

LAW SCHOOL ACCREDITATION: RESPONSIBLE REGULATION OR BARRIER TO ENTRY?

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Good afternoon, ladies and gentlemen. My name is Doug Kmiec from the Pepperdine Law School in Malibu, California. You may be asking yourself what is this topic, the accreditation of law schools, doing in a symposium on limited government. After all, the ABA is not a government, and it is not limited. Indeed, some opponents of ABA accreditation would say look up “regulatory monopoly” in the dictionary and that is where you will find it. And, of course, therein lies the rub. The ABA may not be a government or state actor, but in practical reality it exercises extensive authority over the nature of legal education and derivatively the provision of legal services. The debate this afternoon is a debate over whether ABA accreditation standards serve or disserve the primary purposes of legal education.

And so we begin, what is the primary purpose of legal education? In true multiple-choice bar examiner fashion, is it:

- (A) the provision of competent legal services to the general public;
- (B) an opportunity to take on massive student debt, which in turn necessitates finding a professional position which precludes all meaningful social engagement;
- (C) a chance to become a member of the Federalist Society and thereby defend the Constitution as written, while simultaneously ending your career for the judiciary; or
- (D) none of the above, and simply an opportunity to devote significant monetary resources to the study of catching foxes on wild and uninhabited lands, the rule against perpetuities, the shooting of spring guns, and the unfortunate lot of children with thin skulls.

More seriously, do accreditation standards ensure legal

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competence, or are they barriers to entry that simply raise the cost of legal education and, in turn, the delivery of legal services? We have four excellent scholars this afternoon to present several different aspects of this debate. From the more positive side toward regulation, but by no means totally endorsing of every jot and tittle of it, are professor Thomas Morgan, the Oppenheimer Professor of Antitrust and Trade Regulation of the George Washington University, and Dean John Sebert, who until recently had served as the consultant on legal education for the American Bar Association. John's role in that context was as primary administrator and coordinator of the ABA accreditation process.

Aligned against regulation, or at least more skeptical of it, is Professor John Baker, the Bennett Professor of Law at Louisiana State University. John is well-known to the Federalist Society, but it may not be as well-known that recently he was also the co-director of a study on accreditation standards for liberal education. And finally, Dean Saul Levmore, from the University of Chicago Law School, whose research focuses on behavioral effects of legal rules, and who has characterized the ABA accreditation standards as, I think the kind way he put it was "misguided and excessive."

I want to just set the table very briefly with four arguments that are made in behalf of regulation, the four counterpoints one most frequently finds in the literature on this subject, and then turn it over to the distinguished panel. The arguments in favor of regulation go something like this:

First, that ABA accreditation is needed to protect the public from inadequately prepared graduates.¹ Second, that ABA accreditation standards are necessary in order to promote legal scholarship of the highest quality—invaluable to the long-term health of the American Republic.² Third, that ABA accreditation standards support the rule of law and are invaluable to it.³ And

1. *E.g.*, Christopher T. Cunniffe, *The Case for the Alternative Third-Year Program*, 61 ALB. L. REV. 85, 87 (1997) ("A principal theme of the Root Report [which recommended in 1921 that states adopt minimum standards for law schools] was the need to protect the public from incompetent and unscrupulous lawyers.").

2. John S. Elson, *The Governmental Maintenance of the Privileges of Legal Academia: A Case Study in Classic Rent-Seeking and a Challenge to our Democratic Ideology*, 15 ST. JOHN'S J. LEGAL COMMENT. 269, 273–76 (2001).

3. George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2210–11 (1998).

fourth, that ABA accreditation standards supply valuable consumer information to students and employers alike about the comparative qualities of legal institutions.⁴

The counterpoints: With respect to the first, (protecting the public from inadequately prepared law graduates) most critics of ABA standards would point out that from their vantage point, the standards are largely focused on inputs rather than outputs,⁵ and by virtue of that, there is considerable (and impliedly unnecessary) expense associated with accreditation standards—whether that expense be for the library research facilities, presentation technology, or the money associated with attracting and retaining high-priced legal talent for the faculty or various tenure requirements—but there is very little in terms of the evaluation of the actual effectiveness of the graduates that are leaving these programs.⁶

The second argument in favor of accreditation standards was the promotion of quality legal scholarship. Most of the counterpoints here are not particularly complimentary of legal scholarship. There is a sentiment that says much of what is written in the law reviews is of no help to the courts, of little help to practitioners,⁷ and is mostly devoted to commentary on divisive social issues that could just as easily be resolved by Chris Matthews.⁸

The third argument in favor of accreditation standards was promotion of the rule of law. The most telling counterpoint is one that merely cites the ABA's regulation on diversity, which was reenacted in February 2006. Many people contend this diversity standard actually mandates racial preference, and

4. E.g., Kristen Booth Glenn, *Thinking Out of the Bar Exam Box: A Proposal to 'MacCrate' Entry into the Profession*, 23 PACE L. REV. 343, 350 (2003) ("The belief that the bar examination in fact protects consumers of legal services is widespread."); Cunniffe, *supra* note 1, at 127 ("In its role as a law school accrediting agency, the ABA provides a valuable service to law school applicants, law school students, the law schools, the state and federal governments, and, indeed, society as a whole.").

5. E.g., Mathew D. Staver & Anita L. Staver, *Lifting the Veil: An Expose on the American Bar Association's Arbitrary and Capricious Accreditation Process*, 49 WAYNE L. REV. 1, 5 (2003) ([T]he ABA accreditation process "increasingly concentrates on inputs.").

6. E.g., George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2097 (noting that the ABA system has "rais[ed] the expense of legal training").

7. Indeed, law reviews are cited significantly less today compared to the 1970s. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. TIMES, Mar. 19, 2007, at A8.

8. *Hardball*, with Chris Matthews (MSNBC television broadcast).

mandates racial preference in a way that actually purports to trump state law.⁹ I will quote, so that you do not think I am making this up: “The requirement of a constitutional provision or statute that purports to prohibit consideration of gender, race, ethnicity or national origin in admissions or employment decisions is not a justification for a school’s non-compliance with Standard 212.”¹⁰ So, the fact that the people in California or Michigan, for example, have enacted explicit constitutional limits on the employ of racial preferences is apparently to the ABA of no consequence. It is hard to see how this promotes the rule of law.

And lastly, to the issue of whether or not ABA accreditation standards provide information to employers and students, as a former dean of a law school, I can say that we treated the information we generated in the accreditation process as nothing short of classified information; it was the equivalent of a state secret in a terrorist prosecution, not something that we were about to release.

So, why is there not a public outcry if there is so much criticism of these accreditation standards? Why did it not dominate the midterm elections, rather than Iraq? Part of it, I suppose, is that when we vote in judicial retention elections it is not uppermost in our minds that in roughly forty-five states, it is these judges who have required graduation from an ABA-accredited law school in order to enter the profession. While we may have great dissatisfaction with the existing accreditation standards, it just does not come to mind to register a no-vote because of that particular issue, or at least it does not for most of us. So perhaps we need to stir some creative thinking, and notwithstanding Patrick Leahy’s assessment of the Federalist Society, this is the best place to do that in America. So let us stir our creative faculties, fire the rest of them, and begin with Professor Tom Morgan.

9. See, e.g., David E. Bernstein, Op-Ed., *Affirmative Blackmail*, WALL ST. J., Feb. 15, 2006, at A9.

10. AM. BAR ASS’N SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, 2006–2007 STANDARDS AND RULES OF PROCEDURE at Interpretation 212-1 (2006), available at <http://www.abanet.org/legaled/standards/2006-2007StandardsBookMaster.PDF> [hereinafter ABA STANDARDS].