 (2d ed. May 2004), and "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of [section] 1 of the Sherman Act." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771 (1984).

[17] VON KALINOWSKI ET AL., *supra* note 16, § 2.02.

Two other matters, pertinent to any actual litigation, merit mention. *First*, were a professor to bring a private action seeking damages, the plaintiff would be required to prove an injury stemming from the anticompetitive aspects of the policy. *Id.* § 3.04[1]. That might be difficult to prove.

Second, particular defendants might assert immunity under the state action doctrine, Parker v. Brown, 317 U.S. 341 (1943), as has happened in claims alleging antitrust violations by universities. *E.g.*, Porter Testing Lab. v. Bd. of Regents for the Okla. Agric. & Mech. Colls., 993 F.2d 768 (10th Cir. 1993); Cowboy Book, Ltd. v. Bd. of Regents for Agric. &

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element is easily satisfied, for law professors are recruited on a nationwide basis (frequently, at the AALS's own Faculty Recruitment Conference or through its national *Placement Bulletin*), and any practice that affects the hiring of law faculty thus has an effect on interstate commerce.[18] We assume that the first requirement is satisfied, for the AALS statement appears to memorialize an existing agreement among the law schools.[19] Our analysis, therefore, focuses on the second element — whether the law schools' concerted restriction on the time period in which lateral offers of employment may be extended constitutes an unreasonable restraint of trade.

A threshold inquiry is whether "trade or commerce" is involved at all. After all, the parties to the agreement are nonprofit educational institutions, not profit-seeking businesses.[20] That fact, however, cannot prevent this agreement from creating Sherman Act liability.[21] Although

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Mech. Colls., 728 F. Supp. 1518, 1518-20 (W.D. Okla. 1989) (stating that Board of Regents extending credit to students purchasing textbooks at Oklahoma State University bookstore was immune from antitrust claim by private bookstore); Bd. of Governors of the Univ. of N.C. v. Helpingstine, 714 F. Supp. 167, 176 (M.D.N.C. 1989) ("While few cases have considered whether universities and their governing boards are immune from suit under the Sherman Act, decisions indicate that such immunity exists."); Am. Nat'l Bank & Trust Co. of Chi. v. Bd. of Regents for Regency Univs., 607 F. Supp. 845 (N.D. Ill. 1984). Alternatively, litigation might be complicated by assertion of immunity under the Eleventh Amendment. *E.g.*, Univ. of Tex. at Austin v. Vratil, 96 F.3d 1337, 1339 (10th Cir. 1996) (holding nonparty state colleges entitled to Eleventh Amendment immunity from burden of complying with discovery in connection with damages against NCAA on antitrust claim concerning NCAA rule restricting coaches' earnings).

Because the intended scope of this Essay is limited to the primary issue of the existence of an antitrust violation, and application of certain fact-intensive legal principles is impracticable in the abstract, these ancillary issues pertinent to particular defendants are not addressed here.

[18] *Cf.* Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330-31 (1991) (holding that alleged group boycott of single eye surgeon satisfied interstate commerce requirement).

[19] *See supra* note 6 and accompanying text.

[20] This potential defense, of course, would not be pertinent to the limited number of for-profit law schools, were any part of an agreement restricting competition. *See generally, e.g.*, *In re* Lewis, 86 S.W.3d 419, 420 (Ky. 2002) (describing Western State University College of Law as for-profit); Beth Kormanik, *Law School Weighs Specialties*, FLA. TIMES-UNION, June 13, 2004, at B-1 (stating that owners of Florida Coastal School of Law are contemplating opening series of for-profit law schools); Concord Law School, School Information, *at* www.concordlawschool.com (describing Concord Law School as indirectly owned by Washington Post Company) (last visited March 16, 2005). Florida Coastal School of Law is an AALS nonmember, fee-paid law school. Association of American Law Schools, Inc., AALS Member Schools, *at* http://www.aals.org/members.html (last visited March 16, 2005).

[21] *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 100 n.22 (1984) (noting that section 1 applies to nonprofit entities); United States v. Brown Univ., 5 F.3d 658, 665 (3d Cir. 1993).

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the activities of a nonprofit entity are exempt from section 1 when they represent "the antithesis of commercial activity,"[22] the setting of employees' salaries is commercial by nature and, therefore, is not an exempt activity.[23] Accordingly, the agreement at issue involves trade or commerce.

The key question is whether the agreement *unreasonably restrains* trade or commerce. To answer that question, a reviewing court would employ one of three modes of analysis, depending on the nature of the agreement. For some types of agreements, courts simply presume unreasonableness and declare the agreements illegal per se.[24] Such per se illegal agreements are those "whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality."[25] Included in this category are naked agreements[26] to fix prices or reduce output, agreements involving "bid-rigging," horizontal market divisions, group boycotts, vertical agreements maintaining resale prices, and certain agreements involving tying and reciprocal dealing.[27] If an agreement falls within one of the per se illegal categories, then "(a) neither a relevant market nor an estimate of the defendants' market power must be established to prove that the restraint is unlawful; (b) harmful effects are presumed; and (c) the range of permissible defenses is severely limited."[28]

Given the per se rule's restricted inquiry, and the consequent possibility that a court may mistakenly condemn a procompetitive practice without affording the defendant an opportunity to present a full defense, the rule's scope is narrow.[29] Most types of agreements challenged under section 1 are afforded a significantly more searching

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[22] *Brown Univ.*, 5 F.3d at 665.

[23] *Cf.* Law v. NCAA, 134 F.3d 1010 (10th Cir. 1998) (affirming grant of permanent injunction barring NCAA's enactment of limits on coaches' compensation).

[24] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958) ("[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.").

[25] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978).

[26] A "naked" (or "nearly naked") buyers' cartel is one "where the only or principal purpose of the agreement is to fix the buying price or output and where the challenged restraint cannot be said to be ancillary to a significant integration of the firms' operations." 12 HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 2010 (2000).

[27] VON KALINOWSKI ET AL., *supra* note 16, § 12.02[2].

[28] 11 HOVENKAMP, *supra* note 16, ¶ 1910a.

[29] *See* Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 9-10 (1984) (discussing "the shrinking per se rule").

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judicial inquiry under the "Rule of Reason," which requires analysis of an agreement's impact on competition.[30] Specifically, a reviewing court will first determine whether the challenged agreement has a substantially adverse effect on competition and, if so, will then evaluate whether the procompetitive virtues of the alleged wrongful conduct justify the otherwise anticompetitive impacts.[31]

Traditionally, the Rule of Reason involved a probing inquiry that included both the definition of the relevant market being restrained and a detailed analysis of the facts peculiar to the defendant's business, the history of the restraint, and the reasons for its imposition.[32] Since the Supreme Court's opinion in *National Society of Professional Engineers v. United States*,[33] however, courts have recognized that some restraints not governed by the per se rule may be deemed unreasonable without "elaborate industry analysis."[34] This so-called "quick look" analysis represents a third approach to determining unreasonableness and is appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[35]

In evaluating the reasonableness of the restraint in the AALS Statement, the choice among modes of analysis is ultimately inconsequential.[36] If the restraint were not declared per se illegal, it

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[30] *See Prof'l Eng'rs*, 435 U.S. at 691 (noting that "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition").

[31] *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1017 (10th Cir. 1998).

[32] *See Prof'l Eng'rs*, 435 U.S. at 692 (describing Rule of Reason inquiry). Justice Brandeis described the Rule of Reason inquiry as follows:

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918).

[33] 435 U.S. 679 (1978).

[34] *Id.* at 692.

[35] Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999).

[36] In actual practice, the distinctions among the three modes of analysis are rather blurry. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 5.6c, at 257 (2d ed. 1999)

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would be deemed unreasonable — and thus illegal — under either a "quick look" or Rule of Reason inquiry.

A. Is the Agreement Illegal Per Se?

An argument can be made that the agreement reflected in the AALS Statement is per se illegal. The net effect of the agreement is that each member law school, after the March 1 deadline, is granted the exclusive right to bid for the professors on its faculty without worrying about competing bids from rival law schools. The agreement thus resembles a form of naked horizontal market division, which, as a general proposition, would be illegal per se.[37]

A reviewing court, however, would probably refuse to invoke the per se rule here. The Supreme Court has been reluctant to apply the per se rule to practices with which it has had little experience.[38] Because the restraint in the AALS Statement represents a somewhat novel arrangement, a court considering the restraint's legality would probably find per se treatment inappropriate.[39] Moreover, a reviewing court might be reluctant to apply the per se rule in an otherwise appropriate context simply because the parties are nonprofit educational institutions.[40]

(recognizing "the distinction between the *per se* rule and the rule of reason as soft rather than hard").

[37] The authors of the leading antitrust treatise have opined that similar agreements — the so-called "reserve clauses" in professional sports contracts — should be considered per se illegal:

> Under the reserve clauses, the teams in a certain league or association agree not to bid against one another for certain classes of players. For example, a player's contract with Team X may provide that for one year after the initial contract expires Team X will have a preemptive right to keep the player for an additional year at the same salary. Such agreements are generally unlawful per se, but for the fact that most qualify for the antitrust labor immunity when negotiated as part of a collective bargaining process.

12 HOVENKAMP, *supra* note 26, ¶ 2013b.

[38] *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972) ("It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act.").

[39] *Cf., e.g.*, Granite Partners, L.P. v. Bear, Stearns & Co., 17 F. Supp. 2d 275, 296-97 (S.D.N.Y. 1998).

[40] *See, e.g.*, United States v. Brown Univ., 5 F.3d 658, 672 (3d Cir. 1993) (refraining from declaring agreement among Ivy League institutions per se illegal because parties to agreement were charitable educational organizations with "alleged pure altruistic motive" and no apparent "revenue maximizing purpose").

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B. "Quick Look"

If the arrangement were not categorized as a per se violation, it ultimately would be deemed unreasonable under one of the more probing modes of analysis. Most likely, a court would condemn the restraint using the truncated "quick look" analysis, because even a cursory review identifies the anticompetitive effect.

Under the quick look analysis, as under the full-scale Rule of Reason, the outcome-determinative question is whether the practice at issue decreases or increases competition in the relevant market; courts are *not* permitted to question whether competition in that market is reasonable or desirable.[41] Given this focused inquiry, the restraint in the AALS Statement could not pass muster, for any observer with a basic understanding of economics would conclude that the restraint reduces competition in the market for law professors.[42]

Most obviously, the restraint diminishes competition by artificially reducing the number of lateral employment offers that are extended. For example, a law school that receives or confirms funding for an academic "line" (position) after March 1 may not unilaterally seek to fill the position with an experienced professor.[43] A reduction in lateral offers reduces competition and, thus, artificially lowers prices for the services of experienced law professors.

In addition, the restraint diminishes competition and artificially suppresses salaries in a more subtle way. Some set of law schools will have retained discretion after March 1 to decide whether to renew contracts and to fix the terms of compensation they propose to offer professors. The restraint in the AALS Statement thus limits the ability of faculty members to bargain as to the terms of their employment, by eliminating options that otherwise would be available when terms of employment may be finalized. It takes no more than "a rudimentary

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[41] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (stating that, regardless of analytical approach employed, "the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry . . . that policy decision has been made by the Congress").

[42] *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 770 (1999) (noting that condemnation under quick look is appropriate where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets").

[43] Under the terms of the AALS Statement, the law school could extend a lateral offer between March 1 and May 1, but only if it first procured the consent of the offeree's incumbent dean. After May 1, a lateral offer would be prohibited even if the incumbent dean consented. *See* AALS HANDBOOK, *supra* note 7, at 94.

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understanding of economics" to recognize that compliance with the policy will reduce the number of lateral offers ultimately extended, will impair a sitting law professor's ability to bargain as to the terms of employment, will artificially preclude law professors from receiving full value for their services, and will, thus, reduce the quantity or quality of teaching services brought to market. Therefore, the AALS restraint would probably be condemned under a quick look analysis.

C. *Rule of Reason*

Were a court to decide that neither the per se rule nor the quick look analysis is properly applied here, it would apply the Rule of Reason. In a Rule of Reason analysis, the plaintiff bears the initial burden of demonstrating that the restraint has a substantially adverse effect on competition.[44] Once the plaintiff meets that burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the allegedly wrongful conduct.[45] If the defendant is able to demonstrate procompetitive effects, the plaintiff must then prove that the challenged restraint is not reasonably necessary to achieve legitimate objectives or that those objectives can be achieved in a substantially less restrictive manner.[46] Applied to the AALS restraint, this three-step analysis would reveal that the agreement is unreasonable and, thus, illegal.

1. Substantially Adverse Effect on Competition

The above discussion of the quick look analysis explains why the AALS restraint has a substantially adverse effect on competition. A full-scale Rule of Reason inquiry would reveal the same anticompetitive effect — albeit via a more complicated analysis.

Ordinarily, a basic difference between the quick look and a full-scale Rule of Reason analysis is that the latter involves definition of the relevant market. This fact-intensive inquiry is undertaken not because proof of the relevant market is an end in itself, but because determining the relevant market helps identify the impact that the challenged arrangement has on competition.[47] Thus, a plaintiff seeking to prove that the AALS restraint violates the Rule of Reason would likely proceed by

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[44] Law v. NCAA, 134 F.3d 1010, 1019 (10th Cir. 1998).

[45] *Id.*

[46] *Id.*

[47] *Id.* at 1019-20.

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defining the affected market and then showing how the restraint reduces competition within that market.

In a case involving an agreement among employers affecting employment, market definition turns on the interchangeability, from the perspective of an employee, of various jobs. Where there are few substitutes for certain employment opportunities, those jobs constitute a relevant market (and where there are available substitutes, the market must be expanded to include the most substitutable positions).[48] Applied to this particular case, the issue is the degree to which a slight decrease in professor salaries at AALS law schools would cause professors to quit their jobs.[49] Given that there are few suitable substitutes for law-teaching jobs at AALS law schools, it is highly likely that a modest collusive salary reduction among the AALS members would generate little quitting by professors. Thus, a court would likely conclude that the relevant market is comprised of teaching positions at AALS law schools.[50]

Once the relevant market is defined, the focus shifts to the effect of the restraint on competition within that market. As explained above, the restraint at issue artificially reduces the number of available teaching positions in the market, which means that professors must compete harder — generally, by lowering their salary requirements — for the reduced supply. The restraint also affects the ability of professors to negotiate. Ultimately, these factors will result in lower faculty salaries, which will dissuade individuals who might otherwise provide teaching services from doing so and will lead to an inefficient allocation of productive resources.

The AALS and member schools may argue that the restraint causes no consumer harm because it does not reduce the number of students graduated or credit hours taught. Of course, this "no output reduction" argument fails to the extent that the decrease in lateral hiring prevents law schools from expanding course offerings. Moreover, the argument fails because professor *quality*[51] is a relevant measure of output and will diminish as salaries are artificially suppressed by the AALS restraint.[52]

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[48] *See* Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001) ("At issue is the interchangeability, from the perspective of a [managerial, professional, and technical] employee, of a job opportunity in the oil industry with, for example, one in the pharmaceutical industry.").

[49] *Cf. id.* at 204.

[50] We won't quibble about whether the smattering of non-AALS law schools is part of the relevant market.

[51] For example, their understanding of antitrust.

[52] *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990) ("[T]he

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Thus, the restraint has an anticompetitive effect even if it does not reduce the number of law school graduates or the number of credit hours taught.

2. No Procompetitive Virtues

Confronted with the significant anticompetitive effects occasioned by the restraint at issue, the AALS and its member institutions would seek to prove offsetting procompetitive benefits, but their attempt would fail.

Reduced Disruption. The AALS Statement itself states that a rationale for the restraint is that it avoids educational disruption.[53] The mere fact that untimely faculty departures create problems for the law schools losing professors, however, cannot justify the AALS restraint. Because a competitor law school will be willing to pay more than an incumbent where the competitor is able to make better use of the input (i.e., the professor at issue), free competition for sitting faculty facilitates an optimal distribution of teaching resources. To say that rivals may agree not to compete because the "loser" would face difficulties is to say that competition itself may be limited because it is unreasonable. This is precisely the sort of "ruinous competition" argument that the Supreme Court has rejected time and again.[54] Indeed, in *Professional Engineers*, the Court called this sort of argument "nothing less than a frontal assault on the basic policy of the Sherman Act."[55] The Court rejected an agreement

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'Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.' This judgment 'recognizes that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.'") (quoting Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978)); Law v. NCAA, 134 F.3d 1010, 1022 (10th Cir. 1998) (holding that anticompetitive harm resulted when salary caps reduced coaches' "incentive to improve their performance").

[53] The Statement explains:

> [T]he departure of a full-time law teacher always requires changes at the law school. Unless the school is given sufficient time to make the necessary arrangements to find another to offer the instruction given by the departing teacher, the reasonable expectations of students will be frustrated and the school's educational program otherwise disrupted.

AALS HANDBOOK, *supra* note 7, at 93.

[54] *See, e.g.*, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (refusing to credit "the age-old cry of ruinous competition" as justification for agreement to limit price competition). *See generally* 12 HOVENKAMP, *supra* note 26, ¶ 2015c ("In *Socony* the Supreme Court categorically rejected the proposition that firms acting as buyers should be permitted to collude in order to stabilize fluctuating or erratic markets.").

[55] *See* Prof'l Eng'rs, 435 U.S. at 695.

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designed to protect public safety because the purported safety benefits were created by limiting competition among rivals. The Court explained that, "[e]ven assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad."[56] Thus, because "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable,"[57] the AALS restraint cannot be justified on the ground that it protects law schools against the harm resulting from losing the competition for a sitting law professor.

Lower Costs of Education. The AALS and member law schools might attempt to argue that the restraint at issue prevents bidding wars for professors and, therefore, increases output by lowering the cost of legal education. Cost-cutting by itself, however, is not a valid procompetitive justification; if it were, any group of competing buyers could immunize itself from liability stemming from any maximum price-fixing agreement.[58] From the standpoint of allocative efficiency, buyer agreements that reduce competition and depress prices are just as anticompetitive as seller agreements that artificially raise prices, and they should be judged the same. Both types of agreements lead to an inefficient allocation of productive resources.[59] Buyer agreements that depress prices ultimately rob the sellers of the normal fruits of their enterprises and, thus, reduce sellers' incentives to improve their products and increase output.[60] To the extent the restraint at issue here decreases competition for law professors and depresses professor salaries, it leads to reductions — quantitative or qualitative — in educational output.

Creation of an Otherwise Unavailable Product or Service. The AALS might analogize the restraint at issue to restraints the Supreme Court has upheld as ancillary to legitimate joint ventures. For example, in *NCAA v. Board of Regents of the University of Oklahoma*,[61] the Court recognized that certain horizontal restraints among competing universities would be

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[56] *Id.*

[57] *Id.* at 696.

[58] *See, e.g.*, Law v. NCAA, 134 F.3d 1010, 1022 (10th Cir. 1998); 12 HOVENKAMP, *supra* note 26, ¶ 2013c (stating, as to motion picture "split" agreements, "[h]ere as elsewhere in the law of buyer's cartels, collusion is not justified by the assertion that the split agreement enables theaters to obtain motion pictures at lower prices, and thus enables them to sell movie tickets or provide other services at lower prices.").

[59] *See* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY 36-61 (1993) (discussing inefficiencies created by buyer and seller collusion).

[60] *See Law*, 134 F.3d at 1022.

[61] 468 U.S. 85 (1984).

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necessary for the creation of college football and must, therefore, be deemed reasonable.[62] The AALS might argue that the restraint at issue is similarly necessary to facilitate the production of American legal education. Or, the AALS might rely on *Chicago Board of Trade v. United States*,[63] in which the Court approved a commodities exchange rule prohibiting buyers and sellers from negotiating the price of so-called "to arrive" grain contracts during the afternoon and evening hours.[64] In upholding the exchange rule, the Court emphasized that the rule had the effect of channeling all bids into the regular trading sessions of the exchange, thereby creating more of "a public market for grain 'to arrive.'"[65] The AALS might argue that its rule similarly enhances the efficiency of the market for experienced law professors by forcing bidding to occur within a confined time period.

Any such attempt to analogize to the Supreme Court's joint venture cases would fail. *NCAA* actually undermines the view that the AALS restraint is reasonable, for the Court was careful to emphasize that only those restraints that were essential to the creation of college football would be deemed reasonable.[66] While it is conceivable that some agreements among AALS member schools might be necessary for the creation of American legal education, the restraint at issue certainly is not one of them and is, therefore, more analogous to the restraints that the *NCAA* Court deemed *un*reasonable.[67] *Board of Trade* is inapposite because the rule at issue there (1) restricted only the period of price-making, not (as here) the period in which contracts could be entered;[68] (2) had a random effect on prices,[69] not (as here) a systematic tendency to

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[62] *Id.* at 101 (recognizing that certain otherwise suspect horizontal restraints among rival universities with football teams could be reasonable because college football is "an industry in which horizontal restraints on competition are essential if the product is to be available at all").

[63] 246 U.S. 231 (1918).

[64] *Id.* at 239-40.

[65] *Id.*

[66] *See NCAA*, 468 U.S. at 105-07.

[67] *See id.* (condemning restraints limiting broadcast rights because such restraints were not necessary for production of college football).

[68] 246 U.S. at 239 (noting that "[t]he restriction was upon the period of price-making . . . there was no restriction upon the sending out of bids after close of the Call").

[69] *See* 13 HOVENKAMP, *supra* note 26, ¶ 2102 ("The point is not that no antitrust challenge to the Chicago Board's call rule is possible. Rather, the challenge that was articulated in that case did not explain how the rule led to higher prices, reduced market output, or had other anticompetitive effects. The plaintiff must provide in its complaint at least a theory about how the challenged behavior will produce recognizably anticompetitive effects. If no such theory can even be pled, then the complaint should be dismissed without further inquiry." (footnote omitted)).

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reduce prices below competitive levels; and (3) encouraged participation in a public bidding session, which does not exist here.[70] More generally, these cases — and all the cases in which the Supreme Court has approved horizontal restraints among competitors — are inapposite because the approved restraints resulted in the creation of some product or service that could not have existed otherwise.[71] The AALS restraint, by contrast, is not necessary for the creation of anything that would otherwise be unavailable.

Circumventing Supracompetitive Prices Caused by Other Cartels. As noted above, recently settled litigation involved allegations of improper actions in the law school accreditation process that would have increased professors' salaries.[72] The AALS and member law schools might, therefore, try to justify the restraint at issue as a means of circumventing the supracompetitive salaries resulting from the improper conduct of others in the salary-setting process. Of course, that should not give rise to a *current* defense — the ABA antitrust litigation was settled in 1996.[73] Moreover, the preeminent treatise indicates that the existence of a seller's cartel should not give rise to a defense to a challenge in a buyer's cartel.[74]

3. Less Restrictive Means Available

Even if a court were to credit one of these purportedly procompetitive justifications for the AALS restraint, the restraint would still be unreasonable, and thus illegal, because its ends could be achieved in a less restrictive manner.[75] Any law school concerned about untimely

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[70] The rule in *Board of Trade* had the effect of forcing all price bidding into the public market, so as to increase the efficiency of that market. *See Bd. of Trade*, 246 U.S. at 239 ("The rule made it to their interest to attend the Call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers."). As there is no centralized public market for law professors, the AALS restraint can provide no similar benefits.

[71] *See NCAA*, 468 U.S. at 101 (stating that certain horizontal restraints are necessary to create college football); Broad. Music, Inc. v. Columbia Broad. Sys., 441 U.S. 1, 22 (1979) (stating that horizontal restraints are necessary for creation of blanket music licenses, which otherwise would not have been available); Appalachian Coals v. United States, 288 U.S. 344 (1933) (stating that horizontal price agreement was necessary to facilitate output-enhancing joint marketing arrangement among coal manufacturers); *Bd. of Trade*, 246 U.S. at 239-40 (stating that restraint is necessary to create efficient public market in "to arrive" grain).

[72] *See supra* notes 1-2 and accompanying text.

[73] United States v. Am. Bar Ass'n, 934 F. Supp. 435 (D.D.C. 1996) (final judgment), *modified*, 135 F. Supp. 2d 28 (D.D.C. 2001), No. 95-1211 (RCL), 2001 U.S. Dist. LEXIS 2279 (D.D.C. Feb. 16, 2001).

[74] 12 HOVENKAMP, *supra* note 26, ¶ 2015b.

[75] *See* 7 PHILIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1505 (2000) ("An apparently anticompetitive restraint can be

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departures could protect itself through *unilateral* action. For example, it might negotiate contract terms with faculty members specifying reasonable liquidated damages professors must pay if they depart before a certain date (which would be determined by the law school individually, based on its own assessment of its planning process). Alternatively, a law school set to lose a professor could negotiate for the departing faculty member to teach in the following term for an agreed-upon fee on a schedule that accommodated simultaneous appointments at two institutions.[76] Either approach would accommodate legitimate concerns less restrictively than the restraint reflected in the AALS Statement. Accordingly, the restraint is unreasonable and, thus, illegal.

CONCLUSION

The long-standing AALS Statement of Good Practices concerning the timing of appointments to faculty positions, to the extent that it memorializes an agreement among member law schools, represents a violation of federal antitrust law. The effect of such an agreement is to reduce the number of positions available to faculty members and to inhibit professors in bargaining for compensation. Antitrust law would not justify this arrangement as an attempt to offset the power of a competing cartel that might operate to inflate professor salaries.

The preceding discussion is confined to examining the antitrust implications of the arrangements memorialized in the AALS Statement. Yet, at least in some quarters, a piece of legal scholarship seems to be viewed as incomplete unless it has some sort of proposal, even one that is wildly impracticable or unrealistic. In the spirit of complying with that norm, we propose (or, more precisely, the one of us who does not teach antitrust, and is unlikely to be viewed as part of a cartel of antitrust professors, proposes) inclusion of a mandatory antitrust component somewhere in legal education or testing.

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redeemed only if reasonably necessary to achieve a legitimate objective. To be reasonably necessary, the restraint must not only promote the legitimate objective but must also do so significantly better than the available less restrictive alternatives.").

[76] Presumably it is the short-term loss of teaching services, and not research, that is the legitimate concern of the incumbent employer.

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