Occupational Licensing and Certification: Remedies for Denial

Douglas A. Wallace
OCCUPATIONAL LICENSING AND CERTIFICATION:
REMEDIES FOR DENIAL

DOUGLAS A. WALLACE*

INTRODUCTION

In the past three to four decades, occupational licensing has become one of the most pervasive forms of state regulation of the economy. At one time, with a few exceptions, only the "learned professions" of law and medicine were subject to state licensing; today it is not unusual for a state to license as many as 60 separate occupations. The Council of State Governments reported in 1952 that at least one state had licensed more than 80 different "professions" ranging from abstractors to egg graders, to yacht and ship brokers, and salesmen. State licensing in its modern form, therefore, does not encompass only such occupa-

* B.A., Princeton University; J.D., Yale Law School. Member, Florida bar.

1. The licensing of lawyers and doctors in this country began in the latter part of the eighteenth century and the first years of the nineteenth. Council of State Governments, Occupational Licensing Legislation in the States 15-16 (1952); R. Shryock, Medical Licensing in America 1950-1965 at 3-27 (1967). This trend toward centralized control over admission to the legal and medical professions was soon reversed under the pressure of an expanding frontier and the ideals of Jeffersonian democracy. By the 1830's many of the old statutes were repealed or amended, and legal restrictions on the practice of law and medicine were reduced to a minimum. Council of State Governments, supra at 18-19; J. Hurst, The Growth of American Law: The Law Makers 277 (1950); R. Pound, The Lawyer from Antiquity to Modern Times 223-49 (1953); R. Shryock, supra at 27-42. The qualification of lawyers and doctors to practice through a centralized licensing system began again in earnest in the 1870's. Council of State Governments, supra at 19; J. Hurst, supra at 277-78; R. Shryock, supra at 43-61. After the Civil War, other occupational groups organized professional societies and associations, and they too demanded licensing regulation. Their efforts began to bear fruit in the closing years of the nineteenth century; the period from 1906-35 represented a peak in the enactment of new licensing legislation. Council of State Governments, supra at 20-24; C. Gilb, Hidden Hierarchies: The Professions and Government 28-46 (1966). For an account of parallel developments in England see A. Carr-Saunders & P. Wilson, The Professions (1933); W. Reader, Professional Men: The Rise of the Professional Classes in Nineteenth Century England (1966).


tions as pharmacy, accountancy, and dentistry, which are understandably subject to some form of control designed to protect the public from the incompetent and unscrupulous. On the contrary, state legislatures have found it in the public interest to license watchmakers,\textsuperscript{4} house painters,\textsuperscript{5} photographers,\textsuperscript{6} and members of many other ordinary trades.\textsuperscript{7}

Rarely does such legislation result from the demands of an electorate outraged by ill treatment received at the hands of incompetents and charlatans. Instead, the occupational group itself usually initiates new licensing legislation.\textsuperscript{8} Moreover, such proposals generally move smoothly from the legislature to the governor and finally into the statute books. The only threat during the legislative process is the possibility of opposition from another professional group which feels the bill threatens its interests.\textsuperscript{9} Although the existing maze of state occupational licensure

\textsuperscript{5} See, e.g., State v. Peck, 237 Wis. 596, 297 N.W. 572 (1941).
\textsuperscript{6} See, e.g., Sullivan v. DeCerb, 156 Fla. 496, 23 So. 2d 571 (1945).
\textsuperscript{7} It should be noted that the licensing of the diverse occupations has not been imposed simply as a device for collecting revenue. These licensing statutes often have complex provisions concerning educational qualifications, competitive examinations, apprenticeship requirements, and similar conditions comparable to those in statutes governing the admission to practice of lawyers and doctors. See, e.g., People v. Brown, 407 Ill. 565, 95 N.E.2d 888 (1951) (invalidating statute requiring prospective plumbers to serve a five-year apprenticeship under a master plumber); Schneider v. Duer, 170 Md. 326, 184 A. 914 (1936) (invalidating statute requiring student barbers to master curriculum including the following subjects: "scientific fundamentals for barbering, hygiene, bacteriology, histology of the hair, skin, nails, muscles and nerves, structure of the head, face and neck, elementary chemistry relating to sterilization and antiseptics, disease of the skin, hair, glands and nails, haircutting, shaving and arranging, dressing, coloring, bleaching and tinting of the hair"); Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957) (invalidating a statute requiring applicants for licenses as tile contractors to pass a written examination concerning tile installation); Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946) (invalidating statute requiring applicants for a photographer's license to submit to an examination on their technical qualifications).
\textsuperscript{8} See, e.g., W. Gellhorn, Individual Freedom and Governmental Restraints 109-11 (1956); J. Lieberman, The Tyranny of Experts 14-36 (1970); Akers, Professional Association and Legal Regulation of Practice, 2 Law & Soc'y Rev. 463 (1968). Akers' conclusions are based on "exploratory research" of the Kentucky legislature. See also Council of State Governments, supra note 1, at 57.
\textsuperscript{9} In New York, for example, organized medicine mobilized its resources to defeat a plan for the licensure of psychologists. Although the New York legislature passed the bill, Governor Dewey vetoed it, citing the "vigorouos and impressive objections" of the state medical society and American Psychiatric Association. Comment, The American Medical Association: Power, Purpose, and Politics in Organized Medicine, 63 Yale L.J. 931, 968-69 (1954). The New York psychologists finally realized their goal of becoming licensed in 1956. See Session Laws of N.Y. ch. 737 (McKinney 1956).
has aroused the ire of many legal commentators, the general public normally is not likely to be sufficiently interested to participate in the process. Thus, the legislative process constitutes only a minor barrier to the enactment of new licensing legislation.

Although professional associations contend that additional legislative controls are necessary in order to protect the public, critics of new licensing schemes suggest that there are other, more telling, reasons which motivate occupational groups to seek new regulation. Since members of the profession typically control the licensing authority, legislation often results in a grant of self-regulatory power to the pro-

10. A representative sampling would include the following: M. Friedman, Capitalism and Freedom 137-60 (1962); W. Gellhorn, Individual Freedom and Governmental Restraints 105-51 (1956); D. Lees, Economic Consequences of the Professions (1966); Barron, Business and Professional Licensing—California, a Representative Example, 18 Stan. L. Rev. 640 (1966); Doyle, The Fence-Me-In Laws, 205 Harpers 89 (1952); Graves, Professional and Occupational Restrictions, 13 Temp. L.Q. 334 (1939); Hanft & Hamrick, supra note 2; Reich, The New Property, 73 Yale L.J. 733 (1964); Silverman, Bennett & Lechliter, Control by Licensing over Entry into the Market, 8 Law & Contemp. Prob. 234 (1941).

11. In testimony before the Illinois State Legislature in 1959, Nels J. Johnson, Chairman of the Illinois State Tree Expert Examining Board, observed that “the intent of the tree expert law was primarily to protect the public against tree quacks, shysters and inexperienced persons.” Moore, The Purpose of Licensing, 4 J. Law & Econ. 93 (1961). Similar testimony was given to the California Assembly by a representative of the barber’s union in support of comprehensive examinations for out-of-state barbers wanting to practice in California:

   We have to consider too, California is the fastest growing state ... and everybody wants to come here.
   Question: Isn’t it right to bring barbers ... [also]?
   Answer: Such an influence of them as coming in and they will tear down the conditions.
   Question: What do you mean?
   Answer: Get more barbers here than they can use.
   Question: Is the State worried about that or ... about the health and safety?
   Answer: It would affect health and safety.
   Question: How can it? ...
   Answer: If it tears down the conditions it would very definitely affect the health and safety.

Barron, supra note 10, at 653.

12. Few critics would deny that on occasion licensure may benefit the public. Compare W. Gellhorn, supra note 10, at 144-47, with M. Friedman, supra note 10, at 149-60. Gellhorn concedes that licensing may “in fact afford protection against suffering at the hands of the blatantly inept or patently corrupt,” but argues that it should be “reserved for special cases.” Friedman, on the other hand, carries his critique of occupational licensure to its logical conclusion with the argument that even the licensing of physicians cannot be justified.
This allows the profession to govern admission to practice and to discipline erring members. Consequently, licensing is a very effective tool for dealing with the price cutter or other practitioner whose conduct is deemed unfair or unethical. In a few occupations, licensing may even provide the basis for a state-administered system of price-fixing. Finally, licensing gives the profession the ability to restrict competition by raising standards of admission.

Commercial advantage, however, is not the only motive behind the demand for occupational licensing. For a variety of reasons, a rapidly increasing number of occupational groups aspire to the professional status and prestige traditionally enjoyed by the lawyer, physician, and university professor. Teachers, social workers, librarians, insurance salesmen, and many other “white collar” workers now claim that they are entitled to be recognized as “professionals.” In order to achieve professional status—or, as the favored expression has it, become “professionalized”—many of these groups have consciously reorganized.
the internal structure of their occupational organization along the lines of the legal and medical professions.\textsuperscript{21} Licensing the occupation is one of the most important steps in the "professionalization" process because it represents the judgment of the state that the occupational group is entitled to exercise the same kind of self-regulatory power traditionally reserved to the learned professions of law and medicine.\textsuperscript{22}

Criticism of occupational licensure has focused on its anti-competitive
department, even though some of these may not move very far in this direction." H. Vollmer & D. Mills, Professionalization at viii-viii (1966).

21. Much of the literature in this field assumes that once the characteristics of professions are isolated and analyzed, an occupation may develop a program for adopting these characteristics in a number of "steps" culminating in the achievement of professional status. See, e.g., Proposal to Professionalize Registered Representatives, 198 The Com. & Fin. Chronicle, Dec. 5, 1963, at 3, 24-25. For a criticism of this view see Taylor & Pellegrin, supra note 19, at 114.

Theodore Caplow's analysis of the "steps" involved in the process of professionalization is as follows:

The first step is the establishment of a professional association, with definite membership criteria designed to keep out the unqualified.

The second step is the change of name, which serves the multiple function of reducing identification with the previous occupational status, asserting a technological monopoly, and providing a title which can be monopolized, the former one being usually in the public domain.

The third step is the development and promulgation of a code of ethics which asserts the social utility of the occupation, sets up public welfare rationale, and develops rules which serve as further criteria to eliminate the unqualified and unscrupulous (see Chapter 5). The adoption of a code of ethics, despite certain hypocrisies, imposes a real and permanent limitation on internal competition.

The fourth step is a prolonged political agitation, whose object is to obtain the support of the public power for the maintenance of the new occupational barriers. In practice this usually proceeds by stages from the limitation of a specialized title to those who have passed an examination (registered engineer, certified public accountant) to the final stage at which the mere doing of the acts reserved to the profession is a crime.

Concurrently with this activity, which may extend over a very long period of time, goes the development of training facilities directly or indirectly controlled by the professional society, particularly with respect to admission and to final qualification; the establishment through legal action of certain privileges of confidence and inviolability, the elaboration of the rules of decorum found in the code, and the establishment—after conflict—of working relations with related professional groups.


OCCUPATIONAL LICENSING

It is argued that decreased competition through restricted access to the occupation and the delegation of policy-making authority to private organizations may amount to a re-birth of a medieval guild system which is sharply at odds with American traditions. Abuse of the licensing power also provides the occasion for what Walter Gellhorn has aptly described as "the intrusion of irrelevancies," principally the establishment of irrelevant qualifications for obtaining or continuing to hold a license. A good example is the typical provision that conviction for any felony or misdemeanor justifies suspension or revocation of an occupational license. Another is the common requirement that lawyers must be United States citizens. The addition of such occupationally unrelated definitions of eligibility to licensing statutes arbitrarily limits the individual's ability to pursue his chosen vocation.

Despite this criticism, occupational licensing has not been widely reformed. Not only have the state legislatures been unwilling to halt the extensions of licensing to new occupations, but courts have become much less sympathetic to constitutional challenges to licensing legislation. Fifty years ago the Supreme Court would have invalidated much of the present licensing regulations on substantive due process grounds.

---

23. See authorities cited in note 10 supra. It is often suggested that occupational licensing insulates the beneficiaries of licensing legislation from the market system and thus enables them to reap monopoly profits. See, e.g., J. Liebman, supra note 8, at 141. It should be noted, however, that in the present state of the art, economic analysis is able to provide only the most tentative support for this proposition. The classic study is M. Friedman & S. Kuznets, Income from Independent Professional Practice (1945). See also D. Lees, supra note 10, at 15-17. Kessel, Price Discrimination in Medicine, 1 J. LAW & Econ. 20 (1958); Moore, The Purpose of Licensing, 4 J. LAW & Econ. 93 (1961).

24. See W. Gellhorn, supra note 10, at 111-14; C. Gilb, supra note 1, at 227-32; D. Lees, supra note 10, at 7; Grant, The Guild Returns to America, 4 J. Pol. 303, 458 (1942); Reich, supra note 10, at 768-71.

25. W. Gellhorn, supra note 10, at 125.

26. Id. at 125-40.


28. The Court's freewheeling attitude toward review of state economic regulation prior to 1937 may be observed in the cases of Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Coppage v. Kansas, 236 U.S. 1 (1915); and Lochner v. New York, 198 U.S. 45 (1905). Its views on the individual's right to earn a living were expressed well in Allgeyer v. Louisiana, 165 U.S. 578 (1897), a case which did not involve occupational licensing. In Allgeyer Mr. Justice Peckham stated: The liberty mentioned in [the fourteenth amendment] means not only the right of the citizen to be free from the mere physical restraint of his person.
Today the Supreme Court is less willing to pass judgment on the reasonableness of state economic regulation.\textsuperscript{29} Indeed, the presumption of validity which the Court has applied to state economic regulation has been extended to the actions of state licensing authorities.\textsuperscript{30} As the Supreme Court has retreated from this particular constitutional battleground, however, many state courts have succeeded to its place in the trenches.\textsuperscript{31} Frequently these state courts have invalidated licensing legislation on the basis of state constitutional provisions guaranteeing due process of law.\textsuperscript{32} The legislation has been condemned as an arbitrary

as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his facilities; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes mentioned . . .

\textit{Id.} at 589. See also Burns Baking Co. v. Bryan, 264 U.S. 504, 513 (1924), where Mr. Justice Butler said that a state cannot, "under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."


30. See, e.g., Barsky v. Board of Regents, 347 U.S. 442 (1954). In the Barsky case the Court upheld the suspension of a doctor's license by the New York Department of Education. The applicable New York law made conviction of any crime a violation of the state's "professional medical standards"; Dr. Barsky had been convicted of failing to produce certain papers subpoenaed by the House Committee on Un-American Activities. In dissent, Mr. Justice Douglas said: "The fact that a doctor needs a good knowledge of biology is no excuse for suspending his license because he has little or no knowledge of constitutional law." \textit{Id.} at 473-74. \textit{But see Ex Parte Garland, 71 U.S. (4 Wall.) 333 (1867).} In this post-Civil War case, the Supreme Court held unconstitutional as a bill of attainder and ex post facto law a federal statute which would have barred all persons who had participated in the "Rebellion" from appearing as attorneys in the courts of the United States.


32. These state court decisions often include frank discussion of the anti-competitive aspects of occupational licensing. A particularly good example is Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957) (invalidating statute licensing tile layers). \textit{See also} Sullivan v. DeCerf, 156 Fla. 496, 23 So. 2d 571 (1945) (photographers); Golden v. Bartholomew, 140 Neb. 65, 299 N.W. 356 (1941) (invalidating regulation requiring every licensed funeral director to stock a prescribed number and variety of caskets); \textit{State ex rel.
and capricious restriction on individual freedom to pursue lawful occupations. Nevertheless, these decisions have done little to halt the expansion of occupational licensing; most licensing legislation is certain to survive the attack.\textsuperscript{33}

Closely resembling the licensing process is the form of occupational regulation known as private certification. The fundamental distinction between licensing and certification is that the former is established by legislative enactment and the latter is established by private occupational groups.\textsuperscript{34} Otherwise, the functions of these two institutions are similar. Through the certifying agency, the professional association is able to prescribe educational and ethical qualifications for candidates for certification, administer competitive examinations, and award some hallmark of qualification to the successful. Additionally, the agency always retains jurisdiction to revoke its certificate or diploma for incompetence, "unprofessional conduct," or other shortcomings. The determinations of the certifying board naturally lack the force of law, but often tend to the same economic and social results as state licensing. The only practical limit on the potential power of the certifying board is its ability to win public acceptance of certification as a mark of quality.\textsuperscript{35}


33. As the examples in the preceding note suggest, the state courts have been most receptive to attacks on the licensing of manual trades which are relatively easy to learn; litigation in other areas has borne little fruit.

34. Brief references to the certification device may be found in Anderson & Ertell, Extra-institutional Forces Affecting Professional Education, in Education for the Professions 235, 239 (N. Henry ed. 1962); C. Gilb, supra note 1, at 61, 182. For a more extended discussion see J. Bradley, The Role of Trade Associations and Professional Business Societies in America 112-35 (1965). Analyses of the medical profession's use of the certifying board in the implementation of specialization are also available. See E. Rayack, Professional Power and American Medicine: The Economics of the American Medical Association (1967); R. Stevens, American Medicine and the Public Interest (1971) [hereinafter cited as R. Stevens].

The term "certification" as used in this paper must be distinguished from state certification, a less restrictive form of licensing in which the state certifies the competence of persons meeting its standards but does not prohibit other persons from engaging in the activity at issue. Uncertified persons are simply prohibited from misrepresenting their credentials by posing as certified practitioners. Walter Gellhorn cites as an example of this form of state licensing the "registered nurse." "[T]he designation of a nurse as a 'registered nurse' gives her a titular distinction that at once identifies her as a person schooled in her calling. In many states anyone may nurse the infirm for pay, but if a trained nurse is wanted, the certification of those who are registered serves to indicate the individuals of supposedly greater worth." W. Gellhorn, supra note 10, at 147.

35. See A. Carr-Saunders & P. Wilson, supra note 1, at 358-59.

The possibility that the determinations of a private certifying agency may acquire the
Several reasons have been advanced for allowing a professional association to employ the private certification device as an alternative or an addition to state licensing. Some of these reasons may be described briefly as follows:

(1) **Definitional Problems:** Frequently a professional group may experience difficulty in drafting an acceptable definition of the work it considers its exclusive prerogative for use in a statutory licensing scheme. The American Psychological Association, for example, has promoted the licensing of psychologists for many years but has suffered many setbacks in its bid for licensure because of the problems of defining the practice of psychology. A broad definition of psychology includes work performed by psychiatrists, social workers, marriage counselors, and clergymen, to name only a few; any legislation which purports to give psychologists exclusive jurisdiction over this vast domain is certain to arouse the determined opposition of these groups. A narrow definition, on the other hand, is of little use to the professional psychologist in preventing the charlatan from encroaching on his territory. The private certification device provides a partial solution to this impasse because it enables the association to designate for the benefit of the public and potential employers those psychologists it considers professionally qualified. Corinne Gilb has observed that private arrangements such as certification may also provide necessary flexibility lacking in statutory definitions "when the work situation is in flux, and alterations in the divisions of labor may be required." 36
(2) **National Scope:** Unlike licensing legislation, private certification is not limited by state boundaries. This is important to an association which desires to establish a regulatory system having uniform regional or national basis. The medical profession, for example, has achieved uniform national standards for the recognition of physicians as specialists through the use of the private certification device.

(3) **Licensing Substitute:** An occupational group which lacks the political power to secure state licensing occasionally turns to private certification as an alternative means of achieving its goals. A good example is the case of the social workers. When their first concerted efforts at winning state licensure failed, the social workers developed their own programs for the recognition of “professionals” in the social welfare field by means of private certification.

(4) **Intra-professional Goals:** Private certification can be utilized to serve a number of intra-professional goals. Certification programs often play an integral role in the drive for “professionalization.” Certification has also been used with great success by the medical profession as a means of implementing specialization, and by a number of professions as a device for controlling a group of dependent or allied technical workers. In a case of intra-professional rivalry, one faction may certify its own members and thereby attempt to differentiate them from members of another faction deemed unethical or less qualified.

(5) **Immunity:** Since the certification process operates in the context of private membership associations, the likelihood of judicial review of the activities of certifying boards is often remote. Traditionally, Anglo-American courts have been hesitant to interfere in the internal affairs of private associations; the possibility

---

39. Although federal regulation may seem to be a logical solution to this problem, constitutional and historical reasons will often render federal intervention inappropriate. For example, centralized control over higher education is common in most foreign countries, but in this country tradition favors state and local control. Moreover, it is at least arguable that the power to regulate education is vested not in the federal government but in the states by virtue of the tenth amendment to the Constitution. See Comment, The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation, 52 CORNELL L. REV. 104, 121, 125-26 (1966).

40. See, e.g., Cassel v. Inglis, [1916] 2 Ch. 211; Weinberger v. Inglis, [1911] A.C. 606, aff'd [1918] 1 Ch. 517 (decisions refusing to set aside expulsions of two brokers of German birth from the London Stock Exchange as a result of anti-German sentiment during World War I). See generally Chafee, The Internal Affairs of Associations Not for Profit, 43 HARV. L. REV. 993 (1930).
of compelling a professional association to admit to membership an applicant the association wishes to exclude has been unthinkable until quite recently. Furthermore, unless a court is willing to hold that a certifying board is exercising quasi-governmental power in the performance of its functions, the due process of law argument relied upon in attacks on state licensing legislation is inapplicable without a showing of "state action."  

In view of these uncertainties, the purpose of this article is to survey the operation of the certification process in order to develop a frame of reference for an examination of the following questions: (1) What functions does the certification device serve? What is its economic and social impact on the individual? (2) What remedies under existing law are available to obtain judicial review of the actions of certifying boards? (3) Is additional regulation of the certification device warranted? If so, is it feasible?

**When Licensing Fails: The Social Workers**

The case of the social workers presents a notable example of a professional group which turned to private certification after repeated failures to achieve its goals through the passage of licensing legislation. The social workers had several reasons for seeking legislative controls over the social welfare field. A basic motive was a desire to enhance the prestige of the entire profession. At least since 1915, when Abraham Flexner concluded that social work was not a profession, social workers have been deeply concerned about their status as professionals. Despite a flood of literature designed to demonstrate the "professional" character of social work, the general public does not accord social workers a status commensurate with their education and income. The diff-


44. See, e.g., Greenwood, Attributes of a Profession, 2 Social Work, July 1957, at 44.

45. See, e.g., Rettig & Pasamanick, Status, Work Satisfaction and Variables of Work Satisfaction of Psychiatric Social Workers, 44 MENTAL HYGIENE 48 (1960). The authors conclude from an empirical study that despite the higher education and greater income of the psychiatric social worker, nurses are accorded a higher status by the general public and other professionals.
OCCUPATIONAL LICENSING

cultures experienced by the social workers in achieving the desired recognition have been compounded by problems such as the popular conception of social work as a "female profession," the ill-defined responsibilities and areas of competence of the social worker, and what has been described as a "scapegoat effect" resulting from the association of social work with welfare activities. Public understanding and acceptance of social work is also seen as necessary to obtain adequate appropriations for the conduct of social services. Accordingly, the social workers have sought legislative controls as an indication of community sanction of their profession.

Social workers also have been concerned that such rival professions as medicine, the ministry, nursing, social psychology, and marriage counseling might pre-empt areas of social work. This fear is not unfounded. In 1953, for example, the Attorney General of the State of Michigan issued an opinion defining the practice of medicine (as that term was used in the state's Medical Practice Act) in such a manner as to cast doubt on the legality of casework practice by social workers. A successor attorney general issued a clarifying opinion holding that social workers were not in violation of the Act. It was hoped that legal regulation of the profession authorizing social work practice in a definite field would eliminate the risk that social work would be divested of some of its functions by a profession in a neighboring field.

In addition, some elements of the profession have viewed licensing as a means of distinguishing the "professional social worker" from workers in the social welfare field who lack professional training. Social work is unique as a profession in that only 20 percent of its members have obtained graduate professional training from a school of social work. Because he competes with his untrained counterpart for many of the same jobs, the professional social worker "faces a persistent

47. Rettig & Pasamanick, supra note 45, at 53.
48. Id.
49. See Youngdahl, Social Work as a Profession, 10 Social Work Year Book 497, 504 (1949).
50. Legal Opinion in Michigan, 1 Social Work, April 1956, at 114.
53. Id. at 534-36.
The problem of trying to establish and maintain an independent identity." The history of the profession's attempts to enact licensing legislation is explained in large part by the desire to solve this "persistent problem."

Despite the efforts of social workers to secure licensing legislation, only California regulates through licensure. Dissatisfaction with this result led to the establishment of a separate certifying organization entitled the Academy of Certified Social Workers (ACSW). The requirements for admission to the Academy include: (1) possession of a master's degree from an accredited school of social work; (2) two years of regular membership in the National Association of Social Workers (NASW); and (3) two years of continuous employment under the supervision of an ACSW member. All NASW members are to be admitted to membership in the Academy upon application. The ACSW member is issued a certificate and authorized to use the initials "A.C.S.W." after his name.

The ACSW program has experienced a large measure of success; 80 percent of the eligible members of NASW have been admitted into the Academy. Social workers in private practice utilize the ACSW

54. Meyer, supra note 46, at 496.
55. Kidneigh, Social Work as a Profession, 14 Social Work Year Book 563, 571 (1960). The Academy was created by members of the National Association of Social Workers. The NASW is the only national professional association of social workers in the United States. Its membership is restricted to persons with two years of full-time study leading to a master's degree from an accredited school of social work. See French, Professional Organization, 15 Encyclopedia of Social Work 574, 576 (1965); Meyer, supra note 46, at 503.
56. NASW News, July 1971, at 12, col. 4. The original plans called simply for the creation of the title "Certified Social Worker," a designation to be awarded to any NASW member with two years of employment under the supervision of a certified worker. The decision to create the Academy, a separate organization, was made on the advice of legal counsel as necessary to avoid a violation of the antitrust laws. Schwartz, On Certifying Each Other, 7 Social Work, July 1962, at 21, 23; Schwartz, Re-examining the Record, 7 Social Work, Oct. 1962, at 109, 110; NASW News, May, 1960, at 2.
57. French, supra note 55, at 578.
58. Baker, supra note 52, at 533. This high percentage of enrollment results in part from the effect of the supervision requirement. For example, applicants for ACSW membership must have two years of employment in one agency under the supervision of an ACSW member. This has the effect of compelling agency supervisory personnel to
designated as an indication of special training. Indeed, the success of the program has been such that many employers specify that job applicants must be members of the Academy; "ACSW preferred" is also commonly encountered. But excepting the criterion of two years under ACSW supervision, the requirements for membership in the Academy are almost identical to NASW membership requirements. Membership in NASW is open to persons with two years of full-time study leading to a master's degree from an accredited school of social work. Possession of the ACSW designation, therefore, signifies little more than membership in NASW plus satisfaction of the supervision requirement. Recognition of this fact, together with NASW's failure to endow its creation with an independent board of directors, has sparked vigorous internal criticisms of the spurious nature of the ACSW program.

Nevertheless, insofar as NASW continues to be successful in gaining acceptance of the ACSW designation as an indication of special competence, it achieves the goal of differentiating one segment of the profession from the other through the control of a title—a goal it was unable to achieve in most state legislatures. Despite similarities in the effects of the ACSW program and the licensing legislation frequently proposed, the Academy, as a private membership organization, is subject to a different set of legal rules because of the absence of "state action." Therefore, although an individual social worker might qualify as ACSW members in order to be able to offer ACSW supervision as a means of attracting new graduates from schools of social work. See Schwartz, supra note 56, at 24-25. Personnel information notices in various issues of the NASW News typically indicate that ACSW supervision is available to employees.

59. For example, 14 of 20 marriage and family counselors in the yellow pages of the telephone directory for New Haven and vicinity are listed as ACSW members. Telephone Directory (yellow pages), New Haven and Vicinity, 250 (1971).

60. See section on Personnel Information in various issues of the NASW News.

61. See p. ... supra.

62. See, e.g., Schwartz, supra note 56; Kraft, The State of the Social Work Profession, in HUMAN SERVICES AND SOCIAL WORK RESPONSIBILITY 343, 364-66 (W. Richard ed. 1969). Perhaps in response to such criticisms, the requirements for ACSW certification have been modified very recently to provide for a written examination of competence and the elimination of the former requirement that two years work experience must be under the supervision of an ACSW member. NASW News, July, 1971, at 12, col. 3 & 4.

63. Only after the Academy was established in 1960 were the social workers able to obtain passage of licensing legislation in a number of states. See, e.g., Ill. ANN. STAT. ch. 23, § 5301 et seq. (Smith-Hurd 1968); N.Y. EDUC. LAW § 7700 et seq. (McKinney 1971).

64. See note 42 supra and accompanying text.
ful legal challenge to a denial of his own application for a license, he would experience great difficulty in obtaining judicial review of the general reasonableness of a private certification program such as ACSW, regardless of the fact that it may impinge on employment opportunities in much the same fashion as state licensure.⁶⁵

If the requisite state action could be found to support judicial or administrative review of the reasonableness of such certification programs, the reviewing tribunal ought to consider the public interest in adequate information about the professional designation.⁶⁶ A professional designation or degree which truly evidences advanced training and special competence can be of great value to the public if it promotes an informed choice of professional services. While that certifying body desires to restrict its membership for the reasons suggested above, the public expects that the professional designation conferred upon members will be meaningful in terms of providing information as to the members' professional competence. If the designation enables the consuming public to choose discriminatingly among professionals, then the restrictive effects of certification should be upheld. The courts should balance the restrictive effect of certification against the value to the public of the certified designation. Certification in the medical field, for example, furnishes the public with valuable information otherwise unavailable, guaranteeing that a doctor holding himself out as a specialist has the necessary training and experience in his area of specialization.⁶⁷ The ACSW designation, on the other hand, has little or no value as a means of informing the public about a social worker's training and competence. It indicates nothing more than the possession of a master's degree in social work plus two years of experience under the supervision of another ACSW member. Accordingly, the balancing test suggests that, in view of the negligible informative content of the social workers' designation, the courts, in an action challenging ACSW denial of certification, may look with disfavor upon the restrictive effect of the designation.

**Certification and Specialization in Medicine and Law**

Private certification may be used to implement specialization in a field in which entry into the profession at the level of general practice is

---

⁶⁵. The aggrieved party may seek a remedy in an antitrust action. See pp. 89-108 infra.
⁶⁷. See Greenwood & Frederickson, Specialization in the Medical and Legal Professions 11-47 (1964) [hereinafter cited as Greenwood].
already regulated through state licensure. The medical profession has achieved great success in the education, testing, and recognition of specialists through the private certification process. In the absence of any other viable organizational solution, responsibility for the certification of specialists in the medical profession devolved in the 1930's into the hands of independent specialty boards composed of recognized specialists who established requirements and procedures and determined the qualifications of physicians who wished to be certified. There are now 20 of these specialty boards, each having jurisdiction over a separate medical specialty; some boards recognize and give certificates in sub-specialties, and others grant certificates in special divisions of their.

68. Greenwood, supra note 67; Stevens, supra note 34. Physicians are licensed in all states. Council of State Governments, Occupational Licensing Legislation in the States 74-75 (1952).

69. For a discussion of other solutions to the specialization question considered by the medical profession in the 1920's and 1930's see Stevens, supra note 34, at 149-71, 198-216.

70. Typically, board members are elected from diplomates nominated by independent specialty organizations. Candidates for election to the American Board of Orthopaedic Surgery, for example, are nominated by the American Orthopaedic Association, The Section on Orthopaedic Surgery of the American Medical Association, and The American Academy of Orthopaedic Surgeons. Selection of future board members from the group of nominees is made by the old board members. 14 American Board of Medical Specialties, Directory of Medical Specialists 807 (1970) [hereinafter cited as Directory].

71. The various specialty boards and the year of their incorporation are as follows:

<table>
<thead>
<tr>
<th>Specialty</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anesthesiology</td>
<td>1937</td>
</tr>
<tr>
<td>Colon and Rectal Surgery</td>
<td>1934</td>
</tr>
<tr>
<td>Dermatology</td>
<td>1932</td>
</tr>
<tr>
<td>Family Practice</td>
<td>1969</td>
</tr>
<tr>
<td>Internal Medicine</td>
<td>1936</td>
</tr>
<tr>
<td>Neurological Surgery</td>
<td>1940</td>
</tr>
<tr>
<td>Obstetrics and Gynecology</td>
<td>1930</td>
</tr>
<tr>
<td>Ophthalmology</td>
<td>1917</td>
</tr>
<tr>
<td>Orthopaedic Surgery</td>
<td>1934</td>
</tr>
<tr>
<td>Otolaryngology</td>
<td>1924</td>
</tr>
<tr>
<td>Pathology</td>
<td>1936</td>
</tr>
<tr>
<td>Pediatrics</td>
<td>1933</td>
</tr>
<tr>
<td>Physical Medicine and Rehabilitation</td>
<td>1947</td>
</tr>
<tr>
<td>Plastic Surgery</td>
<td>1937</td>
</tr>
<tr>
<td>Preventive Medicine</td>
<td>1948</td>
</tr>
<tr>
<td>Psychiatry and Neurology</td>
<td>1934</td>
</tr>
<tr>
<td>Radiology</td>
<td>1934</td>
</tr>
<tr>
<td>Surgery</td>
<td>1937</td>
</tr>
<tr>
<td>Thoracic Surgery</td>
<td>1935</td>
</tr>
<tr>
<td>Urology</td>
<td></td>
</tr>
</tbody>
</table>

Directory supra, note 70, at xvii-xviii.
specialty. Supervising the operations of the 20 specialty boards is the American Board of Medical Specialties. The primary functions of the Board are to consider and pass upon applications for the approval of new specialty boards and to oversee the relatively autonomous boards. The Board recommends certain policies to be followed by approved specialty boards, but lacks the machinery for strict enforcement of its recommendations.

The requirements for certification established by the various specialty boards differ to such a degree that it is impossible to summarize adequately. In very general terms, however, each board requires the candidate for certification to have satisfactory professional ability, moral character, and preliminary training. Additional advanced training appropriate to the area of specialization is also required. Often the training requirement may be satisfied in several ways, and completion of the training program frequently will require several years. Finally, the candidate must successfully complete a series of examinations. The candidate who completes this arduous process generally is accorded "diplomate" status by the certifying board and is entitled to have his name listed in the Directory of Medical Specialists, an important reference volume which classifies board-certified specialists according to specialty and address, with appropriate biographical information.

This complicated system for the recognition of specialists has become a subject of controversy within the medical profession. Critics have noted shortcomings of medical certification. First, the existence of numerous sharply defined specialties and subspecialties has resulted in overlapping jurisdiction among the boards, necessitating arbitration of the inevitable jurisdictional disputes. Second, the membership of the boards is unrepresentative. Third, the members are not accountable.

72. The American Board of Internal Medicine, for example, recognizes sub-specialties in allergy, cardiovascular disease, gastroenterology, and pulmonary disease. Directory, supra note 70, at 150. 73. "The American Board is composed of two representatives selected by each of its member organizations." Directory, supra note 70, at xvii. 74. Id. For a discussion of the founding of the Board see Stevens, supra note 34, at 212-15. 75. See statement of "Policies of Approved Specialty Boards," Stevens, supra note 34, at 212-16. 76. For a complete statement of these requirements, see the introductory material inserted by each board in the Directory, supra note 70. 77. Non-certified physician specialists are not listed. Directory, supra note 70, at vi. 78. See generally Croatman & Barland, What's Gone Wrong with Specialism? It Causes Jurisdictional Disputes, 37 Medical Econ., Feb. 15, 1960, at 86.
for their decisions. Fourth, some requirements for certification are arbitrary. Particularly objectionable is the requirement that an applicant for certification obtain references from certified men in his local community; this may enable a specialist who has already attained "diplomate" status to "blackball" a local competitor. Fifth, the examination system is unnecessary and redundant to the residency programs, especially since some boards tend to pass almost every candidate while others fail 40 to 50 percent of their applicants. Sixth, some boards deny or revoke the certificate without an explanation or hearing. Seventh, the large number of autonomous boards has caused a lack of unity in educational policy and programs among specialty boards in contiguous fields and has contributed to the absence of an authoritative policymaking body responsible for supervising the development of graduate medical education in terms of the actual demands of medical care. The eighth criticism concerns the utility of certification. It could be an invaluable source of information concerning the qualifications of a medical specialist. Patient and doctor alike are frequently ill-prepared to determine the merits of self-proclaimed specialists; board certification might function as a guarantee that a specialist has advanced training in his chosen field. However, empirical studies of the quality of patient care have shown that the quality of care usually given by

79. Board-certified specialists describe the typical board member as older and not familiar with new modes of practice and assert that the boards are dominated by persons not in private practice. The boards are also criticized as "self-perpetuating" because of the system which allows old board members to choose from the names offered by the nominating societies. Croatman & Barland, Behind the Tangled Web of Specialism: The Specialty Boards, 37 Medical Econ., May 23, 1960, at 80, 82-85, 288.

80. Id. at 278. The boards dropped many obviously irrelevant requirements, e.g., A.M.A. membership and United States citizenship in the mid-1960's. Nevertheless, five boards still require citizenship. Stevens, supra note 34, at 321-22.

81. Croatman & Barland, supra note 79, at 278. The American Board of Otolaryngology, for example, requires the application for certification to be signed by two diplomates of the Board. Directory, supra note 70, at 910.

82. Stevens, supra note 34, at 323; Croatman & Barland, supra note 79, at 280, 287-88.

83. Croatman & Barland, supra note 79, at 278-79. The procedures of the various boards concerning the grant of a hearing in connection with the revocation of a certificate differ. Some expressly provide for notice of charges and hearing. See, e.g., Directory, supra note 70, at 810 (orthopaedic surgery). Others grant a hearing only in the exercise of their own discretion. Directory, supra note 70, at 2044 (urology). Still others specify whether a hearing or other procedural safeguards are required. See, e.g., Directory, supra note 70, at 535 (obstetrics and gynecology).

84. See Stevens, supra note 34, at 321.
certified specialists is not superior to the care given by non-certified physicians.\textsuperscript{85}

Ninth, with the rapid advance of medical technology, the boards typically have failed to require that member specialists keep abreast of developments.\textsuperscript{86} Tenth, the specialty certification system tends to increase the incomes\textsuperscript{87} of board-certified doctors by restricting hospital

\textsuperscript{85} See R. Trussel, \textit{The Quantity, Quality and Costs of Medical and Hospital Care Secured by a Sample of Teamster Families in the New York Area} 3 (1962). This study reported that patients under the care of physicians certified by a specialty board, as well as those under the care of house staff in voluntary or municipal hospitals, received the highest proportion of optimal care. However, this was true only when care was given in hospitals affiliated with medical schools. The care given by certified specialists in hospitals unaffiliated with medical schools or having no approved training programs was not superior to the care given by physicians without such qualifications.

\textsuperscript{86} See L. Lasagna, \textit{Life, Death, and the Doctor} 70-71 (1968).

An example of the incongruous and potentially dangerous results which follow from the failure of the boards to insure that its diplomates maintain a high level of competence is the case of Dr. John Joseph Foote. Dr. Foote, a graduate of the Harvard Medical School, was certified by the American Board of Surgery in 1949. In 1965 his license to practice medicine in the State of Kansas was revoked by the Kansas State Board of Healing Arts on grounds of "extreme incompetency." Although Dr. Foote challenged the action of the Kansas Board in the courts, the Board's decision was sustained by the Supreme Court of Kansas. Kansas State Bd. of Healing Arts v. Foote, 200 Kan. 447, 436 P.2d 828 (1968). Nevertheless, Dr. Foote's certificate has not been revoked and he is listed in the most recent edition of the Directory of Medical Specialists (1970-71) as a Diplomate of the American Board of Surgery. \textit{Directory}, \textit{supra} note 70, at 1819. See also letter from J. W. Humphreys, Jr., M.D., Secretary of the American Board of Surgery, Inc. to Douglas A. Wallace, Nov. 18, 1971.

Both the American Board of Internal Medicine and the American Board of Family Practice have announced recently that they will require periodic recertification of their diplomates. The certificate of the Board of Family Practice, for example, will be valid only for six years. \textit{Stevens}, \textit{supra} note 34, at 345.

The Oregon Medical Association has taken action to meet this problem by requiring fulfillment of continuing educational requirements tailored to individual specialties as a condition of continued membership in the Association. In January, 1972, eleven physicians were suspended from the Association for failure to meet the requirements. These suspensions were the first in the United States made by a state medical association on educational grounds. New York Times, Jan. 9, 1972, at 63, col. 6.

\textsuperscript{87} See Greenwood, \textit{supra} note 67, at 28-29; Rayack, \textit{supra} note 34, at 212-19; Stevens, \textit{supra} note 34, at 251-57, 265-66, 305-10.

staff privileges to board-certified men, to the exclusion of general practitioners and non-certified specialists.

Notwithstanding these shortcomings, the certification process generally insures an initial level of competence and potentially may enable the consuming public to discriminate between a specialist and a non-specialist. In contrast to medicine, the practice of law in the United States has from its inception been marked by its nonspecialized character. However, as the potentialities of certification are being recognized, a trend toward specialization has developed in the legal profession. Accordingly, proposals presented in 1954 and 1962 for the

88. See E. Rayack, supra note 34, at 220 passim. Rayack cites evidence that the incomes of specialists in the East (where restriction of hospital staff privileges is more prevalent) exceed the incomes of general practitioners by a greater percentage than the incomes of specialists in the West (where restriction of hospital staff privileges is less prevalent) exceed the incomes of general practitioners. This suggests "that medical staff restrictionism tends to raise the relative incomes of specialists." Id. at 239. He concedes, however, that "the data required for giving a rigorous answer to this question are not available." Id.

For information concerning the actual incomes of specialists see Greenwood, supra note 67, at 26-27.

89. Dr. Charles E. Letorneau, president of the American College of Legal Medicine, in response to the question whether he had seen situations where whole groups of staff doctors, such as G.P.s, had suddenly had their privileges reduced, stated: "Yes, typically this happens when a horde of surgical specialists moves into an area only to discover there's not enough surgery to go around. I've seen it affect four or five hospitals in the same community. Board-certified men try to freeze out the competition completely, even though local G.P.s had been there for 30 years doing good work." Panel Discussion, Four Major Hospital Staff Problems, 42 Med. Econ., April 5, 1965, at 73, 90.

90. For an account of the struggle between board-certified specialists and general practitioners over the adoption of restrictions on staff privileges at a San Francisco hospital see Kaye, New Curb on Surgical and OB Privileges, 42 Med. Econ., May 31, 1965, at 59. Despite their argument for an individual evaluation of applicants for staff privileges by the hospital itself rather than a blanket restriction, the G.P.s lost the battle. See G.P.s Lose Fight to Change Staff Bylaws at San Francisco Hospital, 105 Modern Hospital, July, 1965, at 153.


By far the most common way of locating a specialist is to consult one of the numerous law lists, such as the Martindale-Hubbell Legal Directory, indicating the "branches of the profession practiced" by the lawyers listed therein. Greenwood, supra note 67, at 93-94. The difficulty with this system is that such indications of "branches of the profession practices" often constitute nothing more than "self-proclaimed assertions of competence" by the attorney involved and thus provide no substantial guidance to the public or protection to true specialists. Harnsberger, Publication of Specialties and Legal Ability Ratings in Law Lists, 49 A.B.A.J. 33, 37-38 (1963).
certification of lawyers as specialists by committees of the American Bar Association closely resembled medicine's specialty board system. These proposals were defeated primarily because of the uncertainties in their scope and operation, and the fears of some attorneys that implementation of the proposals would result in a loss of their clients to specialists.

Despite the defeat of the ABA proposals, discussion and development of certification programs for lawyers have continued within the various state bar associations. California has initiated a pilot program for certifying specialists in the fields of workmen's compensation, criminal law, and taxation. A practitioner certified under the California plan will be permitted to list his specialty in the yellow pages of the telephone directory, but not on a business card or letterhead. Should the California program prove successful, certification of legal specialists seems destined to spread throughout the United States and take on increasing importance in the future.

Board certification as a vehicle for implementing specialization in


[93] See Greenwood, supra note 67, at 170-72; Q. Johnstone and D. Hopson, supra note 91, at 156.


The American Bar Association has authorized the creation of such certification programs within the states. See ABA, CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 2-14, DISCIPLINARY RULE 2-105.


[96] Id. A Los Angeles tax attorney says of the program: "This doesn't necessarily identify talent, but it gives the public a better chance to know who's an expert." Id.

It should also be noted that the courts are likely to impose a higher standard of care in malpractice cases on attorneys who hold themselves out as specialists, just as a doctor who holds himself out as a specialist is held to a higher standard of care than a general practitioner. See, e.g., Carbone v. Warburton, 11 N.J. 418, 94 A.2d 680 (1953) (orthopedic surgeon); Childs v. Comstock, 69 App. Div. 160, 74 N.Y.S. 643 (1902) (attorneys were experts in practice before customs court). See generally RESTATEMENT (SECOND) OF TORTS § 299A, Comment d at 74 (1965); Comment, Legal Effects of Attorney Specialization, 30 Albany L. Rev. 282 (1966).

[97] It does not seem possible that certification of lawyers as specialists will acquire in the foreseeable future the crucial importance that board certification enjoys in the field of medicine. Lawyers are not likely to accept any plan which would prohibit lawyers not recognized officially as specialists from practicing in a specialty area. See Greenwood, supra note 67, at 159-61. It does not seem likely that the courts—unlike the hospitals—will adopt rules restricting practice in certain areas to certified specialists. Cf. Greenwood, supra note 67, at 120-29.
the fields of medicine and law is creating a two-level system for entry into these professions. The first level, entry into the profession as a general practitioner, will remain a function of state licensure; the second, initiation into the more prestigious and economically rewarding strata of professional practice, is gradually falling under the jurisdiction of specialty boards controlled by private associations. In this evolving system, the general practitioner seems destined merely to guide the client to the appropriate specialist or enlist the efforts of several specialists on his client's behalf. As this development continues, the growing power of the boards inevitably will generate mounting pressures for regulation of both the procedural and substantive aspects of board action and policy. Pressures for reform are likely to center on the problem of protecting the rights of the individual practitioner who applies for specialty certification. Criticisms of the practices of some of the medical specialty boards which deny or revoke certification

98. This development is obviously much more advanced in medicine than in law.

With respect to law, another qualification must be added to the statements in the text. If certification of lawyers as specialists becomes the responsibility of the state bar associations and supreme courts rather than the American Bar Association or individual specialty organizations such as the American Trial Lawyers' Association and the Commercial Law League of America, the role of the private certifying organization will be reduced greatly in importance. See Greenwood, supra note 67, at 151-54. In the light of the requirements of the new Code of Professional Responsibility, the development of certification for lawyers within the state bar associations and supreme courts seems assured. See ABA Code of Professional Responsibility, Ethical Consideration 2-14, Disciplinary Rule 2-105.

99. In the future, the general practitioner may not be permitted to fulfill even the limited role outlined in the text. Specialty restrictionism in the field of medicine has resulted in a decline in the number of general practitioners combined with a gradual assumption of the traditional functions of the general practitioner by the specialists. In addition, patients short-circuit the model of consultation and referral by their "family physician" by choosing to consult a specialist initially rather than allowing the general practitioner to make a rational choice among competing specialists. Rayack, supra note 34, at 236-38. This not only results in a further decline in the position and prestige of the general practitioner, but also in a wasteful misallocation of resources. Many tasks which are well within the competence of the general practitioner are being performed by persons whose advanced training logically dictates that they devote their time to matters requiring special skills. Id. at 237-38.

The American Board of Family Practice, a specialty board for general practitioners founded in 1969, may be able to slow the movement toward specialization by raising the prestige of general practice and making the general practitioner better prepared to perform his tasks by requiring completion of continuing educational requirements. Evidence is not yet available to indicate the degree of success the newly founded board will experience. For a discussion of the newly founded Board of Family Practice see Stevens, supra note 34, at 310-17.
without explanation or grant of a hearing have been noted previously.\textsuperscript{100} A few of the specialty boards have sought to thwart any judicial review of their actions by requiring every candidate to agree not to litigate the decision of the board.\textsuperscript{101} But once the specialty board certification process is recognized as a licensing device, it will undoubtedly seem intolerable that candidates for specialty board certification do not enjoy the benefits of procedural due process now afforded applicants for state licensing as a matter of right.\textsuperscript{102} In this event, it can be expected that judicial reaction will lead to a requirement that all board action affecting a candidate's certification conform to the safeguards of procedural due process. Several methods may be adopted to protect an applicant's rights. First, boards which have established procedural safeguards can be required to abide by them on the theory that such rules are a part of the contract between the board and the candidate.\textsuperscript{108} In return for

\textsuperscript{100} See text accompanying note 83 supra.

In Fontanetta v. American Bd. of Internal Medicine, 421 F.2d 355 (2d Cir. 1970), the plaintiff sought an order to compel the Board to disclose the reasons why he had failed the oral examinations conducted by the Board as part of the certification process. Id. at 356.

\textsuperscript{101} The American Board of Otolaryngology, for example, requires each applicant to agree to the following: "[I]f the Board refuses to grant a certificate, such a refusal may not and shall not be questioned by me in any court of law or equity, or any other tribunal." Directory, supra note 70, at 912.

\textsuperscript{102} Procedural due process in bar admission proceedings includes the right to a hearing. Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963). The applicant has a right to be informed of the charges against him. In re Guberman, 90 Ariz. 27, 363 P.2d 617 (1961); In re Burke, 87 Ariz. 336, 351 P.2d 169 (1960); In re Warren, 149 Conn. 266, 178 A.2d 528 (1962); Coleman v. Watts, 81 So. 2d 650 (Fla. 1955); In re Kellar's Petition, 79 Nev. 28, 377 P.2d 927 (1963). The applicant also has the right to present evidence in his own behalf. In re Lobb, 157 So. 2d 75 (Fla. 1963); In re Frank, 293 Ill. 263, 127 N.E. 640 (1920); In re Monaghan, 122 Vt. 199, 167 A.2d 81 (1961). The nature and scope of the candidate's right to confront and cross-examine the witnesses against him is less well-defined. See Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (due process required confrontation "in a situation such as this"); In re Levine, 97 Ariz. 88, 397 P.2d 205 (1964) (right to confront accusers and adverse witnesses); In re Dinan, 157 Conn. 67, 244 A.2d 608 (1968); In re Kellar, 401 P.2d 616 (Nev. 1965); In re Icardi, 436 Pa. 364, 260 A.2d 782 (1970); In re Monaghan, 222 A.2d 665 (Vt. 1966). See generally Comment, Procedural Due Process and Character Hearings for Bar Applicants, 15 Stan. L. Rev. 500 (1963).

Although there has been less litigation in the medical field, the requirements of due process are certainly no less stringent there. See, e.g., Corbett v. Kinlein, 191 A.2d 246 (D.C. Ct. App. 1963) (hearing required); Marner v. Board of Registration of Chiropractors, 260 N.E.2d 672 (Mass. 1970); Milligan v. Board of Registration in Pharmacy, 204 N.E.2d 504 (Mass. 1965) (hearing required).

\textsuperscript{103} It has been noted previously that some of the boards expressly provide for notice of charges and a hearing in connection with the revocation of a certificate. Supra note 83. These provisions do not appear to contemplate the grant of a hearing to a candidate
the payment of a fee, the specialty boards agree to examine the candidate's qualifications and issue him a certificate if he meets the designated requirements; procedural safeguards promulgated by the boards form a part of this contract and should be enforced judicially. The constitutional limitations of procedural due process might also be imposed upon the boards on the theory that they exercise essentially governmental functions with the tacit consent of the state and therefore act in a quasi-governmental capacity. Finally, some courts find merit in the theory that organizations exercising economic control over a trade or profession are affected with a public interest and have a fiduciary responsibility with respect to membership applications. This fiduciary initially denied a certificate. In such cases some boards apparently refuse to disclose the reasons for the denial of a certificate. See note 100 supra.

104. The fees charged by the boards are substantial. A representative sample is as follows: Dermatology, $25 for registration and $175 for examinations, Directory, supra note 70, at 89; Internal Medicine, $70 for application and $155 for examinations, Directory, supra note 70, at 151; Orthopaedic Surgery, $25 for application, $225 for examinations, Directory, supra note 70, at 890; Surgery, $225, Directory, supra note 70, at 1736.


106. See, e.g., Marjorie Webster Jr. College v. Middle States Ass'n of Colleges and Secondary Schools, 302 F. Supp. 459 (D.D.C. 1969). In the Marjorie Webster case the district court found that both federal and state governments utilized the defendant, an educational accrediting agency, as a service agency for determining eligibility for governmental assistance. Id. at 477-78 (Finding of Fact no. 61). The court concluded that the "defendant in performing its accreditation function is engaged in a quasi-governmental function, subjecting it to the restraints of the Constitution." Id. at 478 (Conclusion of Law no. 3). Subsequently the decision was reversed. Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970). For a critical discussion of the opinion in the court of appeals see 84 HARV. L. REV. 1912 (1971).

107. This theory has its origins in the cases requiring labor unions with closed-shop agreements to admit a non-member or, in the alternative, to refrain from enforcing the agreement against him. See, e.g., James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944). It was applied by the Supreme Court of New Jersey in a well-known decision involving the exclusion of a physician from membership in a county medical society which necessarily resulted in the loss of his hospital staff privileges, Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961), and approved by the Supreme Court of California in a decision involving the plaintiff's right to membership in a dental association where such membership was a prerequisite to certification as a specialist in orthodontics, Finsker v. Pacific Coast Soc'y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969). See generally Tobriner & Grodin, The Individual and the Public Service Enterprise of the New Industrial State, 55 CALIF. L. REV. 1247 (1967).
responsibility gives an applicant for certification or membership a right to have his application considered in accordance with the fundamentals of due process.\textsuperscript{108}

\textbf{CONTROL OF DEPENDENT TECHNICAL WORKERS}

The typical pattern of the professional certification process is peer-group regulation consisting of an examination of the qualifications of candidates for certification by members of the same professional group. Groups of technical workers, however, often are certified not by their peers but by the professionals in whose employ or under whose supervision they are apt to work. For these technicians, or "dependent sub-professionals," certification by a closely related professional group becomes the path to recognition and status in the field. The requirements for the certification of dependent technical workers are similar to those for professionals.

Certification of technicians occurs in diverse occupational fields. The American Society of Clinical Pathologists (ASCP), for example, examines and certifies medical laboratory workers known as "medical technologists."\textsuperscript{109} The successful applicant for ASCP registration earns the privilege of using the initials "M.T. (ASCP)" after his name. Also, the certification of engineering technicians was inaugurated in 1962 by the National Society of Professional Engineers.\textsuperscript{110} The result was the formation of the Institute for the Certification of Engineering Technicians, an organization recognizing three distinct grades of engineering technicians.\textsuperscript{111} Currently, the American Psychological Association is considering the establishment of certification programs for technical workers in psychology at the subdoctoral level,\textsuperscript{112} and the National Association of Social Workers is debating the merits of attempting to measure and define the competence of persons employed in social work who lack professional training.\textsuperscript{113}


\textsuperscript{109} Alcuin, \textit{Medical Technology}, 35 \textit{Minn. Medicine} 331, 333 (1952).

\textsuperscript{110} Williamson, \textit{The Institute for the Certification of Engineering Technicians}, 32 \textit{Am. Engineer}, Sept., 1962, at 51. For a sociological analysis of the role of the engineering technician and his relation to the engineer see Evan, On the Margin—The Engineering Technician, in \textit{The Human Shape of Work} 83 (P. Berger ed. 1964).

\textsuperscript{111} Williamson, \textit{supra} note 110, at 51.

\textsuperscript{112} Woods, \textit{A History of APA's Concern with the Master's Degree}, 26 \textit{Am. Psychologist} 696, 706-07 (1971).

The reasons generally advanced by professionals in favor of the establishment of certification programs for technical workers focus on the need to eliminate misuse of the talent of the true professional on routine job assignments. A certification program, by conferring status and recognition on technicians, will attract more qualified persons to the field, thus freeing the professional for more complex and challenging tasks.\(^{114}\) A related goal assumes the desirability of distinguishing between the titles and the proper functions of the true professional on the one hand, and the technical worker on the other.\(^{115}\) The certification device communicates this information to the general public and potential employers. Professional organizations, moreover, often express the fear that unless an appropriate certification program is instituted, technical workers may lose their identification with the parent profession and form “specialty societies” with distinct codes of ethics and professional discipline.\(^{116}\) It also seems possible that technical workers lack the organization and resources to establish certification programs on their own and may prefer to be certified by the professionals under whom they work.\(^{117}\)

Although certification programs for technical workers typically are described as “voluntary,”\(^{118}\) the programs would obviously never be initiated unless it was contemplated that, at the very least, employers would consider the certification in reviewing the records of job applicants.\(^{119}\) In practice, the preference that employers give to certified

\(^{114}\) See, e.g., Williamson, supra note 110, at 51-52; Elder et al., The Training of Technical Workers in Psychology at the Subdoctoral Level, 10 AM. PSYCHOLOGIST 541 (1955) [hereinafter cited as Elder].

\(^{115}\) See, e.g., Williamson, supra note 110, at 53; Elder, supra note 114, at 541-42.

\(^{116}\) See, e.g., McTeer, A Survey of Graduate School Opinion Regarding Professional Training Below the Doctoral Level, 7 AM. PSYCHOLOGIST 14, 19 (1952); Elder, supra note 114, at 544.

\(^{117}\) See Gneb, supra note 1, at 61.

\(^{118}\) See, e.g., Williamson, supra note 110, at 51.

\(^{119}\) One of the purposes of an association of professionals or semi-professionals not subject to direct regulation by the state is to attain recognition of membership in or certification by the association as an indication of competence comparable to state licensure. See Carr-Saunders & Wilson, supra note 1, at 358-59. Carr-Saunders and Wilson explain this phenomenon as follows:

[I]nstitutional monopoly is not a feature of the registered [licensed] professions only. Some degree of monopolistic advantage may be won by a particular group of practitioners in an unregistered profession. In that case it accrues not to the registered, since there is no register, but to the
WILLIAM AND MARY LAW REVIEW

technicians suggests that participation in certification programs is not voluntary. Moreover, certification programs enable the professionals to exert increased control over technical workers. For example, codes of ethics governing the professional conduct of the technical worker and his relations with the parent profession are promulgated by the certifying agency; violations may result in censure or loss of certification.

The power exercised by a parent profession over its technical workers may be abused. This is amply illustrated by the case of Higgins v. American Society of Clinical Pathologists. Janet L. Higgins was certified as a medical technologist by the ASCP Board of Registry in 1963. She was employed as a medical technologist by a hospital in Trenton in 1964, but later in the same year accepted a position at Egan Laboratories, an independent bio-analytic laboratory, where her salary and working hours were better than they had been at the hospital. Her employment at Egan Laboratories violated provisions of the Code of Ethics and Standards of Conduct promulgated by the ASCP Board of Registry which, in general, required that a medical technologist work under a pathologist or other duly qualified and licensed doctor of medicine. The director of Egan Laboratories, although not a physician,
was licensed to operate the laboratory by the State of New Jersey pursuant to its Bio-Analytical Laboratory and Laboratory Director's Act. Nonetheless, the ASCP Board of Registry refused to renew Janet Higgins' certification in 1965.

Following this refusal, Janet Higgins brought an action against ASCP to compel it to recertify her as a professionally qualified medical technologist and to reinstate her name in the registry of medical technologists. Disregarding the absence of any tangible economic loss, the New Jersey Supreme Court first determined that status as a certified medical technologist was an interest of sufficient value to warrant judicial protection if subjected to unjust interference. The court then held that the provisions of the ASCP rules conflicted with the public policy of the state and therefore were insufficient to provide a proper basis for a refusal to renew Janet Higgins' certification. New Jersey policy, as evidenced in the Bio-Analytical Laboratory and Laboratory Director's Act, favored the operation of bio-analytic laboratories by qualified nondoctors as well as physicians. The rules of the ASCP not only conflicted with this policy, but also were intended to prevent nonphysicians from operating laboratories of clinical pathology rather than elevating the standards and work performance of the certificate holder. Indeed, the natural tendency of the rules was to prevent licensed bio-analytic directors who were not physicians from obtaining the services of certified medical technologists, thus contravening the state's purpose in granting a director's license and depriving the public of laboratory service of the highest quality and reliability.

As the New Jersey court was undoubtedly aware, the conduct of the ASCP in Higgins was an attempt by the pathologists to utilize the medical technologists as involuntary allies in the pathologists' highly successful effort to monopolize the commercial medical laboratory.

A medical technologist will work at all times under the direction or supervision of a pathologist or other duly qualified and licensed doctor of medicine, such qualifications being determined on the basis of accepted medical ethics.

A medical technologist will not act as owner, co-owner, advisor or employee, or by means of any subterfuge, participate in an arrangement whereby an individual not regularly licensed to practice medicine is enabled to own or operate a laboratory of clinical pathology.

_id_. at 196, 238 A.2d at 667-68.
126. 51 _N.J._ at 197, 238 A.2d at 668.
127. _Id._ at 198-202, 238 A.2d at 668-71.
128. _Id._ at 202-04, 238 A.2d at 671-72.
trade in the United States.\textsuperscript{129} The provisions of the Code of Ethics were designed to serve the pecuniary interests of pathologists rather than to protect the public or promote high standards of performance among medical technologists; however, the court did not ground its opinion on this purpose. The New Jersey statute furnished a convenient basis for the court's holding. In the absence of such a statute, however, courts may be obliged to examine the character of the relationship between the parent and the dependent group. If an analogous case arises in the future, courts should recognize that the power inherent in the certification process allows the parent to advance its interests improperly, to the disadvantage of their dependents. In order to preclude abuses of this nature, a fiduciary standard should be imposed on professional associations. Furthermore, when the interests of the dependent are infringed by certification actions of the parent, the burden of proof showing a legitimate countervailing interest should be borne by the parent in order to sustain the certification.\textsuperscript{130} Consequently, the potential abuse of power by the professional group would be obviated without interfering with bona fide certification programs.

\textbf{Remedies}

With the exception of antitrust law, there is no statutory regulation of the certification process. Although the development of a comprehensive code for the regulation of certifying boards seems theoretically possible, such a step would undoubtedly prove impractical and unwise.

\textsuperscript{129} In 1966, the Justice Department filed a suit against the College of American Pathologists charging that the nationwide association of pathologists had conspired in violation of the Sherman Act to monopolize the $3 billion-a-year medical laboratory business. The government asserted that as a result of their efforts, members of the College own virtually all of the 20,000 commercial laboratories in the United States. In 1969, the court entered a consent decree prohibiting, \textit{inter alia}, the college and any persons acting with it from restricting or preventing any person from organizing, owning, or affiliating with any laboratory. United States v. College of Am. Pathologists, 1969 Trade Cas. ¶ 72,825 (N.D. Ill.); 414 BNA Antitrust & Trade Reg. Rep. at A-21 (1969); 261 BNA Antitrust & Trade Reg. Rep. at A-3 (1966).

Although The College of American Pathologists and the American Society of Clinical Pathologists are separate and distinct organizations, their memberships apparently have significant overlap. Annual meetings of the two groups are held jointly. Directory of National Trade and Professional Associations of the United States, 28, 49 (1969).

\textsuperscript{130} Such a requirement may be implicit in the reasoning of the New Jersey court in \textit{Higgins}. The court placed considerable emphasis on the fact that the rules in question were aimed at eliminating laboratories owned or operated by non-physicians and were related to elevating the standards and work performance of the certified medical technologist. 51 N.J. at 203, 238 A.2d at 671.
Even though a code of this sort might be designed which would affect the internal operations and structure of the certifying boards, it would not be likely to impose any substantive limits on their activities. An attempt at comprehensive regulation also seems unwise because no statute could take account of the diverse functions which the certification device serves and the various contexts in which it appears. Thus, a single statute designed to be applied to all of the various certifying boards and agencies would constitute a particularly Procrustean form of regulation. Since the possibility of uniform regulation is unlikely, the remainder of this article will examine various remedies which an aggrieved professional might pursue. These remedies are concerned with the law of libel, contract, antitrust, and unjust interference.

131. These conclusions, however, do not rule out the possibility of ad hoc legislation designed to deal with specific problems. Two examples of the utility of such limited intervention in the certification process are as follows:

(1) Local real estate boards share many of the characteristics of the certifying board. Because local board membership is generally a condition of access to the multiple listing system, a broker excluded from a local board can suffer severe economic distress as a result. Evidence that such exclusions were frequently made on racial grounds led Congress to declare it unlawful to deny any person membership in a multiple listing system or real estate brokers' organization on account of race, color, religion, or national origin. 42 U.S.C. § 3606 (1970). If the Secretary of Housing and Urban Development is unable to obtain a voluntary compliance with this statute, the aggrieved party is authorized to enforce his statutory right in the federal district courts. 42 U.S.C. § 3610 (1970). Similar statutes might be designed to apply to other certifying organizations with a record of discriminatory practices such as the medical specialty boards. See Stevens, supra note 34, at 248-49.

(2) Critics of the educational accrediting agencies have often objected to the agencies' policy of refusing to publish or permit inspections of the evaluations of colleges and secondary schools prepared by the visiting teams. See, e.g., J. Doerner, The Parsons College Bubble 203-06 (1970). Mere accreditation (or the lack of it), it is argued, provided almost no information concerning the caliber of an educational institution and, as a result of the policy of confidentiality, the public is denied valuable information concerning the strengths and weaknesses of numerous schools. The critics conclude that publication of the "visiting team" reports would not only make this information available but would also have the beneficial effect of encouraging impartiality by the agencies and spurring the schools to their best efforts. If a state were persuaded of the validity of this argument, it might provide that disclosure of the reports be required as a condition of the agencies' right to conduct business in the state. Cf. Comment, The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation, 52 CORNELL L. REV. 104, 122-25 (1966).
Libel

Evaluations of the competence and qualifications of professional persons are sometimes published in a directory or otherwise made available to the public.\textsuperscript{132} The law of libel may provide a remedy for a professional aggrieved by the action of an organization concerning his rating or certification.\textsuperscript{133} Disparagement of the reputation of tradesmen was actionable at common law.\textsuperscript{134} By analogy, similar protection was accorded persons engaged in business or the professions.\textsuperscript{135} Indeed, imputations of lack of skill or ability to a person engaged in a calling requiring such skill were deemed so serious as to constitute an exception to the general rule demanding proof of special damages; recovery for slander became actionable without proof of special harm or loss.\textsuperscript{136} Such charges are libelous and actionable per se.\textsuperscript{137}

However, for the following reasons, the law of libel is usually an illusory remedy for the aggrieved professional: First, professional associations in which certification is the criterion for membership do not attempt to rate members of the profession generally; only applicants...
for membership are evaluated. By applying for membership, the professional has "consented" to the accompanying evaluation and may be said to have assumed the risk that the result may be defamatory.\textsuperscript{338} Consent is a complete defense to an action for defamation.\textsuperscript{339} Second, since professional associations do not purport to judge the competence and qualifications of all potential members, a professional who fails to apply for membership will not be permitted to complain that the omission of his name from a list of qualified persons constitutes, by negative implication, a libelous charge of incompetence.\textsuperscript{340} Moreover, the applicant who has been denied a rating or certification does not have a claim for damages; he will not be branded a failure. His name simply will

\begin{itemize}
\item \textsuperscript{338} Prosser, supra note 133, at 804 n.56.
\item \textsuperscript{339} Restatement of Torts § 583, comment d at 221 (1938): "One who agrees to submit his conduct to investigation knowing that its results will be published, consents to the publication of the honest findings of the investigators. Such consent may be derived from voluntary membership in an association, the rules of which provide for such an investigation."
\item \textsuperscript{340} Davis v. New England Ry. Publ. Co., 203 Mass. 470, 89 N.E. 565 (1909). In Davis it was alleged that the defendant's publication intentionally created a public belief that the list contained the names of all the reputable express companies engaged in business in Boston and the surrounding area. The Massachusetts court held that the intentional omission of the name of the plaintiff's express company from the publication did not constitute a libel upon the plaintiff. However, the court did hold that there was an injury to property, and that the plaintiff would be entitled to an injunction upon proof of the facts. \textit{Id.} at 479, 89 N.E. at 566.
\end{itemize}

The result in \textit{Davis} is supported by the reasoning of the Appellate Division of the New York Supreme Court in Morrison v. NBC, 24 App. Div. 2d 284, 266 N.Y.S. 2d 406 (1965). The \textit{Morrison} litigation arose out of the plaintiff's participation as a contestant in the popular television quiz show known as "Twenty-One." The plaintiff alleged that he participated in the quiz show honestly and in good faith, receiving no coaching or assistance, and that when it became common knowledge in 1959 that the producers had rigged the results by giving the correct answers to some contestants, the public believed that all contestants were privy to the fraud. Consequently, he became an object of scorn and contempt, suffered injury in his reputation as a university professor, and lost the chance to obtain fellowships from two foundations. Discussing the nature of the plaintiff's claim for damages, the Appellate Division stated: "The claim is not for defamation ... because defendants did not publish in any form anything derogatory to or concerning plaintiff. Instead, they put him in an unduly hazardous position where his reputation might be injured, not because this was their purpose, but because they did not care what happened to him in the pursuit of their purpose for selfish gain. Yet the harm sustained is exactly like that from defamation, albeit induced neither by slander nor libel." 24 App. Div. 2d at 287-88, 266 N.Y.S.2d at 410. On appeal, the New York Court of Appeals reversed the Appellate Division, holding that regardless of whether the defendants' conduct was actionable—a question it did not resolve—the plaintiff's cause of action fell "within the ambit of tortious injury which sounds in defamation" and therefore was barred by the applicable one-year statute of limitations. 19 N.Y.2d 453, 227 N.E.2d 572, 280 N.Y.S.2d 641 (1967).
not appear in the roster of the qualified. Finally, professional ratings typically occur in connection with a report of membership in an association. An individual may claim that his low rating is defamatory. The professional association may offer the counterargument that freedom of association guaranteed by the due process clause of the fourteenth amendment permits the association to accept members on its own terms, which, in this case, includes a publication of the individual's level of professional competence. The effectiveness of the libel action as a means of obtaining judicial review in this field, therefore, appears limited to actions against non-membership organizations publishing evaluations or ratings of substantially all of the members of a professional group.

The second reason that the law of libel may not afford a remedy is that publications describing the qualifications of professional persons might be held privileged. Insofar as the decision to rate, accredit, or certify a member or members of a professional group is made in the context of proceedings affected with a public interest, a published report of the proceedings arguably is within the privilege for the publication of reports of public proceedings and meetings. The rationale of the privilege is the right of the public to be informed of proceedings in which it has a legitimate interest, but the commentators indicate that the courts have not shown "a tendency to extend the rule beyond official governmental proceedings and include certain types of meetings of general public concern." Thus the publication by a member of the Massachusetts Medical Society, in the *Boston Medical and Surgical Journal*, of an accurate account of society proceedings resulting in the

141. See Fontanetta v. American Bd. of Internal Medicine, 303 F. Supp. 427 (E.D.N.Y. 1969), aff'd, 421 F.2d 355 (2d Cir. 1970), an action by a doctor against one of the medical specialty boards for equitable relief and damages arising out of the board's refusal to certify the doctor as a specialist in internal medicine. While dismissing the case for lack of jurisdiction, the district court stated: "The complaint uses the adjective 'defamatory' in describing the defendant's denial of certification, but the word seems not to be used in the sense of 'defamation of character' . . . nor is the cause of action basically for a tortious act. There is no allegation that defendant published the fact of plaintiff's failure to anyone else. Plaintiff is complaining of unfairness or arbitrariness in the testing procedure, which has caused him economic detriment. Plaintiff's character is not in issue, but only defendant's procedures." 303 F. Supp. at 431.


expulsion of the plaintiff from membership for misconduct was held a privileged communication. The court analogized this situation to the common law privilege for reports of judicial proceedings. Characterizing the proceedings as "quasi judicial," the court noted that the great number of associations holding meetings of interest to the public and publishing their proceedings for general information required a "larger liberty." Though meetings at which decisions are made to certify are generally not open to the public, it is at least conceivable that a modern court might hold publication of the results of such proceedings privileged because of the public interest in their results.

Third, the common law also recognized a privilege for the publication of defamatory matter in order to protect an important interest of the recipient of the communication. Under this principle, mercantile agencies furnishing their subscribers with information concerning the credit of persons engaged in trade were held to have a conditional privilege against an action for defamation. Despite the potential for abuse inherent in the activities of these associations, the American courts supported a qualified privilege for their activities as "a most potent factor in keeping up public confidence." Arguably, the communication of information concerning the competence of a professional to a person with a legitimate interest in such information should be held privileged, since reliable information concerning the capabilities of a surgeon, a tax lawyer, or a securities analyst is valuable to one who is about to employ such a person. The common law privilege for mercantile agencies, however, was a qualified one; it was lost if the information was given wide dissemination rather than in response to a request from interested persons. Likewise, the publication of ratings

145. Barrows v. Bell, 73 Mass. (7 Gray) 301 (1856).
146. Id. at 313.
147. But see RESTATEMENT OF TORTS § 611, comment b at 293-94 (1938).
148. Id. § 595; HARPER & JAMES, supra note 136, § 5.25.
150. Pollasky v. Minchener, 81 Mich. 380, 285, 46 N.W. 5, 6 (1890). Some American jurisdictions, following the English rule, denied the privilege completely on the grounds that as profit-making ventures, mercantile agencies should be penalized if they "sell and traffic falsehood and misrepresentation about the standing and credit of men or corporations." Pacific Packing Co. v. Bradstreet Co., 25 Idaho 696, 704, 139 P. 1007, 1010 (1914).
or information concerning certification or accreditation in directories and in other forms calculated to reach the general public should constitute an abuse of the privilege defeating the protection otherwise afforded.

Members of professional associations also benefit from another conditional privilege for the communication of defamatory matter made in the furtherance of the common interest of the members of the association. Thus a letter from a member of a medical society to the secretary of the society, in the bona fide discharge of the former's duty, describing another member as unworthy of membership and recommending his expulsion, was held a privileged communication. Although this privilege would protect the certifying association in disseminating published evaluations to its members, the privilege does not extend to a public distribution of such materials.

Fourth, if the criticism of a professional focused on his activities connected with a matter of public concern, the publication of such criticism might be held privileged as "fair comment." For example, a dental association's critique of a dentist's views on fluoridation of public water supplies as "based on incomplete information" and "totally irresponsible" was held privileged as "fair comment" because of the public nature of the water fluoridation issue.

Even if the theoretical applicability of the libel action is assumed, further practical difficulties remain. Technical rules of pleading governing the libel action set many traps for the unwary. For example, in the minority of American jurisdictions which require proof of special damages if the libel upon which the action is based is not "libelous per se," the plaintiff must plead and prove actual economic loss and

---

152. Restatement of Torts § 596, comment c at 256 (1938); Prosser, supra note 133, at 809.
154. See Restatement of Torts § 604 (1938); Prosser, supra note 133, at 819.
155. Restatement of Torts § 606 (1938); Prosser, supra note 133, at 812-16.
157. See Kirby v. Martindale, 19 S.D. 394, 103 N.W. 648 (1905). The defendant a publisher of a legal director, demurred to the plaintiff's complaint alleging a libelous statement published in the defendant's legal directory, the "substance and effect" of which was that the plaintiff was a second-rate lawyer. The South Dakota court sustained the demurrer because of the plaintiff's failure to set out the libel in haec verba and to explain how the alleged libel would injure him.
158. For an explanation of the origins of the rule and a list of the jurisdictions which adhere to it, see Harper & James, supra note 136, § 5.9, at 373-74 n.9.
further establish the causal connection between the loss and the publication of the defamatory matter. These problems of proof will be difficult, if not insurmountable. Moreover, the possibility of winning a substantial money judgment may not restore a tarnished reputation and certainly will not gain the rating or accreditation sought. For all these reasons, the defamation action may have little more than a nuisance or spite value.

Contract

Although professional certification is in many respects analogous to state licensing or registration, it also resembles traditional educational programs. Typical characteristics of certification which closely resemble academic functions include the following: (1) a prescribed course of study; (2) the sponsorship of facilities for the conduct of

---


160. Consider the plight (and tenacity) of Judge S.E. Ellsworth. From 1907-27 Judge Ellsworth received the best possible rating in *Martindale-Hubbell Law Directory* and its predecessor *Martindale's American Law Directory*. In 1928 Judge Ellsworth's rating was lowered for reasons unexplained in the various appellate opinions which marked the litigation. When Judge Ellsworth attempted to have this slight to his professional reputation rectified, Martindale responded by refusing to give him any rating at all, simply placing four dashes or blank spaces after his name. Ellsworth's action for libel followed, and the history of the litigation may be found in Ellsworth v. Martindale-Hubbell Law Directory, Inc., 65 N.D. 297, 258 N.W. 486 (1935); 66 N.D. 578, 268 N.W. 400 (1936); 68 N.D. 425, 280 N.W. 879 (1938); 69 N.D. 610, 289 N.W. 101 (1939). Martindale ultimately won a directed verdict because of Judge Ellsworth's failure to introduce evidence that a low rating or no rating would be understood as defamatory and that the diminution of his business was a result of the publication.

161. Informal modes of redress are likely to be more effective. For an example of the possibility of such informal adjustments see the following statement in the forward to the *Martindale-Hubbell Law Directory*: "While we are continually making rating investigations in accordance with our regular revision procedures, an initial or review investigation of any lawyer will be made at his request. Solicited endorsements or testimonials, however, cannot be given the same consideration as confidential reports obtained by us." *Martindale-Hubbell Law Directory*, at vi (1971). For a discussion of alternatives available to lawyers dissatisfied with their Martindale-Hubbell ratings see Harnsberger, Publication of Specialties and Legal Ability Ratings in Law Lists, 49 A.B.A.J. 33, 36 (1963) [hereinafter cited as Harnsberger].

scholarly research;\footnote{163} (3) competitive examinations;\footnote{164} (4) the exaction of fees for admission to the course of study and/or the examinations;\footnote{165} and (5) the granting of designations or "degrees." In addition, the increasing importance of the professional "degree" as a prerequisite for employment parallels the evolution of the significance of the academic degree. Furthermore, the various certifying boards tend to emphasize the educational aspects of their programs rather than the correlation between professional certification and state licensing.\footnote{166} Since the programs of certifying boards and educational institutions are similar, the remedies available to a student who is wrongfully denied a diploma may also be available to a professional aggrieved by a board's refusal to certify.

Matriculation at a college or university establishes a contractual relationship between the student and his school.\footnote{167} If the student complies with the regulations and requirements of the school, he is entitled to receive a degree; the school which refuses to confer a promised degree upon a student who has complied fully with its requirements breaches the contract of enrollment.\footnote{168} Although various remedial theories might

\footnote{163} An example is the establishment of the Research Center of the Institute of Chartered Financial Analysts. \textit{See} Morehouse, \textit{From the President's Desk}, 22 \textit{FIN. ANALYSTS} J., Jan-Feb., 1966, at 7.


\footnote{165} These fees may be quite substantial. \textit{See}, for example, the fees required by the various medical specialty boards of applicants for certification in the \textit{DIRECTORY}, \textit{supra} note 70.

\footnote{166} The American Board of Surgery, one of the medical specialty boards, has stated that it "considers its certificate comparable to an advanced University degree." Letter from J.W. Humphreys, Jr., M.D., Secretary of The American Board of Surgery, Inc. to Douglas A. Wallace, November 18, 1971. \textit{See also} Sheppard, \textit{The C.F.A. Program: Retrospect and Prospect}, 23 \textit{FIN. ANALYSTS' J.}, March-April, 1967, at 10 (statement of objectives). This emphasis on educational aspects as opposed to viewing certification as a substitute for or adjunct to legal regulation undoubtedly is motivated in part by a desire to forestall antitrust prosecutions. A notable exception to the statement made in the text is the case of the social workers. The social workers have always seemed to view self-certification as an interim substitute for legal regulation of their profession. \textit{See}, e.g., Baker, \textit{supra} note 52, at 532, 533.


be devised for the redress of such a breach of contract, courts generally have designated the writ of mandamus as the proper remedy to compel the conferring of a degree wrongfully refused.

An independent judicial examination of the action of a college faculty in assessing the academic preparation of a student and his qualifications for a degree raises substantial problems concerning academic freedom and institutional autonomy. Although courts usually provide the remedy of mandamus in an appropriate case, the threshold question of whether a case is appropriate is treated with circumspection. Courts are cautious in delineating the form and extent of judicial review of a school’s refusal to confer a degree. This is because the faculty exercises a discretionary function in assessing the qualifications of students and determining their right to receive degrees, and their decisions are conclusive upon the courts unless they have acted arbitrarily or in bad faith. Accordingly, the scope of judicial review is limited. However,


171. See Review of University Expulsions, supra note 169, at 1392-95.


In the Addy case, the board of trustees of the college had refused to approve the recommendation of the faculty that a diploma be granted to the student plaintiff. The court stated that: “This was a matter solely for [the board of trustees], unless, perhaps,
the circumstances in which the courts will hold that educators have acted "arbitrarily or in bad faith" are uncertain. To ascertain how the courts have applied this standard, it will be helpful to classify the situations in which the problem under study arises:

Category A: A diploma is withheld on the grounds that the student has failed to meet objective requirements for obtaining a degree, such as the number of hours in attendance, payment of proper fees, and compliance with rules of discipline. No question is presented as to the academic attainments of the student and the faculty's assessment of them.

Category B: A degree is refused even though the student has met the objective requirements and he has been approved by the faculty as academically qualified to receive the degree.

Category C: A diploma is withheld on the ground that the faculty has adjudged the student not qualified academically to receive a degree. No question of the student's compliance with the objective requirements for obtaining a degree is presented.

Category A. A limited scope of judicial review poses no major barriers to relief in cases within Category A. The relatively simple factual issues presented differ very little from the kinds of fact-finding courts perform regularly. In such cases it will be clear whether the student has fulfilled his part of the contract of enrollment and become entitled to the promised degree. Because review of a faculty determination of a student's academic qualifications is unnecessary, the risk of judicial interference with academic freedom and institutional autonomy is minimal. Accordingly, the courts have not hesitated to review faculty decisions denying a student a degree in cases in which the only issue is an alleged failure by the student to comply with the school's formal requirements. In Finkel v. Brooklyn Law School, for example, a

in a case of bad faith, or so manifest a violation of the principles of right and justice as clearly to indicate their conduct was not only wrongful but perverse."

173. See Cieboter v. O'Connell, 236 So. 2d 470 (Fla. Dist. Ct. App. 1970) (doctoral candidate was not entitled to a writ of mandamus to compel a university official to take specified action in connection with his candidacy for a Ph.D. in education where student failed to fulfill additional educational requirements deemed necessary by faculty for completion of doctoral program); Finkel v. Brooklyn Law School, 61 Misc. 2d 198, 305 N.Y.S.2d 61 (Sup. Jud. Ct. 1969); Blank v. Board of Higher Educ. 51 Misc. 2d 724, 273 N.Y.S.2d 796 (Sup. Jud. Ct. 1966) (college could not assert that attendance at classes was necessary for credit and was estopped from refusing delivery of a degree to a student who had, pursuant to permission given by instructors acting as agents of Dean of Faculty, taken two courses without attending class).

A law student instituted a proceeding to compel a law school to issue him the Juris Doctor degree. A rule promulgated by the New York Board of Regents required a candidate for the degree to have completed successfully at least three years of undergraduate work in an accredited institution. Upon finding that the student plaintiff had not complied with the rule, the court denied the relief requested.

Category B. The courts have not hesitated to intervene in cases in Category B. A student who has met the objective requirements and whose academic qualifications have been approved by the faculty will have little difficulty in convincing a court that a refusal to grant him a degree was prompted by arbitrary action or bad faith. Moreover, the court need not be concerned with usurping academic prerogatives or deciding an issue for which its fact-finding processes may be ill-suited; the issue of the student's academic qualifications will have already been resolved in his favor and the court may confine its activity to halting capricious action by the school.

A good example of the issues posed by cases falling within Category B is *State ex rel. Nelson v. Lincoln Medical College*. In *Nelson* the court found that the dean of a medical college had the responsibility of determining which students had met the scholastic requirements for graduation. The faculty, acting in accordance with the determination of the dean, was to recommend qualified students to the college's board of directors which, in turn, was responsible for conferring degrees on qualified students. The court held that a faculty refusal to recommend a student deemed qualified by the dean was arbitrary. Accordingly, the trial court's decision awarding a writ of mandamus to compel issuance of a diploma to the student in question was sustained.

---

175. *Id.*

176. See *State ex rel. Valentine v. Independent School District*, 187 Iowa 555, 174 N.W. 334 (1919) (high school pupil who qualified for graduation was denied her diploma because she refused to wear a cap and gown at commencement exercises on the grounds that they were nauseating from fumigation and also might carry disease. The court held that she was entitled to mandamus to compel the issuance of her diploma); *Hamlett v. Reid*, 165 Ky. 613, 177 S.W. 440 (1915) (a state superintendent of public instruction could not refuse arbitrarily to sign the diploma of a student who had complied with all the rules and regulations of the institute and completed the prescribed course of study); *State ex rel. Roberts v. Wilson*, 221 Mo. App. 9, 297 S.W. 419 (1927) (a board of education had no power to impose a requirement of tuition payment as a condition precedent to graduation). See *State ex rel. Nelson v. Lincoln Medical College*, 81 Neb. 533, 116 N.W. 294 (1908).

177. 81 Neb. 533, 116 N.W. 294 (1908).
Category C. Problems of a different order arise when a student claims that the faculty has misjudged his academic qualifications. Here the court must decide whether to undertake an independent review of the merits of the faculty action or to treat the problem through some alternative means. Unfortunately, this question remains unresolved because student litigants have failed to prove the essential element of arbitrariness or bad faith on the part of the faculty.\(^{178}\) But in a closely analogous situation, one court has stated that should a student prove faculty arbitrariness, capriciousness, or bad faith in judging his academic qualifications, the appropriate judicial response is not an independent examination of the student's qualifications, but an order requiring the school to give the student a fair and impartial hearing.\(^{179}\) The limited scope of

178. See People ex rel. Moore v. Lory, 94 Colo. 595, 31 P.2d 1112 (1934) (a candidate for a master of arts degree alleged bad faith by the faculty council in refusing to recommend him for a degree. The court found overwhelming evidence that the action of the council was taken with careful deliberation and in good faith); Militana v. University of Miami, 263 So. 2d 162 (Fla. Dist. Ct. App. 1970), cert. denied, 401 U.S. 962 (1971) (student failed to establish that university officials had acted in a capricious, prejudicial, or arbitrary manner in deciding that his academic performance was unsatisfactory); People ex rel. Pacella v. Bennett Medical College, 205 Ill. App. 324 (1917) (abstract); State ex rel. Niles v. Orange Training School, 63 N.J.L. 528, 42 A. 846 (Sup. Ct. 1899) (A nursing committee faithfully discharged its duty in determining a student nurse's right to a diploma); Ede v. Columbia Univ., 8 Misc. 2d 795, 168 N.Y.S.2d 643 (Sup. Jud. Ct. 1957), aff'd, 6 App. Div. 2d 780, 175 N.Y.S. 2d 556 (App. Div.), motion to dismiss appeal denied, 5 N.Y.2d 777, 154 N.E.2d 558, 180 N.Y.S.2d 298 (1958), appeal dismissed, 5 N.Y.2d 881, 156 N.E.2d 458, 182 N.Y.S. 2d 829 (1959), cert. denied, 359 U.S. 956 (1959) (the court found ample evidence to support refusal of a doctoral candidate's dissertation by a faculty committee, and it was not established that the rejection was arbitrary, capricious or unreasonable); Tate v. North Pacific College, 70 Ore. 160, 140 P. 743 (1914) (a student failed to prove allegations of bad faith and arbitrary action by the faculty in giving him low marks on examinations so as to bring his average below the level required for graduation).

The student's difficulties in proving arbitrariness and bad faith are likely to be compounded by the rule that he is not entitled to notice and hearing for expulsion resulting from failure to meet scholastic standards. Mustell v. Rose, 282 Ala. 358, 211 So. 2d 489, cert. denied, 393 U.S. 936 (1968); Militana v. University of Miami, 236 So. 2d 162 (Fla. Dist. Ct. App. 1970), cert. denied, 401 U.S. 962 (1971); Barnard v. Inhabitants of Shrewsbury, 216 Mass. 19, 102 N.E. 1095 (1913). However, such notice and hearing may be required when the student is expelled for misconduct. See, e.g., Woody v. Burns, 188 So. 2d 56 (Fla. Dist. Ct. App. 1966). See generally Comment, Procedural Limitations on the Expulsion of College and University Students 10 St. Louis U.L.J. 542 (1966).

179. Connelly v. University of Vt. & State Agriculture College, 244 F.Supp. 156 (D. Vt. 1965). In Connelly, a third year medical student was dismissed from the school and denied permission to advance to the fourth year under a rule of the College of Medicine because he had failed 25 percent or more of the major courses of his third year. The court held that the plaintiff's allegation that an instructor's determination to fail a student prior to his completion of the course was equivalent to an allegation of bad faith,
judicial review of expulsions and refusals to confer degrees when based on academic considerations may be justified as necessary "to avoid invasion of the classroom," but it is questionable whether a mere order to afford the student a fair and impartial hearing would provide an adequate remedy in a situation in which one or more faculty members, for whatever reason, have determined to frustrate all of the student's efforts in seeking a degree.

The cases under review are indicative of the obstacles which a professional dissatisfied with the action of a certifying board concerning the issue of his certification would encounter if he elected to emphasize the similarity between the professional designation and the academic degree and proceed against the board on an appropriate contract theory. The courts would undoubtedly offer relief in cases involving manifest arbitrariness or prejudice; nevertheless, effective judicial action might prove extremely difficult to obtain where each of the conflicting claims had more than merely colorable merit. The paucity of reported cases premised on such a theory, however, renders an informed prediction of the course of the law in this area impossible. Nevertheless, it does

arbitrariness, and capriciousness on the part of the instructor which, if proven, would justify granting the plaintiff appropriate relief. Id. at 161. The court then stated:

It should be emphasized that this Court will not pass on the issue of whether the plaintiff should have passed or failed his pediatrics-obstetrics course, or whether he is qualified to practice medicine. This must and can only be determined by an appropriate department or committee of the defendant's College of Medicine. . . . Therefore, should the plaintiff prevail on the issue of whether the defendant acted arbitrarily, capriciously or in bad faith, this Court will then order the defendant University to give the plaintiff a fair and impartial hearing on his dismissal order.

Id.

180. Review of University Expulsions, supra note 169, at 1393.


182. A case which might have resolved many of these unanswered questions is Fontanetta v. American Bd. of Internal Medicine, 303 F.Supp. 427 (E.D.N.Y. 1969), aff'd, 421 F.2d 355 (2d Cir. 1970). The American Board of Internal Medicine, a medical specialty board, had refused to certify Dr. Fontanetta as a specialist in internal medicine because of his alleged failure to pass the required oral examination. Dr. Fontanetta brought an action against the Board for equitable relief and damages. His complaint was based on a breach of an implied contract to administer the tests fairly, or a request for judicial review of a quasi-administrative procedure. The Court of Appeals for the Second Circuit affirmed the district court's dismissal of the case on jurisdictional grounds. After a subsequent action was begun in Pennsylvania, a representative of the American Board of Internal Medicine agreed to permit Dr. Fontanetta to take the oral examination again. Dr. Fontanetta passed the examination and has been certified as a Diplomate in Internal Medicine. Letter from Harry Grossman, Dr. Fontanetta's counsel in the New York litigation, to Douglas A. Wallace, Oct. 15, 1971.
seem safe to assume that the various certifying boards would attempt to defeat such attacks by inserting “no-action” clauses in the candidate’s application for certification or admission to the examinations, thereby writing the “contract of enrollment” in their own favor. On the other hand, such clauses might be held unenforceable as a violation of public policy.

Notwithstanding the strong policy of judicial restraint in reviewing the decisions of college and university faculties concerning the scholastic proficiency of students, several factors lend support to an argument for greater judicial supervision of the quasi-educational activities of certifying boards in judging the competence of professionals. First, one of the major reasons for judicial restraint in cases involving colleges and universities—the commendable desire to avoid infringements on academic freedom—is of no real concern in the case of the certifying board. Second, the members of certifying boards are generally professionals active in their chosen fields; their role is much more akin to that of the members of a state board of examiners responsible for testing applicants for admission to an occupation or profession than to the academic faculty responsible for scholarly research and the education of students. Third, the professional, unlike the student, faces the risk of judgment by colleagues who may view his application for certification with disfavor for a variety of reasons arising out of their self-interested activities. In other words, the professional certifying board may control economic advancement and preferential employment in the profession—a form of power which a single college or university could never attain. Since the reasons underlying the court’s restraint in academic matters are absent in the area of certification, courts should grant appropriate contractual relief to aggrieved professionals.

183. Several of the medical specialty boards have taken this precaution. The American Board of Otolaryngology requires the applicant for certification to sign an “Applicant’s Agreement” which includes the following clause: “[I]f the Board of Otolaryngology refuses to grant a certificate, such a refusal may not and shall not be questioned by me in any court of law or equity, or any other tribunal.” Directory, supra note 70, at 912.


Antitrust Law

The possibility of antitrust liability is inherent in self-regulatory or "seal of approval" plans due to the common practices of excluding professionals from the employment market and limiting competition in spheres of professional activity.\(^{186}\) Thus, the federal antitrust laws\(^ {187}\) may give the professional another avenue of relief against the certifying board. The availability of injunctions and treble damages makes this route especially attractive.\(^ {188}\) However, applicability of the antitrust laws in this area is uncertain. Comprehensive programs for the certification of the quality and characteristics of manufactured goods as well as professional people are prevalent in the United States and frequently operate on a nationwide basis.\(^ {189}\) Although the benefits flowing from many forms of voluntary self-regulation in both industry and the professions are not to be doubted, the possibility of applying the antitrust laws to the practice of self-regulation raises many troubling questions.

Two distinct but closely related problems of potentially controlling significance in the application of the antitrust laws to the activities of professionals must be examined. These problems are: (1) whether any or all of the professions constitute "trade or commerce" within the meaning of the Sherman Act; and (2) when, if ever, professional activities will satisfy the Sherman Act's jurisdictional requisite of interstate commerce.

The reference in the Sherman Act to "trade or commerce"\(^ {190}\) constitutes a limitation of undetermined significance on the scope of the federal antitrust laws. Because the Supreme Court has never addressed itself to a resolution of the ambiguities inherent in the "trade or commerce" concept, doubts have arisen whether the practice of a profes-

---


187. A consideration of state antitrust laws is beyond the scope of this article.


189. In 1965 there were over 120 trade associations in the United States engaged in such quality control programs. Bradley, The Role of Trade Associations and Professional Business Societies in America 95-96 (1965).

190. "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 declared to be illegal." 15 U.S.C. § 1 (1970) (emphasis supplied).
sion—at least one of the “learned professions”—constitutes “trade or commerce” within the meaning of the Sherman Act.\footnote{191} These doubts have led to a claim for an implied exemption of the activities of professionals from all or a portion of the antitrust laws.\footnote{192} The claim for this implied exemption was treated equivocally in \textit{American Medical Association v. United States}.\footnote{193} In that case the Supreme Court sustained a conviction of the A.M.A. and other defendants for conspiring to destroy the business of Group Health, a prepaid medical insurance plan operating in the District of Columbia. The Court found it unnecessary to decide whether a physician’s practice of his profession constitutes trade, holding instead that it was sufficient that the defendants had conspired to restrain the business of Group Health.\footnote{194} This disposition of the case made it plain that any interference by professional groups with the business of other persons would invite antitrust scrutiny, but the Court’s refusal to decide the “trade or commerce” issue suggested the possibility that the internal affairs of a professional association would remain immune from antitrust attack.

The case of \textit{United States v. National Association of Real Estate Boards}\footnote{195} gives support to this analysis of the Court’s position. In \textit{Real Estate Boards} the Court sustained conviction of a number of real estate brokers for price-fixing. Finding that the activities of real estate brokers did in fact amount to “trade,” the Court once again avoided the issue of whether the professions constituted “trade” by concluding that real estate brokers were not professionals.\footnote{196} Nevertheless, the decision in \textit{Real Estate Boards} laid to rest the notion that no occupation involving the sale of personal services would fall within the statutory meaning of “trade.”\footnote{197}


194. “If, as we hold, the indictment charges a single conspiracy to restrain and obstruct this business [Group Health’s] it charges a conspiracy in restraint of trade or commerce within the Statute. As the Court of Appeals properly remarked, the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health . . .” \textit{Id.} at 528.


196. \textit{Id.} at 491. In dissent, Justice Jackson stated: “If real estate brokerage is to be distinguished from the professions or from other labor that is permitted to organize, the Court does not impart any standards for so doing.” \textit{Id.} at 496.

197. “Members of the Washington Board of entrepreneurs. Some are individual pro-
Although the Court has thus far refused to decide whether the Sherman Act applies to all professional activities, there is little reason to doubt that it would do so if the issue were squarely presented in a proper case.\textsuperscript{198} English cases interpreting the doctrine of restraint of trade, the common law progenitor of the Sherman Act, assumed the applicability of the doctrine to surgeons, physicians, and dentists.\textsuperscript{199} The American cases decided before the passage of the Sherman Act followed the English cases, even in the face of contentions that the nature of a profession made the law of restraint of trade inapplicable.\textsuperscript{200} A relatively recent English decision held that a boycott by members of the British Medical Association of doctors engaged in "contract practice" was a conspiracy in restraint of trade.\textsuperscript{201} Moreover, respectable American authority construing "trade or commerce" limitations in antimonopoly provisions supports an expansive definition of "trade" as encompassing professional activities. Chief Judge Groner of the District of Columbia Court of Appeals concluded from a thorough analysis of the authorities that the Sherman Act applied not only to commercial activity ordinarily defined as "trade," but also to the medical profession.\textsuperscript{202} The Supreme Court of Washington reached a similar conclusion in construing a provision of the state constitution prohibiting monopolies and restraints of trade.\textsuperscript{203}

\textsuperscript{198} For an argument that the so-called "personal service exemption" is dead see Comment, \textit{Personal Services and the Antitrust Laws}, 1 \textit{Wayne L. Rev.} 124 (1955).


\textsuperscript{200} See, e.g., Gilman v. Dwight, 79 Mass. (13 Gray) 356 (1859) in which the court noted: "There is nothing in the nature of the business or profession to which the contract relates, which takes it out of the ordinary rules applicable to contracts in partial restraint of trade. The cases are numerous in the books, in which similar contracts entered into by attorneys, solicitors, apothecaries, dentists and surgeons have been upheld and enforced." \textit{Id.} at 359. \textit{See also} Cook v. Johnson, 47 Conn. 175 (1879); Haldeman v. Simonton, 55 Iowa 144, 7 N.W. 493 (1880); Dwight v. Hamilton, 113 Mass. 175 (1873); Mandeville v. Harmon, 42 N.J. Eq. 185, 7 A. 37 (Ch. 1886).

\textsuperscript{201} Pratt v. British Medical Assoc., [1919] 1 K.B. 244.


\textsuperscript{203} Group Health Co-op v. King County Medical Soc'y, 39 Wash. 2d 586, 237 P.2d 737 (1951) (interpreting Wash. Const. art. XII, § 22 prohibiting "monopolies and
The second problem, the jurisdictional requisite of interstate commerce, \textsuperscript{204} may present a more substantial barrier to the application of the antitrust laws to professional associations. The professions may not be subject to antitrust laws because their practice is inherently "local" in nature. \textsuperscript{205} Accordingly, antitrust challenges to professional activities logically should fail when no effect on interstate commerce can be demonstrated. \textsuperscript{206} The leading case, \textit{United States v. Oregon Medical Society}, \textsuperscript{207} involved a charge of a conspiracy by state medical society sponsored health plans to restrain competition among themselves. The district court dismissed the charge on the ground, \textit{inter alia}, that no effect on interstate commerce was shown. \textsuperscript{208} Describing various interstate contacts proven at trial, such as payments to out-of-state doctors and hospitals, as "few, sporadic and incidental," the Supreme Court affirmed the district court's finding on the issue of fact without indicating the quantum of proof necessary to satisfy the interstate commerce requirement. \textsuperscript{209} The lower federal courts have followed the Court's cryptic lead in \textit{Oregon Medical Society} and found the requisite interstate commerce lacking in a variety of antitrust litigations involving physicians and hospitals. \textsuperscript{210} Judicial construction of the interstate commerce requirement with respect to professions outside the medical field is almost non-existent. \textsuperscript{211} The courts have not yet determined what

\textsuperscript{204} "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 declared to be illegal." 15 U.S.C. § 1 (1970) (emphasis supplied). See generally Marcus, \textit{Civil Rights and the Anti-trust Laws}, 18 U. Cm. L. Rev. 171, 184-203 (1951) [hereinafter cited as Marcus].

\textsuperscript{205} See Coleman, \textit{supra} note 191, at 53-54.

\textsuperscript{206} \textit{Id.} at 53.

\textsuperscript{207} 343 U.S. 326 (1952).


\textsuperscript{209} 343 U.S. at 338-39.

\textsuperscript{210} See Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1957), \textit{cert. denied}, 361 U.S. 884 (1959); Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), \textit{cert. denied}, 355 U.S. 954 (1958); Spears Free Clinic v. Cleere, 197 F.2d 125 (10th Cir. 1952); Polhemus v. American Medical Ass'n, 145 F.2d 357 (10th Cir. 1944); Robinson v. Lull, 145 F. Supp. 134 (N.D. Ill. 1956).

\textsuperscript{211} \textit{But cf.} United States v. Prince George's County Bd. of Realtors, Inc., 1970
minimum effect upon interstate commerce will suffice to invoke federal antitrust jurisdiction over the professions.

The present century, however, has witnessed a steady decline in the quantum of "effect" on interstate commerce necessary to invoke Congress' regulatory powers under the commerce clause in antitrust and other areas.\textsuperscript{212} The requirement of a measurable "effect" has gradually become of little more than formal significance.\textsuperscript{213} Indeed, at least one commentator has suggested that, in view of the acceptance in antitrust law of per se rules making certain conduct illegal regardless of its effect on the market, it is inconsistent simultaneously to require proof of effects on interstate commerce in order to satisfy the statute's jurisdictional test.\textsuperscript{214} In the recent case of \textit{Burke v. Ford},\textsuperscript{215} the Supreme Court has moved very close to—if it has not adopted—this suggestion. Therefore, in future antitrust cases proof of a combination or conspiracy assumed to have anti-competitive effects may satisfy ipso facto the Act's interstate commerce requirement and thus eliminate the need for direct proof on the issue. Express judicial acceptance of this proposition would resolve much of the uncertainty as to whether professional activities can satisfy the Sherman Act's jurisdictional test.

Regardless of the meaning of \textit{Burke v. Ford}, many professional certification programs should be deemed to have a substantial impact on


\textsuperscript{213} See, e.g., United States v. Bensinger Co., 430 F.2d 584 (8th Cir. 1970) (conspiracy to fix price of one dishwasher within interstate commerce); NLRB v. Pierce Brothers, 206 F.2d 569 (9th Cir. 1953) (NLRB had jurisdiction over funeral home on the basis that some of the corpses were destined for out-of-state shipment).

\textsuperscript{214} P. Areeda, \textsc{Antitrust Analysis} \textit{60} (1967) [hereinafter cited as \textsc{Areeda}].

\textsuperscript{215} 389 U.S. 320 (1967). In this private antitrust action a group of Oklahoma liquor retailers sought an injunction against an alleged state-wide market division by all Oklahoma liquor wholesalers. The trial judge found that there had been a division of markets both by territories and by brands but nevertheless entered judgment for the wholesalers because, \textit{inter alia}, the interstate commerce prerequisite of the Sherman Act was not satisfied. Affirming, the Court of Appeals stated that "the proof was entirely insufficient to show that the activities complained of were in or adversely affected interstate commerce." 377 F.2d 901, 903 (10th Cir. 1967).

The Supreme Court reversed the Court of Appeals in a \textit{per curiam} opinion, concluding through a process of a priori reasoning that "the state-wide wholesalers' market division inevitably affected interstate commerce." 389 U.S. at 322.
interstate commerce. Several certifying organizations publish the names, addresses, and other particulars of certified persons and institutions in order to facilitate referrals of business and consultations. Many of these transactions take place across state lines. The Directory of Medical Specialists published by the American Board of Medical Specialties, for example, is designed for use in making referrals to specialists and must have a substantial impact on interstate referrals. A nationwide system for the certification of lawyers as specialists could be implemented through the existing law list system or a special directory similar to the Directory of Medical Specialists. In any case, the amount of interstate commerce affected by the system would be substantial. Although the amount of interstate business forwarded annually through the law list medium cannot be estimated accurately, it is at least in the hundreds of millions of dollars.\textsuperscript{216} The impact of the certification process on interstate commerce may be much more difficult to demonstrate in the case of medical technologists, social workers, security analysts, engineering technicians, and life insurance salesmen. However, these certification programs are operated on a nationwide scale and have a corresponding impact on the commercial life of the country. This in itself may prove to be sufficient to invoke the antitrust laws.\textsuperscript{217}

Assuming the hurdles of “trade or commerce” and minimum “effects” are cleared, the question remains whether a discriminatory refusal to certify constitutes an antitrust violation. The leading case involving a “seal of approval” program, the Supreme Court’s decision in \textit{Radiant}

\textsuperscript{216} See Harnsberger, \textit{supra} note 161. The author states:

\begin{quote}
Actually no estimate of the value of business transmitted by general law lists, probate lists, insurance lists and the \textit{Martindale-Hubbell Law Directory} is possible, but the total must be tremendous. Some idea may be obtained from the 1938 report of the Law List Committee which states “... a fair estimate of the actual amount forwarded over all the commercial lists alone in 1936 approximated $90,000,000. No estimate of the volume of business forwarded to attorneys listed in non-commercial directories is possible, but it is reasonably safe to say that in dollars and cents it is very much larger than that which flows over the commercial law lists. Accordingly, it would appear that these sundry publications are used in the transmittal of a very substantial quantity of legal business, both in number of items as well as in money value.” This statement is impressive in view of the fact that national income during 1936 was about $64.9 billion; in 1960, it was over $417 billion. The gross national product in 1936 was $82.7 billion; in 1960, over $504 billion.
\end{quote}

\textit{Id. at} 33.

\textsuperscript{217} See Austin, \textit{Real Estate Boards and Multiple Listing Systems as Restraints of Trade}, 70 \textit{COLUM. L. REV.} 1325, 1335-36 (1970); Marcus, \textit{supra} note 203, at 192.
Burners, Inc. v. Peoples Gas Light & Coke Co.,\textsuperscript{218} has multiplied uncertainty concerning the future course of antitrust law because it raised the crucial issue only by implication. The plaintiff was a manufacturer of a ceramic gas burner known as the “Radiant Burner”; the defendants were the American Gas Association (AGA), whose membership included gas distributors as well as manufacturers of gas appliances and equipment. Demanding treble damages and injunctive relief, the plaintiff alleged that the AGA operated testing laboratories in which it purported to determine the safety, utility, and durability of gas burners and affixed a “seal of approval” to gas burners which passed its tests. The plaintiff alleged that the AGA’s tests were not based on “objective standards” and were influenced by some of the defendants who were in competition with plaintiff. Consequently, the determination to deny a seal of approval could have been made “arbitrarily and capriciously.” The plaintiff also alleged the failure of the AGA to approve the Radiant Burner in spite of its being safer, more efficient, and just as durable as other burners which had been approved. The denial of the seal of approval resulted in the exclusion of the Radiant Burner from the market because the members of AGA engaged in the distribution of gas had agreed not to supply gas for use in any burner not approved by the AGA. Consumers were naturally unwilling to buy gas burners for which they could not obtain gas. Reversing a district court judgment which had dismissed the complaint for failure to state a claim upon which relief could be granted, the Supreme Court held in a per curiam opinion that the alleged collective refusal to supply gas for the plaintiff’s burner stated a violation of Section 1 of the Sherman Act.\textsuperscript{219}

Because the illegality of concerted refusals to deal—eliminating even a single competitor from the market—had been announced by the Supreme Court two years earlier,\textsuperscript{220} the Radiant Burners decision blazed no new trails in antitrust law. Interest in this particular decision arose out of speculation that, had there been no allegation of a collective refusal to supply gas, the Supreme Court would still have held that the complaint in Radiant Burners stated a cause of action because of the exclusionary effects of the AGA’s testing plan. The AGA’s discriminatory refusal to grant the plaintiff’s burner the seal of approval essential to success in the gas appliance market could, arguably, have constituted a combination in unreasonable restraint of trade in violation of

\textsuperscript{218} 364 U.S. 656 (1961).
\textsuperscript{219} Id. at 659-60.
Section 1 of the Sherman Act.\textsuperscript{221} This speculative inference has raised many questions concerning the duties which might be imposed upon the sponsor of a seal of approval or certification program. Such an organization may be brought under close scrutiny with regard to the substantive and procedural fairness of its testing procedures and non-discriminatory access to them by all interested persons.\textsuperscript{222}

These ramifications of the \textit{Radiant Burners} decision have not gone unnoticed by organizations operating or contemplating the operation of certification programs for professionals. Precautionary measures taken by the National Association of Social Workers and the various medical specialty boards, for example, have previously been noted.\textsuperscript{223} Nevertheless, because antitrust liability depends on substance rather than form,\textsuperscript{224} it is doubtful whether carefully worded disclaimers or the creation of purportedly autonomous "academies" will suffice to comply with antitrust regulations. Several hypothetical examples—using the medical specialty boards for illustrative purposes—may illuminate some of the principles and problems in this emerging branch of antitrust law:

(1) As part of an effort to raise their standards, all hospitals in the New York metropolitan area have agreed with the American Board of Pathology that they will employ only board-certified pathologists in their laboratories. \textit{R}, a pathologist practicing in New York who has been denied certification by the Board, brings a private antitrust action against the Board and hospitals alleging that as a result of their agreement and conspiracy he has been unable to obtain employment as a pathologist in any area hospitals because he is not board-certified.


\textsuperscript{222} See note 186 \textit{supra}.

\textsuperscript{223} See Kidneigh, \textit{supra} note 55. The specter of antitrust liability was also raised at a meeting of the National Conference of Bar Presidents in connection with plans for the certification of lawyers as specialists by the American Bar Association. Harold J. Gallagher stated: "[T]he house of Delegates alone should not be the sole criteria to determine what 200,000 lawyers should do in respect to this specialization. We have half, or perhaps 40\% of them in the American Bar Association, but the great mass of lawyers have to be considered. . . . The antitrust problems would not permit the American Bar Association to say that only American Bar Association Lawyers are certified to specialize." Proceeding of the National Conference of Bar Presidents, Aug. 3-5, 1962, at 115, quoted in Greenwood, \textit{supra} note 67, at 152-53.

Clearly, allegations of such a collective refusal to deal on the part of the hospitals would state a cause of action under the principle of **Radiant Burners**. Significantly, an attack on their role in defining requirements for staff membership and employment by hospitals is the type of antitrust challenge to which the specialty boards apparently feel most vulnerable. \(^{225}\)

(2) The members of the American Board of Internal Medicine have agreed not to certify any doctor who has a reputation among the physicians in his local community as a price-cutter. Alleging that the Board's refusal to certify him was motivated solely by his well-deserved reputation as a price-cutter, S, an internist, brings an action against the Board and its members seeking treble damages and injunctive relief.

Such an exclusionary use of the certification device could not be justified as necessary for the preservation of ethical standards. Extrapolation from the **Radiant Burners** case leads to the conclusion that the Board of Internal Medicine is a combination in unreasonable restraint of trade in violation of Section 1 of the Sherman Act, and S has stated a cause of action.

(3) As part of its examination process, the American Board of Plastic Surgery has always required all candidates for certification to perform Procedure \(P\). Procedure \(P\) is quite difficult to learn and perform properly and in the past decade has almost completely been supplanted by a new substitute procedure known as \(Q\). Thus, only older plastic surgeons are familiar with \(P\); it is no longer taught in medical school or graduate training programs. The members of the Board have continued the requirement, not out of a desire to limit the number of board-certified plastic surgeons, but because of tradition and the feeling of some members of the Board that they should not be too lenient with the younger doctors.

\(^{225}\) Illustrative is the following statement of the American Board of Orthopaedic Surgery: "It is neither the intent nor the purpose of the Board to define requirements for membership in any organization or the staff of any hospital." Directory, supra note 70, at 807. For similar statements see Directory, supra note 70, at 532 (obstetrics and gynecology), 1734 (surgery), 2041 (urology).

These disclaimers, which were first issued after the Supreme Court's decision in American Medical Assn. v. United States, 317 U.S. 519 (1943), made it clear that the medical profession was not exempt from the Sherman Act, and partially are designed to defeat actions under the antitrust laws. See Rayack, supra note 34, at 222; Stevens, supra note 34, at 306-309.
T, a plastic surgeon, was denied certification by the Board because he failed to perform \( P \) successfully. Alleging that this requirement is unreasonable, \( T \) brings a private antitrust action to enjoin the Board from withholding his certification solely on the basis of his failure to perform \( P \) successfully.

\( T \)'s action raises the questions of whether and to what extent the antitrust laws impose a duty on a professional organization to insure that its certification standards are current and in accord with existing technology and practice. Because the requirements of the Board of Plastic Surgery are not anticompetitive by design, \( T \)'s action also raises corollary issues concerning the relevance to antitrust liability of the Board's intent in formulating and enforcing the requirement.

(4) The members of the American Board of Psychiatry and Neurology have become convinced that R.D. Laing, the well-known British psychiatrist, is a crackpot. His theories, they feel, represent a grave threat to the future of psychiatry. Accordingly, the Board adheres to a firm policy of refusing certification to psychiatrists attracted to Laing's views. \( U \), a psychiatrist with impeccable credentials, feels that the Board has denied his application for certification because he is a disciple of Laing. The Board's notice informing \( U \) of the denial of certification stated that his candidacy might be reconsidered when he acquired "a proper appreciation of the principles of psychiatric theory." Assailing the Board's policy, \( U \) brings an action for treble damages and injunctive relief against the Board and its members.

A court confronting \( U \)'s case might easily picture itself about to plunge into the "Dismal Swamp of obscure rules and doctrines" formerly thought reserved for the intricacies of theological disputes.\(^{226}\) Here the court must consider not only the largely unexplored issue of whether the defendants' non-commercial purpose is a valid defense to an antitrust claim, but also the propriety of judicial intervention in the internal affairs of a professional association.

The professional organization's purpose in establishing its certification program is relevant to a determination of antitrust liability because in formulating and enforcing their requirements and standards, certifying organizations will frequently be furthering goals of undisputed social

\(^{226}\) See Chafee, supra note 40, at 993, 1024.
importance. It thus becomes necessary to consider whether restraints of trade cognizable under the antitrust laws may be saved from illegality because they are designed to further socially desirable objectives.

This question has arisen most frequently in the context of concerted refusals to deal, as, for instance, an agreement by members of a basketball association not to hire a former basketball player who had wagered on games. Although the leading case in concerted refusals to deal, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*[^227] might be viewed as an enunciation of a rule of per se illegality for all group boycotts,[^228] the lower federal courts have not so interpreted the decision and have repeatedly upheld the legality of some group boycotts in which they have discerned socially desirable objectives.[^229] Similarly, the lower federal courts have sustained the legality of certification programs under antitrust attack by emphasizing the importance of the defendants' good purposes and the value of voluntary self-regulation by industry and the


[^229]: Deesen v. Professional Golfers' Ass'n of America, 358 F.2d 165 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966) (exclusion of golfer from tournaments because he was not an "approved tournament player" under PGA rules was reasonable); Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (refusal by association to hire former basketball player who had bet on games was reasonable); United States v. United States Trotting Ass'n, 1960 Trade Cas. ¶ 69, 761 (S.D. Ohio) (harness racing association rules requiring membership to drive horse on member track and limiting "eligibility" so as to exclude unsavory elements were only reasonable restraints and not a per se commercial boycott); United States v. Insurance Bd, 188 F.Supp. 949 (N.D. Ohio 1960) (membership rule requiring member insurance agents to represent stock insurance companies exclusively not illegal per se, but did amount to Sherman Act violation under "rule of reason" approach). But see Washington State Bowling Proprietors Ass'n v. Pacific Lanes, Inc., 356 F.2d 371 (9th Cir.), *cert. denied*, 384 U.S. 963 (1966) (eligibility rule limiting BPA A tournaments to bowlers who restricted their league and tournament bowling to member establishments intends to insure that all scores used in computing qualifying averages were made under conditions supervised by the association was held to be an illegal group boycott); Community Blood Bank, [1965-67 Transfer Binder] TRADE RES. REP. ¶ 17,728 (FTC 1966) (boycott of commercial blood banks by hospitals and pathologists was not justified by belief that commercial blood banking was morally wrong); Mechanical Contractors Bid Depository v. Christiansen, 352 F.2d 817 (10th Cir. 1965) (group boycott of non-members of bid depository not justified as an attempt to eliminate construction industry evils of "bid shopping" or "bid peddling"). See generally *Note, Trade Association Exclusionary Practices: An Affirmative Rate or the Rule of Reason*, 66 COLUM. L. REV. 1486 (1966).
These cases indicate that the courts will allow certification and "seal of approval" plans a relatively large measure of freedom from antitrust scrutiny.

In *Roofire Alarm Co. v. Royal Indemnity Co.*, a private antitrust action, the plaintiff alleged concerted action between the defendant and Underwriters Laboratories to keep the plaintiff's fire alarm device off the market by refusing to test it or publish the results of its tests. Underwriters Laboratories had established certain standards which a fire alarm device had to meet before it would be listed or approved; the refusal to test the plaintiff's device was based on those standards. There was no dispute as to whether plaintiff's device met the standards, and plaintiff conceded that neither the defendant nor Underwriters Laboratories were engaged in the manufacture of fire alarm devices or received commissions or royalties from the sale of fire alarm devices produced by manufacturers other than the plaintiff. Referring to Underwriters Laboratories' national reputation as a testing organization, the court characterized its action with respect to the plaintiff's product as "lawful and proper" and held that no violation of the Sherman Act had been established. This summary treatment of the issue of quality control through product standards is undoubtedly explained by the plaintiff's failure to prove the inadequacy or unreasonableness of those standards and the lack of any competition between the plaintiff and either the defendant or Underwriters Laboratories.

The decision in *Structural Laminates, Inc. v. Douglas Fir Plywood Association* evidenced a more discerning approach to the problem of

---


232. One of the standards the plaintiff's product failed to meet required that "the warning sound continue for at least three minutes at full intensity." The plaintiff's fire alarm device consisted of two carbon dioxide filled capsules enclosed in a metal tube with crimped ends. When heated, the capsules explode, thereby warning people in the vicinity. This information appears in the report of an earlier phase in the litigation in which the plaintiff had sought to compel Underwriters Laboratories to change its standards so that the plaintiff's fire alarm might be approved. A summary judgment for Underwriters Laboratories was affirmed on appeal. *Roofire Alarm Co. v. Underwriters Laboratories, Inc.*, 188 F. Supp. 753 (E.D. Tenn. 1959), aff'd, 284 F.2d 360 (6th Cir. 1960).


OCCUPATIONAL LICENSING

The case involved a treble damage action by a plywood manufacturer against a trade association whose members manufactured from 82 to 89 percent of all the plywood produced in the United States. The plaintiff manufacturer claimed that the association's quality control program had the effect of excluding its product from the market and eventually driving it out of business. The association inspected and tested members' products, permitting members whose products were approved to use its stamp and certificate. Plywood not bearing the association's mark was more difficult to sell and brought a lower price.

The defendant association assumed a dominant role in proposing standards, soliciting approval of them by members of the industry, and securing their adoption. Because the industry had experienced difficulties with the bonding of relatively thick veneers, a standard was adopted which prohibited the use of such veneers in the construction of \( \frac{1}{2} \)-inch plywood and required that such plywood be constructed of five plies. The plaintiff believed it had solved these bonding difficulties and in 1957 constructed a mill designed specially for the production of \( \frac{1}{2} \)-inch sheathing plywood composed of three plies. In 1958, the plaintiff sought from the defendant a modification of the industry standard approving the three ply construction. Although the plaintiff's product passed the defendant's performance tests for \( \frac{1}{2} \)-inch plywood, the defendant did not recommend a revision in the quality standard to approve the three ply construction until 1963. Plaintiff had gone out of business in November, 1959.

The court recognized that the defendant association might have concluded that the poor reputation three ply \( \frac{1}{2} \)-inch plywood enjoyed in the industry was unwarranted; however, it held that the exclusion of such plywood was neither unreasonable nor done with evil intent. In support of its finding that there was no violation of the Sherman Act, the court explained its understanding of the law as follows:

If intent and purpose are factors in the anti-trust law, and the court believes they are except where per se violations are involved, then the mere failure of one who is responsible for the adoption of a commercial standard to appreciate changes which make that

235. Id. at 159.
236. Id. at 158. The court reached this conclusion despite its finding that some of the members of the association had economic motives for opposing the use of three ply \( \frac{1}{2} \)-inch plywood. Id. at 158-59.
standard obsolete and to take immediate and effective action to alter it, does not amount to a conspiracy to restrain trade. Any system of standards pre-supposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade is to some extent restrained. This much however is congressionally sanctioned and the court is of the opinion that in the absence of a bad purpose mistakes made in the formulation of maintenance of standards do not subject the one making the mistake to antitrust liability.

In other words, a certification plan will not violate the antitrust laws unless the formulation and enforcement of an industry standard is done with the intent of excluding competitors from the market.

The Structural Laminates decision is subject to criticism on a number of grounds. First, the court's preoccupation with the intent of the defendant rather than the effect of its certification program as the issue on which liability depended is not supported by case law. Antitrust analysis does not preclude reference to intent as one factor to be considered in assessing the reasonableness of a restraint of trade or the existence of an antitrust violation, but it has never been supposed that a benign intention would save from illegality an otherwise objectionable restraint of trade. On the contrary, the opportunities for abuse inherent in a certification program operated by mutual competitors would suggest the imposition of an affirmative duty of fairness on a certifying organization. Support for this suggestion is found in the antitrust policies favoring ease of entry into the market and innovation.

---

237. Id. at 159. The court's reference to "congressional sanction" is simply to the Department of Commerce's participation in the development of voluntary standards for products, rather than express congressional approval of the standard at issue in the case.

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

239. Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) (Sherman Act not applicable to activities designed to influence legislation and law enforcement practices even though such activities are designed to produce a trade restraint or monopoly).

240. "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. . . ." 246 U.S. at 238-39.

241. This is amply demonstrated in both the Structural Laminates and Radiant Burners decisions.

tion stimulated by competitive rivalry.\textsuperscript{243} Certainly antitrust law should not condone a failure to update standards in accordance with technological advancement simply because the failure results from neglect rather than a manifest desire to hamper the competitive ability of rivals.

In addition, the court assumed that the association was justified in refusing to modify its standard because it had no reason to believe mills other than the plaintiff’s would have been able to produce satisfactory \( \frac{1}{2} \)-inch plywood using the three ply construction.\textsuperscript{244} This was an inadequate reason for denying approval to a new market entrant which had solved the bonding difficulties. The association did not claim that three ply construction was inherently inferior to five ply construction; rather, the association’s disapproval centered on the bonding difficulties formerly experienced with the thicker veneers used in the three ply construction. Although the plaintiff’s product met the performance standards demanded of five ply construction, the association continued to deny the plaintiff a seal of approval merely because its product did not conform to the required construction specifications. In view of the fact that plaintiff’s plywood performed in a manner consistent with the goals of the quality control program, the association’s insistence on compliance with construction specifications should have been deemed unreasonable.

Another case concerning the status of certification plans under the antitrust laws is \textit{Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools}.\textsuperscript{245} The \textit{Marjorie Webster} decision was prompted by the refusal of Middle States, one of the United States’ six regional educational accrediting associations, to evaluate for possible accreditation Marjorie Webster Junior College, a proprietary school located in Washington, D.C. Middle States had declined Marjorie Webster’s request for an evaluation in accordance with the association’s established policy of refusing to evaluate schools operated on a profit-making basis. Because of the increasing difficulty it experienced in operating without regional accreditation, Marjorie Webster brought suit against Middle States to compel an evaluation. The district court found, \textit{inter alia}, that the Middle States policy unreasonably restrained trade in violation of section 3 of the Sherman Act and enjoined Middle

\begin{itemize}
\item \textsuperscript{243} See, e.g., United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
\item \textsuperscript{244} 261 F. Supp. at 158-59.
\end{itemize}
States from refusing to evaluate Marjorie Webster solely on the basis of the school’s profit-making status.246

On appeal, the Court of Appeals for the District of Columbia reversed the district court on the ground that Middle States’ objectives were “educational” rather than “commercial.” 247 The Court of Appeals explained the significance of this distinction as follows:

That appellant’s [Middle States] objectives, both in its formation and in the development and application of the restriction here at issue, are not commercial is not in dispute. Of course, when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality. But the proscriptions of the Sherman Act were ‘tailored . . . for the business world,’ not for noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.248

Although the opinion is unclear on the point, the court apparently supported the district court’s characterization of Marjorie Webster’s educational activities as “trade.” 249 Its holding, however, was grounded

246. The district court also held that as an accrediting agency, Middle States was engaged in a quasi-governmental function, subjecting it to the restraints of the Constitution. Because the refusal to evaluate Marjorie Webster was arbitrary, discriminatory, and unreasonable, fundamental fairness dictated that Middle States evaluate Marjorie Webster and accredit it if it should otherwise qualify. 302 F. Supp. at 471, 478. 247. 432 F.2d at 654. 248. Id. 249. But see 432 F.2d at 654-55, where the court stated: “We are fortified in this conclusion by the historic reluctance of Congress to exercise control in educational matters. . . . [T]he process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself. We do not believe that Congress intended this concept to be molded by policies underlying the Sherman Act.” For the district court’s discussion of Marjorie Webster’s activities as “trade” see 302 F. Supp. at 465-66.

For a different view of the “commercial” nature of certification activities see Fontanetta v. American Bd. of Internal Medicine, 421 F.2d 355 (2d Cir. 1970). There the court was faced with the problem of construing a New York “long arm” statute to determine whether the district court had jurisdiction over the defendant, a medical specialty board. The statutory language in question referred to the “transaction of business within the state.” The defendant board had argued that the statute applied only to commercial activities and, therefore, jurisdiction was lacking because its activities were non-commercial. The court gave the following answer to the Board’s contention: “[I]t is a considerable strain to characterize the board’s activities as non-commercial. Non-profit they may be, but the certifying of practicing physicians as specialists ob-
chiefly in the defendant's intent; Middle States' educational purposes constituted an affirmative defense in justification of the restraint imposed on Marjorie Webster.\(^2\) This interpretation of the decision is supported by the court's willingness to apply the Sherman Act to commercially motivated restrictions on eligibility for accreditation, such as a refusal to accredit schools dealing with suppliers who did not grant discounts to association members.\(^2\)

There is little practical difference between Marjorie Webster and Structural Laminates: the former allowed the defense of a non-economic purpose; the latter required proof of an anti-competitive intent. Both decisions will allow self-regulatory certifying groups a large degree of immunity from antitrust liability. Assuming a worthy non-economic purpose, the application of the Sherman Act to the activities of a certifying board would be restricted to cases in which (1) direct proof of intent to use the certifying plan to exclude competitors from the market is available, or (2) the anti-competitive effect of the plan is so obvious that there is no need for an inquiry into the question of intent. Thus, by focusing exclusively on the issue of intent or purpose, both decisions foreclose inquiry into the actual effect of a certification plan and its reasonableness in terms of the goals of the Sherman Act.\(^2\)

Under this view, the antitrust laws pose little threat to all but the most self-serving certification plan.

In defense of the Marjorie Webster approach, however, it is at least arguable that it is not inconsistent with the policy of the Sherman Act to refrain from applying it to the internal affairs of "the liberal arts and learned professions" by accepting non-economic purpose as justifying

\(^{2}\) Under this view, the antitrust laws pose little threat to all but the most self-serving certification plan.

\(^{250}\) For discussions of the unsettled question whether non-economic purpose may be recognized as a Sherman Act defense see Bird, Sherman Act Limitations on Non-Commercial Concerted Refusal to Deal, 1970 Duke L.J. 247; Coons, Non-Commercial Purpose as a Sherman Act Defense, 56 Nw. U.L. Rev. 705 (1962).

\(^{251}\) 432 F.2d at 654-55 & n.21.

\(^{252}\) Cf. 302 F. Supp. at 465-69. The district court considered in Marjorie Webster the reasonableness of the proprietary distinction as an indicator of academic quality and the relevance of the antitrust laws. James D. Koerner reports that the major issue at the trial of the case was whether Middle States' basic requirement for membership, that an institution be "nonprofit with a governing board representing the public interest," was defensible and fair. Koerner supra note 245, at 46. The noted economist Milton Friedman testified on Marjorie Webster's behalf (without fee), the first occasion on which he has ever agreed to serve as an expert witness. Id. at 48-49. James Tobin, Sterling Professor of Economics at Yale, declined Middle States' invitation to testify in its favor, as did John H. Fischer, President of Teachers College, Columbia University. Id. at 46.
A restraint of trade that is otherwise consistent with public policy. A "considered" dictum in the Supreme Court's opinion in the Oregon State Medical Society case recognizing a distinction between the professional-client relationship and ordinary commercial matters gives force to this argument. Moreover, the professions and the academic world have traditionally maintained high ethical and technical standards; a certification program is one method of promoting and gaining recognition for these standards. A desire to disrupt this pattern of voluntary self-


In Levin the plaintiff established that the defendant hospital had agreed to conform to the standards of the Joint Commission on Accreditation of Hospitals in order to receive accreditation from the Commission. These standards required, inter alia, a sharp limitation on the freedom of podiatrists to utilize hospital facilities. The plaintiff, a podiatrist who had formerly utilized the hospital's facilities, alleged the hospital's motive was to eliminate competition between podiatrists and orthopedic surgeons and contended that the agreement was a restraint of trade violative of the Sherman Act. Rejecting the plaintiff's contention as "farfetched," the district court stated:

Endeavors of professional groups to raise the ethical standards of their profession and to enhance the quality of services rendered to the public are to be encouraged and commended. They do not constitute a restraint of trade, even if they result in the elimination of some persons who are not regarded as sufficiently qualified, or in a limitation of activities on the part of some professional men. This principle is particularly important where considerations of public health and the welfare of individual patients are involved.

354 F.2d at 518.

The district court granted summary judgment for the defendants; the court of appeals reversed, holding that summary judgment was improper but expressing no view on the district court's interpretation of the law. Id.

254. 343 U.S. at 336:

Since no concerted refusal to deal with private health associations has been proved, we need not decide whether it would violate the antitrust laws. We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.

In the case of Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608 (1934), the Court had sustained the validity under the due process clause of an Oregon law prohibiting advertising by dentists. The citation to Semler, therefore, is not without significance. Advertising may very well lead to price competition among sellers and divert customers from one seller to another. See Barron, Business and Professional Licensing—California, A Representative Example, 18 Stan. L. Rev. 640, 654 (1966). This dictum, therefore, is one indication that the internal affairs of professional association constitutes an area in which the policy of the Sherman Act must yield to other social values. Cf. Handler, Recent Antitrust Developments, 71 Yale L.J. 75, 88 (1961).
regulation perhaps should not be imputed to Congress. An immunity resting on these grounds naturally would be subject to forfeiture if a certification program were used to injure the business of others outside the professional group, as in the utilization by pathologists of a certification program for laboratory technicians as a means of excluding non-physicians from the commercial medical laboratory business.

Nevertheless, the recent decision of the Supreme Court in Silver v. New York Stock Exchange strongly suggests that action by an association exercising a large degree of self-regulatory power which adversely affects a competitor of association members may be "reconciled" with the antitrust laws only if the association provides due process safeguards with respect to its decisions affecting non-member competitors. The Silver decision casts considerable doubt on the conclusion of the Court of Appeals in Marjorie Webster that intent or purpose rather than the actual effect of a certification program should be determinative of the antitrust question. Apart from the questionable approach taken by the courts in deciding Structural Laminates and Marjorie Webster, there is a more fundamental conflict. These decisions fail to comport with one of the basic tenets of antitrust policy—a preference for untrammeled choices by consumers in competitive markets as the favored method of allocating finite resources and determining the success or failure of competing enterprises. The goal of any certification program for professionals is to influence the choices of consumers of professional services by encouraging them to rely on the fact of certification as an indication of competence and high ethical standing. The competitive process is disrupted whenever certification is awarded or denied unfairly because the consumer who relies on the fact of certification in choosing among the services of competing professionals has not made a choice on the merits. This disruption of the competitive


257. See H. BLAXE & R. PITOFSK, CASES AND MATERIALS ON ANTITRUST LAW 455, 480 (1967). The authors suggest that the requirements of procedural fairness, as set forth in Silver, may apply to an industry-wide "seal of approval" plan operated by a trade association.

process occurs regardless of the intent or purpose of the certifying board; the issue of intent or purpose in this context is largely irrelevant. Judicial treatment of certification problems should preserve the integrity of the consumer selection process as a method of resource allocation by encouraging the award of certification on the basis of merit.

Finally, it should be noted that the major reason for the passage of the Sherman Act was a fear that aggregations of economic power would adversely affect the public.\[259] This was the evil the Act was designed to alleviate. Although the economic power blocs feared most at the time of the passage of the Act were burgeoning corporate organizations, the statutory language was designed to eradicate all evils within its reach regardless of the form in which they appeared.\[260] Since the passage of the Act, many professional associations in the United States have achieved a "stranglehold" over the lives of the persons they represent and have become receptacles of considerable economic power.\[261] In accordance with the purpose of the Sherman Act, any device such as the certification program through which this power can be exercised is a prime candidate for antitrust scrutiny.

The Federal Trade Commission

The Federal Trade Commission (FTC) has reached its own conclusions concerning the duties which the antitrust laws impose on organizations sponsoring certification programs.\[262] Unlike the courts deciding *Structural Laminates* and *Marjorie Webster*,\[263] the FTC holds a certi-

---

259. Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911).
260. Id. at 60-62.
261. The "stranglehold" was noted by Zechariah Chafee as early as 1930; the growing power of professional associations has been the subject of considerable commentary ever since. See, e.g., Lieberman, supra note 8; Tobriner & Grodin, supra note 107, at 1247; Chafee, supra note 40 at 1021-23; Grant, *The Guild Returns to America*, 4 J. of Pol. 303, 458 (1942); Comment, *The American Medical Association: Power, Purpose and Politics in Organized Medicine*, 63 YALE L.J. 937 (1954). See generally *Developments in the Law—Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963).
263. See, e.g., Blake & Pitofsky, supra note 257 (Structural Laminates); Kirkpatrick, supra note 221, at 22-26 (Structural Laminates and Marjorie Webster). See also Jackson v. New York Produce Exch., 1959 Trade Cas. ¶ 69,395 (S.D.N.Y.) (produce exchange licensing "petroleum inspectors" ordered in consent decree to adopt uniform, non-discriminatory standards for granting licenses and to grant a license to a qualified person.
fying organization responsible for insuring "that its standards reflect existing technology and are kept current and adequately upgraded to allow for technological innovation." 264 Moreover, construction or specification standards may be used only in "exceptional circumstances" and never when performance standards can be developed. 265 The FTC also urges sponsoring organizations to avoid the use of single standard, or "pass/fail" systems, and to employ instead graded systems which preserve consumer and user options. 266 When a challenge to a standard or set of standards arises, the FTC will place the burden of proof on the issue of reasonableness upon the organization developing and enforcing them. 267 The FTC will invalidate any standardization or certification program which has the effect of boycotting or excluding competitors. 268 Finally, an organization sponsoring a standardization or certification program must accord due process to all parties interested in or affected by it, including "the conduct of timely hearings with prompt decisions on claims respecting standards or the denial of certification." 269

If the courts had applied the FTC's guidelines to the facts of Structural Laminates and, by analogy, to the non-product accreditation plan under attack in Marjorie Webster, they would have made the following findings: The quality standards of the defendant trade association in Structural Laminates were out of date and its quality control plan was based entirely on construction standards; similarly, Middle States violated the FTC guidelines by refusing to evaluate Marjorie Webster solely because of its profit-making character rather than judging its performance as an educational institution on the merits. Both certification plans utilized pass/fail standards rather than graded systems. The outcome of the cases would have been entirely different; this leads to the supposition that, henceforth, plaintiffs complaining of the action of

regardless of whether he is a member of the exchange); United States v. Western Pine Ass'n 1940-43 Trade Cas. ¶ 56,107 (S.D. Cal. 1941); United States v. National Lumber Mfrs. Ass'n, 1940-43 Trade Cas. ¶ 56,123 (D.D.C. 1941); United States v. Southern Pine Ass'n, 1940-43 Trade Cas. ¶ 56,007 (E.D. La. 1940) (trade associations engaged in testing and grading of lumber required in consent decrees to make services available to all manufacturers on a non-discriminatory basis regardless of whether manufacturers were association members).

265. Id.
266. Id.
267. Id.
268. Id.
269. Id.
a certifying body will carry their cases before the FTC. Unfortunately for these plaintiffs, the difference in anticipated result may be more theoretical than real, as will be explained below.

Notwithstanding the potential application of the agency’s enlightened guidelines, the adjudicative procedures of the FTC may not provide a remedy to the aggrieved party in a certification dispute. As an independent administrative agency, the FTC has jurisdiction of “unfair methods of competition” as well as Sherman Act violations, but its jurisdiction over professional activities generally and certifying agencies in particular is subject to the same limitations created by the uncertain scope of the terms “trade” and “interstate commerce” as discussed in connection with judicial application of the Act. Furthermore, the FTC has never shown an interest in halting the restrictive practices of professional associations; the Justice Department has been responsible for bringing all significant antitrust litigation concerning the professions before the courts. In view of the inadequacy of the FTC’s staff and budgetary resources to cope with its present tasks, one could not expect it to assume additional responsibilities in the certification area without increased funds. The accumulating evidence of the FTC’s inefficiency and preoccupation with “trivia,” moreover, calls into question the wisdom of lodging such duties with that agency.

Unjust Interference and the “Public Service”
Rationale of the Falcone Decision

A professional certifying board’s “seal of approval” is frequently an important source of advantageous business relationships. A denial or revocation of certification will often seriously impair a professional’s


272. See pp. 89-94 supra.


ability to find employment and, indeed, to practice his profession at all. The individual’s stake in his profession or calling has long been the subject of judicial protection; an unjustified interference with this interest is tortious and actionable under the theory of interference with prospective advantage. Therefore, action by a certifying board which is detrimental to a professional’s practice may expose the board to tort liability.

No cases have been reported in which a professional has challenged the action of a certifying board on the basis of the traditional interference with prospective advantage or prima facie tort theories. The case of *Owens v. Williams* illustrates the judicial application of these theories to an analogous situation. In this case the plaintiff claimed that the defendant, a physician on the staff of the hospital at which the plaintiff was employed as a special nurse, wrongfully caused the hospital to dismiss her and bar her return to the hospital. The plaintiff alleged that, as a direct result of this action by the hospital, she was unable to obtain employment as a registered nurse on the staff of any other hospital in good standing and was thus deprived of her means of livelihood. After a jury returned a verdict in the plaintiff’s favor, the trial judge entered judgment for the defendant. On appeal, the Supreme Judicial Court of Massachusetts reversed the trial judge’s decision and ordered the jury verdict reinstated. The court observed that being listed on the hospital’s roster of nurses and the opportunity of nursing at the hospital were business relationships valuable to the plaintiff because they guaranteed ready employment. Furthermore, this business relationship would not have been interrupted except for the defendant’s threat to

---

276. See, e.g., Regan v. Davis, 97 So. 2d 324 (Fla. App. 1957) (speech therapist).
277. Cf. Pinsker v. Pacific Coast Soc’y of Orthodontists, 1 Cal. 3d 160, 460 P.2d 495, 81 Cal. Rptr. 623 (1969). In this case the plaintiff sought judicial review of the denial of his application for admission to the defendant society, an orthodontics association. Membership in the society was a prerequisite for certification by the American Board of Orthodontics, the sole certifying board within the specialty. In the trial court the plaintiff also sought damages for “infringement of advantageous relationships” but did not appeal from the finding of the trial court that he failed to prove such damage. 1 Cal. 3d at 164 n.2, 460 P.2d at 497 n.2, 81 Cal. Rptr. at 625 n.2.
279. It is in this particular that *Owens v. Williams* is distinguished from the non-existent case of a challenge to a certifying board’s action; in *Owens* the plaintiff’s professional standing is denied by an individual. The strength of the analogy depends upon the willingness of courts to extend the law applying to the individual in *Owens* to a certifying board.
the hospital superintendent that he would bring no more patients to
the hospital unless the plaintiff was dismissed. The court found that the
defendant had purposefully engineered the plaintiff's dismissal with full
knowledge of the consequences to her. Finally, the court dismissed the
contention that proof of a binding contract with the hospital was essen-
tial, adhering instead to the rule that "an existing or even a probable
future business relationship from which there is a reasonable expect-
tancy of financial benefit is enough." 280

The cause of action against a certifying board, as suggested by
Owens v. Williams, would include the below-listed elements. The
complainant would have to establish: (a) his standing as a professional;
(b) the importance of certification by the appropriate board as a source
of valuable business relationships; (c) an interference with these busi-
ness relationships by virtue of an "unjustified" 281 denial or revocation
of certification; (d) the intent 282 of the certifying board to interfere
with the plaintiff's prospects; and (e) resulting harm to the plaintiff.

Absence of justification for the certifying board's action may be the
most difficult element to establish. The law of interference with pro-
spective advantage recognizes privileges for group action designed to
protect the public interest 283 or the legitimate interests of the group
itself. 284 If, for example, a defendant board proves that its withholding
of certification is for the purpose of maintaining high standards, 285 it
cannot be held liable for unjustified interference with prospective ad-
vantage; its conduct is not "unjustified" and, therefore, not tortious. 286

Assuming both the good faith and reasonableness of a certifying board's

280. 322 Mass. at 361-62, 77 N.E.2d at 322. See generally Restatement of Torts § 766,
comment e at 53 (1939).

281. Strictly speaking, once the plaintiff proves an intentional interference and re-
sulting harm, the defendant bears the burden of proving that his conduct was privileged.

282. As used here, "intent" refers merely to the intent to deny or revoke certification
with knowledge of the probable results, not malevolence or a desire to inflict pecuniary
injury on the plaintiff. "Ill will on the part of the actor toward the person harmed
is not an essential condition of liability under the rule stated in this Section. . . ."
Restatement of Torts § 766, comment m at 62 (1939). See also Keene Lumber Co. v.
Leventhal, 165 F.2d 815, 821-22 (1st Cir. 1948).

283. See, e.g., Julie Baking Co. v. Graymond, 152 Misc. 846, 274 N.Y.S. 250 (Sup.

284. See, e.g., Jones v. Cody, 132 Mich. 13, 92 N.W. 495 (1902); Kuryear Publishing
Co. v. Messmer, 162 Wis. 565, 156 N.W. 948 (1916).

285. See, e.g., Harris v. Thomas, 217 S.W. 1068, 1076-77 (Tex. Civ. App. 1920);
Thompson v. New South Wales Branch, British Medical Ass'n, [1924] A.C. 764, 768-71
(P.C.) (N.S.W.).

286. See Restatement of Torts §§ 766, 767 (1939).
action, it is not likely that a denial or revocation of certification could be characterized as unjustified interference. The goals of professional certification programs usually fall within both of the privileges mentioned above. On the other hand, it seems clear that these privileges would not justify a denial of certification solely on grounds of personal animosity or the maintenance of standards designed to exclude one or more otherwise qualified persons.

In the gray area between these two extremes, the application of the law of unjustified interference is problematic. For example, the New York courts recognize any self-interest as a sufficient justification and therefore permit recovery only when the plaintiff can show that the defendant acted solely out of a malicious desire to injure the plaintiff. This rule would restrict the availability of the unjustified interference remedy to instances involving personal animosity and extreme capriciousness. Even in jurisdictions which reject the New York rule, judicial review of the certification process is limited by the fact that the certifying board will be able to postulate justifications for its conduct in virtually all cases except those where abuse of power is manifest. The critical question is the extent to which the courts will inquire into the actual necessity of the board's action for the protection of the interests at issue. Such inquiry would reveal many instances wherein less restrictive action on the part of a board would have sufficed to protect its interests and would have allowed a measure of satisfaction to an otherwise aggrieved applicant. However, once a privilege is demonstrated by the board, few courts have been willing to undertake an examination of alternatives. This narrow approach is ill-suited to a thorough evaluation of the competing requirements involved in the

287. Professional certification programs protect the public by enabling them to identify competent persons more readily, and simultaneously aid the profession by encouraging and recognizing high professional achievement.


289. See, e.g., Hawarden v. Youghiogheny & Lehigh Coal Co., 111 Wis. 545, 87 N.W. 472 (1901). A partial list of jurisdictions rejecting the New York rule is contained in Forkosch, supra note 288, at 474-82.

certification process and its proper role in the regulation of the professions.  

A few jurisdictions have abandoned the traditional approaches to the doctrine of justification and have treated the issue in terms of whether the defendant's conduct is justified in the light of all the circumstances. The case of *Willis v. Santa Ana Community Hospital Association* is a good example of this approach. Stating the issues to be considered on remand, the Supreme Court of California said:

> There is an established principle at common law that an action will lie where the right to pursue a lawful business, calling, trade, or occupation is intentionally interfered with either by unlawful means or by means otherwise lawful when there is a lack of sufficient justification. . . . Whether there is justification is determined not by applying precise standards but by balancing, in the light of all the circumstances, the respective importance to society and the parties of protecting the activities interfered with on the one hand and permitting the interference on the other.

Although this approach encourages an analysis of all relevant factors, including the availability of less restrictive alternatives, it does so through a flexible and fact-based approach.

---

291. For example, until quite recently the Academy of Certified Social Workers required applicants for certification to have two years of successful social work experience in one agency under the supervision of an academy member. Because the social work profession has always placed a premium on the value of supervised work, this requirement is not manifestly unreasonable as a criterion for membership in a professional society established for the recognition of advanced preparation and commitment in the social work field. But would a claim of privilege based on these grounds survive the counter-argument that two years of supervised work experience under any qualified agency supervisor—regardless of whether an academy member—is sufficient to further all the legitimate goals of the academy and, therefore, implementation of the requirement constitutes unjustified interference? This is the kind of analysis which will often be necessary if the certifying boards are to be challenged successfully via the theory of unjustified interference.


293. 58 Cal. 2d 806, 376 P.2d 568, 26 Cal. Rptr. 640 (1962).

294. Id. at 810, 376 P.2d at 570, 26 Cal. Rptr. at 642.

295. See, e.g., Blank v. Palo Alto-Stanford Hosp. Center, 234 Cal. App. 2d 377, 44 Cal. Rptr. 572 (Dist. Ct. App. 1965). In the Blank case, an action for unjustified interference was brought by a radiologist attacking the exclusive contract method of operating the diagnostic X-ray department of a hospital. The decision of the trial judge sustaining the validity of the hospital's method of operating its X-ray department is based on a careful consideration of existing practice and available alternatives. Relevant portions of the trial judge's opinion are quoted in 234 Cal. App. 2d at 387-89, 44 Cal. Rptr. at 579-80.
without indicating the relative weight to be assigned to the various factors.

A recent New Jersey case, however, dealing with the activities of a professional association, not only retained the flexibility which characterized the *Willis* decision but also proceeded on the theory that public policy demanded greater consideration to be given to some factors than others. This is the so-called "public service" or "fiduciary responsibility" theory first enunciated in *Falcone v. Middlesex County Medical Society*. In *Falcone* the defendant medical society had refused to admit as an active member the plaintiff, Dr. Italo Falcone, on the ground that he had received part of his medical training at an osteopathic college. In fact, Falcone held an unrestricted license to practice medicine and surgery in New Jersey and had also received the degree of Doctor of Medicine from the University of Milan, an AMA-approved medical college. His unquestioned professional qualifications notwithstanding, Falcone was immediately dropped from the staffs of two local hospitals which, like other hospitals in the area, required their staff physicians to be members of the county medical society. Faced with the loss of his surgical and obstetrical practice, Falcone obtained a court order directing the society to admit him to full membership. The Supreme Court of New Jersey subsequently affirmed the lower court decree in a unanimous opinion which stressed the severe "economic and professional effects" of the society's action on Falcone and its virtual monopoly over access to hospital facilities:

Through its interrelationships, the County Medical Society possesses, in fact, a virtual monopoly over the use of local hospital facilities. As a result it has power, by excluding Dr. Falcone from membership, to preclude him from successfully continuing in his practice of obstetrics and surgery and to restrict patients who wish to engage him as an obstetrician or surgeon in their freedom of

---


297. Falcone had attended the Philadelphia College of Osteopathy, an accredited school of osteopathy which was held to be in good standing by the New Jersey State Board of Medical Examiners. At the Philadelphia College, Falcone received a full traditional medical course as well as osteopathic training and upon graduation was awarded the degree of Doctor of Osteopathy (D.O.). *Id.* at 584-85, 170 A.2d at 792-93.

298. Falcone received the M.D. degree after seven months attendance at the University of Milan with credit for his work at the Philadelphia College. *Id.* at 585, 170 A.2d at 793. The basis for his exclusion from the society was an "unwritten membership requirement of four years of study at a medical college approved by the A.M.A." *Id.* at 586, 170 A.2d at 794.

choice of physicians. Public policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in reasonable and lawful manner for the advancement of the interests of the medical profession and the public generally; the evidence firmly displays that here it was not so exercised and that Dr. Falcone was fairly and justly entitled to the relief awarded to him in the Law Division.

In view of Falcone's undoubted competence, the court concluded that the society's action was "patently arbitrary and unreasonable and beyond the pale of the law." Though revolutionary in its implications for judicially compelled admission to private associations, the rationale of *Falcone* is not without foundation. The basis of the decision was a recognition that a medical society is not a voluntary membership association analogous to the Order of the Eastern Star, but is rather a private body exercising functions of vital concern to the entire public. Thus strong policy grounds dictate judicial review of a medical society's power to restrict its membership. This public service argument has direct antecedents in a line of cases ordering labor unions to admit workers to membership in situations in which the union exercised a monopoly of employment in a particular trade or occupation. In these circumstances, the courts declared that a union occupies a quasi-public position and does not

300. 34 N.J. at 597, 170 A.2d at 799.
301. Id. at 598, 170 A.2d at 800.
302. A good example of the prior judicial attitude (which may remain very much alive today) is the following statement from Hawkins v. North Carolina Dental Soc'y, 230 F.Supp. 805, 810 (W.D.N.C. 1964), rev'd on other grounds, 355 F.2d 718 (4th Cir. 1966): "An individual is free to choose his associates and a voluntary private association of individuals is free to choose its members. A court will not and cannot compel admission of an individual into a voluntary association, membership being a privilege and not a right. This is true no matter what may be the reason or motive for the denial of membership." See generally Annot., 89 A.L.R.2d 964 (1963); Annot., 20 A.L.R.2d 531 (1951); Comment, *Medical Societies and Medical Service Plans—From the Law of Associations to the Law of Antitrust*, 22 U. Chi. L. Rev. 694 (1955).
possess the right to exclude arbitrarily some employees from membership.305

The Falcone rationale has more fundamental origins in the common law doctrine of "public callings." Certain occupations and businesses deemed to be "affected with a public interest" were under a duty to provide competent service for a reasonable compensation and on a non-discriminatory basis.306 The public calling concept involved two basic factors: (1) the indispensable nature of the service in the medieval English economy, and (2) the virtual monopoly status of the service.307 Such occupations as innkeepers, common carriers, surgeons, and blacksmiths were considered public callings. As economic conditions changed, the doctrine's flexibility allowed the courts to reassess the need to regulate various enterprises.308

The Falcone decision implicitly recognizes the analogy between the public service responsibilities of innkeepers and common carriers in an earlier age and medical societies in the present era.309 Significantly, the basis of the Falcone opinion—the economic necessity of membership in the society due to its monopoly position—includes the same factors

305. This position is well-stated in the following quotation from James v. Marinship Corp., 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944):

In our opinion, an arbitrarily closed or partially closed union is incompatible with a closed shop. Where a union has, as in this case, attained monopoly of the supply of labor by means of closed shop agreements and other forms of collective labor action, such a union occupies a quasi-public position similar to that of a public service business and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.

In the Falcone opinion the court quoted the above statement from the James case and explicitly relied on the reasoning of the labor union cases. 34 N.J. at 593-96, 170 A.2d at 797-98.


308. See Small, supra note 306, at 3-5.

309. In Falcone, the court cited and quoted portions of Wilson v. Newspaper & Mail Deliverers' Union, 123 N.J.Eq. 347, 197 A. 720 (Ch. 1938), a case involving admission to labor unions. 34 N.J. at 594-95, 170 A.2d at 798. In Wilson the court explicitly based the union's duty on the law of public callings. 123 N.J.Eq. at 350-51, 197 A. at 722.
which were controlling in the old public calling cases. It is in this doctrinal parallel that the New Jersey court's view of the proper scope of judicial review of the actions of professional associations may be most clearly discerned. The regulation of various enterprises in the medieval English economy through the public calling concept exemplified the activism of the common law courts. *Falcone* is a modern call for judicial activism in the regulation of the professional association.

The principle of *Falcone* promotes an enlargement of individual rights with respect to the actions of certification boards. An unexpected consequence of the decision has been the barrage of critical student comment questioning the competence of the courts to rule in this area. In an effort to "save" the *Falcone* decision from its critics, another student commentator has suggested that the courts rely on the fact of state licensure or certification as a standard of review in cases involving exclusions from professional associations:

When an applicant has been certified or licensed by the state there should be a presumption that the applicant is qualified for admission to the professional association. . . . Making state licensure prima facie evidence of qualification for membership in a professional association places upon the association the burden of proving that a particular applicant should be excluded. The society would have to demonstrate that although the applicant had a license his admission was not in the public interest. Absent a clear and convincing showing, a court should accept the fact of licensure.

---


The criticism from student commentators is remarkable because it seems to rest on a distinction between personal rights and economic rights now largely discredited. See McCloskey, *supra* note 29; Reich, *supra* note 10. For a different evaluation of the *Falcone* case see, Tobriner & Grodin, *supra* note 107, at 1258-59.

The *Falcone* decision has been followed in at least two reported cases involving admissions to local medical societies. *Blende v. Maricopa County Medical Soc'y*, 96 Ariz. 240, 393 P.2d 926 (1964); *Kurk v. Queen's County Medical Soc'y*, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Jud. Ct.), rev'd, 24 App. Div. 2d 897, 264 N.Y.S.2d 859 (1965), aff'd mem., 18 N.Y.2d 928, 276 N.Y.S.2d 1007 (1966). The reversal of the lower court in *Kurk* was based on the ground that *Falcone* was not applicable to the facts of the case rather than a rejection of the principles enunciated by the New Jersey court.

311. 74 *Yale L.J.* 1313 (1965).
as sufficient evidence of qualification and order the applicant admitted to the association.\textsuperscript{312}

Such a presumption raised by the fact of licensing in favor of an applicant could minimize the need for courts to make technical or policy determinations concerning professional qualifications and would have little or no adverse effect on the professional association's function of raising ethical standards.\textsuperscript{313}

A standard of review linked to state licensure, however, is inadequate to deal with many of the problems which arise when a certifying board seeks to determine professional qualifications. On the one hand, the board's inquiry may be directed to matters not explored in the licensing process. On the other hand, the state may not have chosen to regulate the profession in question through the licensing device. More to the point, even where a state licensing standard may have been applicable to a particular certification question, courts generally have not utilized the suggested presumption; the cases have been decided without reference to the fact that the applicant had satisfied state licensing requirements.\textsuperscript{314} For example, California courts have decided two cases\textsuperscript{315} involving licensed real estate brokers who were denied

\textsuperscript{312} Id. at 1321-22.
\textsuperscript{313} Id. at 1322.
\textsuperscript{315} Martin v. Board of Realtors, No. R-12694 (Super. Ct., Contra Costa County, Cal., May 16, 1966); Slaughter v. Board of Realtors, No. 334-342 (Super. Ct., Alameda County, Cal., Mar. 29, 1965). These cases are noted in Tobriner & Grodin, supra note 107, at 1259. See Austin, Real Estate Boards and Multiple Listing Systems as Restraints of Trade, 70 Colum. L. Rev. 1325, 1362 (1970), including the following quotation from the opinion in the \textit{Slaughter} case:

\textit{The activities and services of the Board vitally affect the public through}
admission to local real estate boards and access to the multiple lists kept by those boards.\textsuperscript{318} Despite the fact that the actions of the local boards undercut the application of state licensing standards, the courts explicitly relied on the “public service” rationale in ordering local real estate boards to admit qualified brokers to their membership rolls.

Nor have courts limited their review of certification actions to those cases in which state licensure provides evidence of professional qualifications. Although New Jersey does not regulate the practice of medical technology, the Supreme Court of New Jersey intervened in the case of \textit{Higgins v. American Society of Clinical Pathologists}\textsuperscript{317} to protect the interest of a medical laboratory worker in a certification proceeding. The court simply held that the society’s certification rules violated the public policy of the state and could provide no valid basis for the society’s action.\textsuperscript{318}

The significance of \textit{Higgins} may be easily exaggerated. The Society’s rules were blatantly self-serving and entirely unrelated to the plaintiff’s professional qualifications as a medical technologist. The New Jersey court may also have been influenced by a contemporaneous antitrust prosecution by the Justice Department of a related group of pathologists for activity similar to that under attack in the \textit{Higgins} case. Future cases in which the association rules bear a closer relationship to the efforts of professionals to advance their legitimate interests and raise standards may dampen the activist ardor of the New Jersey court. In any event, Justice Jacobs, the author of the \textit{Falcone} opinion, was careful to state that action by the county medical society designed to ad-

\begin{flushright}
\textbf{But cf.} Grillo \textit{v. Board of Realtors}, 91 N.J. Super. 202, 225, 219 A.2d 635, 648 (Super. Ct. 1966) (holding that state system of regulation of the real estate business had preempted the field and thus a local real estate board was not free to establish its own independent standards of ethics and competency).

\textsuperscript{316} See \textit{Austin, supra} note 315, at 1350.

\textsuperscript{317} 51 N.J. 191, 238 A.2d 665 (1968). The \textit{Higgins} case is discussed in detail at pp. 72-74 \textit{supra}.

\textsuperscript{318} \textit{Id.} at 202-04, 238 A.2d at 671-72.
\end{flushright}
vance medical science or elevate professional standards would be "sympathetically supported." 319

Regardless of the extent to which the above mentioned considerations may detract from the importance of Falcone,220 that case offers the best prospect under present law for some form of regulatory check on the activities of private certifying boards. The chief merit of the "public service" rationale is a frank recognition of the breadth of the

319. 34 N.J. at 598, 170 A.2d at 800.

320. Another ambiguity in the Falcone decision is the vagueness of the standard of economic necessity which it establishes. Although the economic necessity of membership in the county medical society to Dr. Falcone was obvious, it has been argued that the open-ended nature of the concept may lead to judicial review of membership questions involving fraternal orders, honorary societies, colleges and universities, and similar organizations. See Recent Decision, 37 Notre Dame Law. 453, 461 (1962). Assume, for example, that a life insurance salesman who was denied membership in a local Elks club brings an action to compel the club to admit him to membership, arguing that personal contacts attainable through fraternal orders were essential to his success in the life insurance business. Would the principles of Falcone be applicable to such a case? It seems doubtful. Cf. Trautwein v. Harburt, 40 N.J. Super. 247, 123 A.2d 30 (App. Div.), cert. denied, 22 N.J. 220, 125 A.2d 233 (1956) (no liability for exclusion of plaintiffs from Order of Eastern Star). It seems extremely unlikely that such a hypothetical life insurance salesman could prove the two factors deemed crucial in the Falcone opinion: the economic indispensability of membership in the association and its monopoly position. First, the possibility that membership in the local Elks Club might be economically advantageous to a life insurance salesman is not enough—indispensability is the criterion. In Falcone the court concluded that exclusion from the local medical society amounted to a partial revocation of the license to practice medicine. It is difficult to imagine a case in which exclusion from a fraternal order could have such devastating consequences. Second, unless the Elks Club is the only source of informal, friendly personal contacts in the local area, the criterion of monopoly is not satisfied. In the normal case the life insurance salesman might seek membership in the Masons, Lions, church groups, civic organizations, and similar associations.

On the other hand, the possibility of applying the Falcone doctrine to colleges and universities—particularly professional schools—is more troublesome. The conclusion that the courts should be asked to review questions concerning student admissions and dismissals or faculty appointments and tenure is speculative. But cf. DeFunis v. University of Washington (Wash. Super. Cr. Sept., 1971), in N.Y. Times, Sept 25, 1971 (law school required to admit plaintiff excluded because of admissions policy favoring racial minorities). Nevertheless, there is no question, for example, of the economic indispensability of graduation from professional school to the would-be lawyer or doctor. The professional school generally enjoys a monopoly position vis-à-vis its students; a student dismissed from a professional school will very often be unable to gain admission to another. In a case involving the dismissal of a student from a professional school, the Falcone criteria may be satisfied and judicial review would follow. But it is probably incorrect to assume that the courts will apply a doctrine which has evolved in cases involving professional associations to the college and university situation. The importance of preserving academic freedom presents a countervailing policy strongly supporting judicial non-intervention. See Green v. Howard University, 271 F.Supp. 609 (D.D.C. 1967), remanded, 412 F.2d 1128 (D.C. Cir. 1969).
problem it addresses, namely, the virtual monopoly of the professional association and the resulting economic and social impact on both the individual applicant and society at large. Although there are areas of professional association activity in which the courts will undoubtedly continue to maintain a "hands-off" attitude, widespread acceptance of the public service rationale will preclude arbitrary and discriminatory action and very likely result in a wide-ranging judicial review of the more guild-like aspects of professional associations and certifying boards.

**CONCLUSION**

Modern socio-political analyses of the professions have isolated the self-regulatory authority possessed by professional associations as one of their most fundamental characteristics.\(^{321}\) There is no lack of evidence to support this thesis. Professional associations closely guard the gates of entry into their respective occupations, generally armed with state power exercised through the licensing system. Except in extreme situations involving criminal violations, professional associations also have the duty of disciplining their wayward members and the concomitant responsibility for evaluating professional performance. Professional self-government is rendered more complete in the United States by the absence of any centralized control of higher education—a factor which has enabled the professions to assume the task of accrediting their own training centers.

Thus, it is, in a sense, incongruous to distinguish the private certification process from the closely related procedure of state licensure. Where state authority to govern professional activities ends, the authority of these professions to govern themselves begins—the line of demarcation is often a fine one. The economic and social impact of certification is likely to be substantially similar to the effects of licensing systems. In view of the state policies of leaving much of the regulation of professional activities to the professions themselves through the certification process, inquiry is raised as to the advisability of placing external restraints on certification.

There are a number of reasons for imposing limits on the scope of professional autonomy as it is manifested in the proliferation of independent certifying boards and agencies. The first reason is the compell-

---

\(^{321}\) See, e.g., Caplow, supra note 14; Gilb, supra note 1; Lieberman, supra note 8; Goode, Community Within a Community: The Professions, 22 Am. Sociological Rev. 194 (1957); Greenwood, supra note 19, at 44. Some of these observers have differed over whether the public or the professionals themselves are the primary beneficiaries of this grant of self-regulatory authority. Compare Goode, supra, with Lieberman, supra.
ing need to reform the procedures of some of the certifying boards. Since the boards are not deemed instrumentalities of the state, they are not constitutionally required to accord procedural due process to the persons whose professional fortunes they may determine. Consequently, some certifying organizations have disregarded fundamental procedural safeguards against arbitrary action in passing on the applications of candidates for certification or in conducting disciplinary proceedings.

Simultaneously with the increase in use of the certification device, both the Supreme Court and the state courts have been expanding the procedural rights of applicants for state licensing. Because licensing and certification are functionally equivalent, logic demands that the guarantee of due process required in licensing be extended to certification. The imposition of a duty on certifying boards to grant basic due process rights seems essential to reduce the possibility of arbitrary action and to preserve the integrity of the process.

Secondly, more rigid control of the certification process will insulate the certifying board from the pressures of competing groups. Any professional association's ability to achieve its goals in the legislature will be limited by the lobbying power of rival groups who feel threatened.


Such abuses have been most widespread among the medical specialty boards; like many medical societies, the medical specialty boards have claimed the right to reject applicants without the benefit of a hearing or even a statement of reasons for the rejection. See, e.g., Fontanetta v. American Bd. of Internal Medicine, 303 F.Supp. 427 (E.D.N.Y. 1969), aff'd, 421 F.2d 355 (2d Cir. 1970).


325. Although it might be objected that such a requirement necessarily will result in increased costs, any additional expenses could be recovered easily by raising application fees.
by the association’s proposals.\textsuperscript{326} Through this clash of interests a check is placed on the ability of the professions to manipulate the licensing process to their advantage or to the detriment of the public.\textsuperscript{327} However, since no legislation is necessary to establish a certification program, a professional association which establishes a certifying board is not subject to any restraints upon its self-serving actions. As Higgins demonstrates, the professional association may attempt to achieve goals through certification which would be unattainable if only licensing were available.\textsuperscript{328} Since the safeguards which inhere in the licensing system are absent in certification, additional regulations should be imposed on certifying organizations.

A third argument for expanded regulation of the certification process concerns the independence of the professions in setting their standards of training and ethics. Certifying agencies frequently make major policy decisions with important implications for the entire society. Regardless of whether a certifying agency’s particular decision has beneficial consequences, the unrestricted right to determine such policy


\textsuperscript{328} Higgins v. American Soc’y of Clinical Pathologists, 51 N.J. 191, 238 A.2d 665 (1968), is a good example of the disregard of the public interest which may result when a certifying organization avoids the competing group pressures at work in the legislature. State enactments concerning clinical laboratories uniformly authorize qualified non-physicians as well as pathologists to own and operate such laboratories. See, \textit{e.g.}, \textit{Cal. Bus. & Prof. Code} § 1200 \textit{et seq.} (West Supp. 1962); \textit{Fla. Stat. Ann.} § 483.011 \textit{et seq.} (West Supp. 1971-72); \textit{Ill. Ann. Stat.}, ch. 111-1/2, § 621-103 \textit{et seq.} (Smith-Hurd Supp. 1972); \textit{N.J. Rev. Stat.} § 45:9-42.1 \textit{et seq.} (1963); \textit{N.Y. Pub. Health Law} § 570-81 (McKinney Supp. 1971); \textit{Pa. Stat. Ann.} tit. 35, § 2151-65 (1964). The pathologists, dissatisfied with this state of affairs, conceived a plant to monopolize the commercial medical laboratory business in the United States. One facet of this plan was a scheme to prevent the non-physician laboratory owners from obtaining the services of qualified laboratory personnel. The American Society of Clinical Pathologists was able to enlist laboratory workers in the pathologists’ campaign against the non-physicians through the certification program which it conducted for medical technologists—the only recognized hallmark of qualification in the field. The Society simply declared it a breach of “professional ethics” for a medical technologist to work in a laboratory owned by a non-physician. The penalty for such “unethical” conduct was revocation of certification. The effect of this exclusionary campaign was not only to limit the ability of medical technologists to find advantageous employment, but also to deny the public the benefit of competition between laboratories owned by physicians and non-physicians. Clearly the pathologists would not have been able to achieve their goals in the state legislatures without a fight from the non-physician laboratory owners; in any case, the states already have made the decision to license non-physicians as owners and operators of clinical laboratories.
should not be conferred on professional groups. If such issues were to arise in the context of legislative proposals, a lively debate would be engendered in the community at large. The certification process, unlike the licensing system, lacks the mechanism for the receipt and incorporation of ideas from outside the profession. Many matters should remain within the province of the certifying board, but additional control of the certifying process is necessary to guarantee that the views and legitimate interests of parties other than the professionals themselves are taken into account in those instances in which the ramifications of the certification action extend beyond the immediate issue.

It does not follow from this analysis, however, that certification should be proscribed or rendered superfluous by complete state domination. Even if the administrative and financial difficulties inherent in carrying such a proposal into action were discounted, a state takeover would involve needless duplication of effort. Many private certification programs are performing well in defining professional training standards and are providing the clientele with valuable information. Private certifying agencies perform many services which could not be performed as satisfactorily by the states. It makes good sense, for example, to certify medical specialists on a national rather than a state or local basis. Not only do the medical specialty boards provide uniform standards for specialist training; they also make certification possible for physicians residing in states with small populations and a correspondingly small number of specialists whose unwillingness or inability to allocate the necessary resources might cripple a state licensing system. In addition, a regulatory system which has been subjected to as much criticism as state licensing should not undertake to grapple with the problems of the certifying boards. State assumption of the certification task would only add further complexities to the present chaos of the various state licensing systems.

329. The case of Marjorie Webster illustrates this point. By virtue of its decision to refuse to evaluate proprietary colleges for possible accreditation, the Middle States Association had made a major policy choice concerning the role of such institutions in American higher education. Because of the vast importance of regional accreditation to most colleges, many proprietary schools have yielded to pressure from the accrediting agencies and converted to nonprofit status in order to become eligible for accreditation. Koerner, supra note 245, at 40, 44. But certainly the question of whether the American educational system is to consist wholly of nonprofit institutions is of sufficient importance to deserve the informed consideration of economists, sociologists, political scientists, students and their parents, as well as professional educators. Although the state legislatures provide a natural forum for a lively debate of this sort, the private certification device enables the accrediting agency alone to decide the question.
Widespread acceptance of the principles of the *Falcone* decision, moreover, will remove the need for a state takeover of the certification process. Indeed, the developing case law indicates that in regard to the issue of procedural due process, *Falcone* has already succeeded; an applicant for membership in an organization has a judicially enforceable right to have his application considered in accordance with the fundamentals of due process when membership in the organization is essential to professional achievement and recognition. Clearly, the due process requirement will be applicable in most situations involving certification. As the principles of *Falcone* are accepted in other states, the certifying agencies will probably undertake a reform of their procedures on their own account, thereby guaranteeing candidates for certification the same procedural rights to which they would be entitled in a state licensing context.

The scope of judicial review of a certifying board’s substantive decisions is not settled. Although it has been suggested that application of the principle of *Falcone* should be confined to cases in which state licensure provides a standard of review, the courts of New Jersey and California have extended their inquiry beyond this standard. The parameters of the *Falcone* doctrine of intervention are unclear because the courts have been presented, for the most part, with cases concerning procedural rather than substantive matters.

---


332. Counsel to professional associations, always anxious to prevent their clients from becoming embroiled in litigation, will provide the impetus for such reforms. See, e.g., Braemer, *Disciplinary Procedures for Trade and Professional Associations*, 23 Bus. Lawyer 959 (1968).

333. 74 Yale L.J. 1313 (1965).


335. Many of the cases have turned on procedural matters. See, e.g., Blende v. Maricopa County Medical Soc’y, 96 Ariz. 240, 393 P.2d 926 (1964). In the cases which have raised policy questions, the courts have focused on various factors which vitiated association claims that they had acted in the responsible exercise of their self-regulatory authority. For example, in the *Falcone* case, there was little reason to doubt that the medical society’s exclusion of Dr. Falcone was the product of an arbitrary prejudice against physicians with osteopathic training. In the light of Falcone’s conceded qualifications and his possession of an unrestricted license to practice medicine and surgery,
Regardless of these uncertainties, judicial intervention in the internal affairs of professional associations is destined to increase. The present century is widely interpreted as being in the throes of a return to "status" concepts rather than "contract" as the chief means of social integration. The institutions of occupational licensing and the private certification contribute to the resurgence of "status" because they do not focus on contractual relationships. The professional's ability to perform and the willingness of others to contract with him for the purchase of his services are secondary to the controlling question of status—the requirement that a professional possess a state license or a certificate from the appropriate certifying board. Although the idea of wide-ranging judicial review of the internal affairs of professional associations is novel, it is not an anomaly in an age which emphasizes professional status. Because existing "property" concepts provide scant protection for the individual's professional status, the necessity for innovative judicial action in the areas of occupational licensing and private certification is certain to increase as our return to status concepts becomes more complete.

the decision can be interpreted as holding that since the state legislature had refused to grant the M.D.'s a preferred position over osteopaths in the medical field, the M.D.'s could not achieve such a result through concerted action. The merits of the feud between M.D.'s and osteopaths, the opinion is careful to state, were not before the court. 34 N.J. at 597-98, 170 A.2d at 799-800.

The substantive issues in the Higgins case made even smaller demands on judicial competence. The restrictive practices of the pathologists in dispute were in direct conflict with a state statute and were the subject of a contemporaneous antitrust prosecution by the Justice Department.

336. See, e.g., Liebmann, supra note 9, at 51-52; Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629 (1943); Reich, supra note 10.

337. See Rich, supra note 10. For a discussion of the virtually complete disintegration of status concepts in the professions in colonial America see Boorstin, supra note 90 at 191-239.

338. It is significant that in Higgins, despite the absence of any present economic loss resulting from the revocation of the plaintiff's certification, the New Jersey court concluded that her "stake in her professional status" was substantial enough to warrant judicial intervention. 51 N.J. at 202, 238 A.2d at 670.


340. See McCloskey, supra note 29; Reich, supra note 10, at 783-87.