large full-time faculty; and a school's physical facilities will be called inadequate if they are not new or recently refurbished and do not cost literally tens of millions of dollars.

The arbitrary procedures and inconsistent actions to which MSL was subjected included: the site inspection team was stacked with the insiders to insure the adverse site report desired by the accreditors; site inspectors were prejudiced against MSL before they even inspected it; they intentionally wrote a biased and false report; rules were applied against MSL that were applied to no other schools or that were invented on the spot; MSL was criticized on the basis of comparative statistics that had been withheld from it; the School was criticized for matters on which it had a far better record than other schools that were praised (e.g., bar passage rates); procedural delays were placed in the School's path; site inspectors were chosen who had grave conflicts of interest; some of the same persons sat on both the Accreditation Committee and on the Council which reviewed the Accreditation Committee's decision; intentionally false statements were made to MSL and its students; and certain site inspectors may have been applying more stringent Association of American Law Schools (''AALS'') criteria although MSL was not seeking AALS membership.

From MSL's study of the accreditation process, knowledge the School has obtained in discovery, information it has received from other schools, and even statements in the Complaint and CIS, it is clear that MSL's experience was typical in the sense that secret rules and arbitrary and inconsistent conduct, as well as grave violations of the antitrust laws, have been de rigueur in ABA accreditation. Yet *none* of this could have happened if the accreditation process regarding schools had been open—if the documents kept secret had instead been made public. For, if the relevant documents had been public—just as their analog court and agency briefs, records and opinions are public—then the affected law schools, faculty members, students, scholars and analysts, law enforcement agencies, reporters, potential students and members of the public would all have been able to see that there were violations of law, unwritten rules, and inconsistent treatment of schools. The result would have been that these things would not have occurred or, at minimum, would have been quickly stopped.

B. The short of it is that secrecy was and remains the essential precondition of accreditation misconduct, and openness was and remains the best guarantee against it. Yet, the Consent Decree does not require an end to the secrecy that has prevailed. The closet the Decree comes to providing for openness on any matter other than the identity of site inspectors is to say that the Council must annually send the Board of Governors a report of accreditation activities during the preceding year, including a list of schools on report or under review, with identification of each school's areas of actual or apparent non compliance with the Standards and how long the School has been on report or under review. (Consent Decree, p. 6.) But even this report—which goes *only* to the Board, and not to any other person—can be provided ''on a confidential basis if necessary.'' (Consent Decree, p. 6.) Given the long, strongly held view of the accreditors that confidentially is always necessary, as a practical matter it is certain that these annual reports will be kept confidential, thus maintaining secrecy from everyone but Board members. And, since the reports do not need to discuss the reasons why schools are held not to comply with given Standards, even complete openness of these reports would not enable schools, scholars and analysts, potential students, reporters or others to know such underlying reasons, much less to know of unwritten rules that are used as reasons.[13]

C. Thus, the secrecy which led to illegality will, as a practical matter, be preserved under the Consent Decree. There is, however, a simple step that would cure this and would almost certainly insure, in and of itself, that the process is conducted in a legal and fair way in the future—in a way that does not violate the Sherman Act and does not violate elemental rules of fairness and due process. The Consent Decree should be changed to provide that the documents created during the accreditation process will be available to any person, just like analogous court and agency briefs, records, transcripts and opinions are available to any person. This would make it impossible to have a repetition of the illegality, unwritten rules, inconsistency and arbitrariness that arose. For such conduct would be quickly discovered and attacked by a host of schools, analysts, students, reporters, members of the public, and enforcement officials. Justice Brandeis said that sunlight is the best disinfectant; the principle is applicable to ABA accreditation.

4. The Consent Decree's Novel Provisions for Review of Anticompetitive Practices by a Special Commission Heavily Comprised of Accreditation Insiders May Cause the Decree To Fail To Remedy Anticompetitive Practices Charged in the Complaint

A. The CIS says that the DOJ originally intended to seek to prohibit anticompetitive rules relating to calculation of student/faculty ratios, limitations of teaching hours, leaves of absence, and banning of credit for bar review courses. (CIS, p. 15.) Ultimately, however, the DOJ agreed that, although these practices, plus practices regarding physical facilities and allocation of revenues between law schools and universities, had been used ''inappropriately'' ''at times to achieve anticompetitive, guild objectives'' (CIS, pp. 9, 13), they nonetheless should be reviewed ''in the first instance by the ABA itself'' (CIS, p. 16). The practices, the Government agreed, should thus be submitted to a ''Special Commission.'' (Consent Decree, pp.7–8; CIS, p. 16). That Commission, it is now known, is the so-called Wahl Commission. It is packed with accreditation insiders who had captured the accreditation process and, when the Decree was filed on June 27, 1995, it had been sitting for over a year and was nearing the end of its work, which from inception had been due to be completed by the first week in August, 1995.

Under the Consent Decree, the Special Commission's Report is to be submitted to the Board of Governors ''no later than February 29, 1996'' (CIS, p. 13), and the Board, after reviewing it for an unspecified period (presumably for the purpose of possibly making changes in the Commission's recommendations), will file it with the Government and the Court. (CIS, p. 13.) The Government can then challenge the Report in Court within 90 days if the Special Commission ''fails to consider adequately the antitrust implications of continuing the ABA's past practices * * *'' (CIS, p. 16.)

The government states that this arrangement is ''novel relief.'' (CIS, p.13.) The DOJ's agreement to allow an insider-dominated Special Commission to make the initial decisions on crucial anticompetitive practices could result in failure of the Consent Decree to stop those practices, however.

B. The members of the Special Commission were appointed by two leading members of the group which controls ABA accreditation: Joseph

[13] The provision of the Consent Decree (p. 6) requiring the Accreditation Committee to send reports to the Council suffer from all the same weaknesses plus the weakness that the reports go to the Council alone.