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## Gresham's Law in Legal Education

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# Gresham's Law in Legal Education

STEVEN R. SMITH\*

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## I. INTRODUCTION

One of the most enduring principles of economics is attributed to a letter Thomas Gresham wrote to Queen Elizabeth I near the beginning of her reign, probably in 1559, about one of the most pressing problems facing the country.<sup>1</sup> That sixteenth-century principle (commonly and incorrectly stated as “bad money drives out good money”<sup>2</sup>) has relevance to legal education in the twenty-first century.<sup>3</sup> It may, for example, explain

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\* Dean and Professor of Law, California Western School of Law. I am grateful to my friends and colleagues who assisted with the preparation of this article, William Aceves, Bucky Askew, Tom Barton, Dan Freehling, Bill Rakes, Don Shapiro, Lera Smith, Liz Stevens, Rennard Strickland, Debbie Wilson and Peter Winograd. The remaining errors are a result of not having taken some of their advice.

1. RAYMOND DE ROOVER, GRESHAM ON FOREIGN EXCHANGE 15 (Harvard Univ. Press 1949).

2. There are as many formulations of Gresham's Law as there are economists. See Robert Mundell, *Uses and Abuses of Gresham's Law in the History of Money*, 2 ZAGREB J. ECON. 3, 6-10 (1998) (describing several “faulty renderings” of Gresham's Law before proposing and supporting his own version).

3. A good statement, technically, is that bad or less desirable currency tends to drive out (or circulate instead of) good or more desirable currency if both exchange for the same price (e.g., because of legal tender laws). *Id.* at 10. As we shall see, however,

the legitimacy of some accreditation rules and why accreditation itself is an important form of public protection.

This article will first examine the traditional Gresham's Law regarding currency and then its broader application to instances in which the nominal and intrinsic values of something are separated. It will then look at the licensing of attorneys and how Gresham's Law may justify both the general accreditation of legal education and specific accreditation Standards. Viewed from this perspective it is the interests of the public, and not the more parochial interests of law schools, that deserve primary consideration in accreditation related to licensure. The article will conclude with a consideration of a coming debate about the appropriate place of scholarly research as a requirement of accreditation.

## II. GRESHAM'S LAW

Thomas Gresham, a merchant and ambassador, was writing his letter to the Queen to urge her to avoid further debasing the Pound and to restore the legitimacy of the coinage.<sup>4</sup> Her predecessors had financed wars, debts and entanglements by producing various forms of coins that contained such limited precious metal that they were a small fraction of the face value of the coins.<sup>5</sup> The result was the flight of gold from England and various internal economic problems.<sup>6</sup> In the opening section of the letter Gresham noted these consequences of the debasement of the currency and the unfortunate consequence of trying to circulate such currency.<sup>7</sup> The principle he enunciated is commonly stated as "good money drives bad money out of circulation," but this is, technically, a somewhat incomplete, or even incorrect, statement of the principle.<sup>8</sup>

It was not until 1858 that economist H.D. Macleod described the principle as "Gresham's Law," carelessly phrasing it as the fact that good and bad money "cannot circulate together."<sup>9</sup> In fact, Gresham was not the first to have understood such a principle. Robert Mundell traces the origin more than twenty centuries before Gresham to Theognis in the late sixth century BC.<sup>10</sup>

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a broader form of Gresham's Law can operate when the intrinsic and nominal values of something can be separated. See *infra* notes 20-28 and accompanying text.

4. See Frank Whitson Fetter, *Some Neglected Aspects of Gresham's Law*, 46 Q.J. ECON. 480 (1932).

5. See H. Buckley, *Sir Thomas Gresham and the Foreign Exchange*, 34 ECON. J. 589 (1924) (discussing the monetary circumstances of Gresham's era).

6. *Id.*

7. Fetter, *supra* note 4, at 482.

8. Mundell, *supra* note 2, at 8-10.

9. *Id.* at 3 (quoting H.D. Macleod without specific attribution).

10. *Id.* at 4.

There are any number of statements, good and bad, claiming to capture Gresham's Law.<sup>11</sup> The most common statement, that "bad money drives good out of circulation," is bad (incomplete) and has mostly driven out the more complete or accurate statements.<sup>12</sup> Robert Mundell notes that without more qualification, in fact, good money drives out bad money because nobody will take bad money and it will cease to circulate.<sup>13</sup> For bad money to drive out good, the additional condition must be added that both forms of money are legal tender and both must, therefore, be accepted in payment of debts.<sup>14</sup> In such circumstances the debtor will choose to pay his debt using the debased (or bad) money and keeping for himself the good.<sup>15</sup>

Mundell believes a correct expression of Gresham's Law is that, "cheap money drives out dear, if they exchange for the same price."<sup>16</sup> Cheap and dear money would exchange for the same price, ordinarily, only if there were a legal requirement that they do so, as is the case with a "legal tender" law.<sup>17</sup>

Gresham's Law has been applied to any number of non-monetary situations.<sup>18</sup> The uses of Gresham's Law in this manner are by way of analogy or metaphor. For example, the claim has been made that bad

11. See *supra* note 8.

12. The very simplicity of "bad money drives out good money" may account for its success. It neglects to state several of the conditions necessary for the law to operate, including that legal tender laws or the like separate the nominal and intrinsic values. See Buckley, *supra* note 5.

13. Mundell, *supra* note 2, at 8.

14. *Id.* at 6-8. See also George Selgin, *Salvaging Gresham's Law: The Good, the Bad, and the Illegal*, 28 J. MONEY CREDIT BANK 637, 643 (1996).

15. See Mundell, *supra* note 2, at 7 (stating a debtor's "law of economy" as "of two types of payment, pay with that which involves the least sacrifice").

16. *Id.* at 9. This generally supposes that there is sufficient cheap money in circulation to meet the immediate needs of the economy so that the "dear money" is not needed. *Id.*

17. *Id.* at 8-9.

18. The judiciary has noted Gresham's Law: a Lexis search identified thirty-eight federal court opinions (including four U.S. Supreme Court decisions) and ten state court opinions citing Gresham's Law. See, e.g., *Brown v. Gen. Serv. Admin.*, 425 U.S. 820, 833 (1976) (applying Gresham's Law in holding that the 1964 Civil Rights Act must supply a federal employee's exclusive remedy for job-related racial discrimination because if other judicial remedies were available, no employee would first seek administrative relief as the Act requires); *Herceg v. Hustler Magazine*, 814 F.2d 1017, 1019-20 (5th Cir. 1987) (suggesting the First Amendment's free speech guarantee "rel[ies] on a reverse Gresham's law, trusting to good ideas to drive out bad ones and forbidding governmental intervention into the free market of ideas.").

teaching drives good teaching out of the law school.<sup>19</sup> Such applications are not literal statements of the classical Gresham's Law, but rather a general recognition that ironically and sadly there are conditions under which the good loses out to the less adequate.

The more generalized form of Gresham's Law may arise where something has "intrinsic" and "nominal" values that are unequal.<sup>20</sup> This is at the core of the original observation of Gresham. That is, coins had an intrinsic value based on the metal of which they were made. They also had a nominal value based on the legal tender established by the monarch.<sup>21</sup> The distinction between the nominal and intrinsic values causes people to try to obtain the benefits of the nominal value while preserving for themselves much of the intrinsic value (or avoiding the intrinsic costs).<sup>22</sup>

At the heart of Gresham's Law is the observation that when people can pay with something of greater or lesser value, they will do so with the lesser.<sup>23</sup> In a similar way, "charters" (e.g., licenses and education degrees) may also create the dynamics of Gresham's Law. These charters are commonly "paid for" by money, time and efforts.<sup>24</sup> There are sometimes both nominal and intrinsic values and costs of these charters, with the nominal value being the representation of the intrinsic benefit. For example, college degrees are the nominal statement for the many intrinsic benefits provided by education. Or, a driver's license is the nominal statement for some assurance of decent driving ability (the intrinsic value).

It is the possible separation of the nominal and intrinsic values of these charters that raises the specter of Gresham's Law. Some people will seek the nominal value of the charter without paying for the full intrinsic value (or cost) because it will be less costly in terms of time and

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19. Roger C. Cramton, *The Current State of the Law Curriculum*, 32 J. LEGAL EDUC. 321, 330-31 (1982).

20. This separation of nominal and intrinsic value has not been a part of the routine economic discussion of Gresham's Law, but it is the underlying principle that causes the ironic result of the market "rewarding" something of lesser value.

21. The necessity of something like "legal tender" laws to make Gresham's Law operate becomes obvious. Those laws create the nominal value as distinguished from intrinsic value. See Fetter, *supra* note 4.

22. See Mundell, *supra* note 2, at 7 ("motivated by the law of economy," individuals will "pay with that which involves the least sacrifice"). See also Selgin, *supra* note 14, at 641 (using game theory to explain how Gresham's Law operates through rational actors' utility decisions).

23. Mundell, *supra* note 2, at 7.

24. A legitimate law degree, for example, requires the payment of tuition plus years of study and successfully passing examinations to prove that the student has acquired the necessary knowledge and skills.

effort. If that charter (nominal benefit) is accepted for some purposes in some markets, cheap providers (those giving the charter without ensuring the full intrinsic value) may put pressure on quality providers (who furnish the intrinsic value as well as the charter).

Suppose, for example, that a person may receive a state driver's license in one of two ways: by sending \$50 to the Department of Motor Vehicles, or by going to the DMV, taking written and driving tests and paying \$50. Many people will be inclined to do the former because they want to have the license without paying the "cost" of mastering the rules and good driving technique, and taking the test to prove their skills. That is, they may obtain the nominal value of a license without "paying" the intrinsic cost of the learning and testing. This is, of course, unfortunate for the general public because it would probably result in more unprepared drivers on the streets. It would presumably also not be in the interest of the individual drivers not just because they would be facing more unprepared drivers on the road, but because they themselves would be less well prepared for driving than if they had undertaken the more rigorous program.

A state in which both a "pay only drivers license" and the "pay plus testing drivers license" were available would probably see the "pay only" system attract many more customers. Moreover, it would likely draw so many customers away from the better system that it would threaten the existence of the "pay plus testing drivers license" or put pressure on it not to adopt especially tough standards. Here the nominal value is the same to potential drivers whether they go to the trouble of learning good driving technique or not.<sup>25</sup>

Economists have noted that Gresham's Law will operate even if there is a market somewhere that recognizes the true intrinsic value as being higher than the nominal value of the money. Indeed, some market, other than the one that uses the nominal value, must exist for there to be an intrinsic value. That is, technically, there must be two kinds of money "which are of equivalent value for some purposes and of different value for others."<sup>26</sup> The example typically given is of two coins, one of debased value, that have the same nominal value within a country

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25. They would, of course, have other incentives apart from the licensing process to learn to be good drivers. The fear of liability or personal injury, for example, would be incentives to learn to drive reasonably well. The point here, however, is that they can obtain the nominal value of a license without paying the intrinsic value cost.

26. Mundell, *supra* note 2, at 9.

because of exchange laws.<sup>27</sup> For another purpose, however, they have different value, notably they may be melted down for bullion or transferred out of the country for a better exchange based on their intrinsic value.<sup>28</sup>

In a similar way, the more generalized form of Gresham's Law will operate when the nominal value (say, of the license) is not the same for all purposes. Even if, for example, some employers or insurance companies preferred the "pay plus testing" license, it is likely that competition from the "pay only" system would put pressure on the "pay plus testing" system. That pressure might result, for example, in the "pay plus testing" system becoming a special niche or providing very low testing standards to encourage more drivers to use their system.

In short, when the nominal value and intrinsic value of something can be separated, the risk exists that efforts to obtain the benefits of the nominal value without having to pay the full price for the intrinsic value will occur. The result often is not only to make the easy (bad) approach to obtaining the nominal value attractive, but the resulting competition may cheapen the value to society. This was the case with the "pay only" license where society received less protection from bad drivers.

### III. THE LICENSING OF ATTORNEYS

A society might hypothetically let the free market completely control the practice of law. It could allow anyone to claim to be an attorney, give legal advice, draft documents and appear before tribunals. That is generally not the approach for several reasons, beyond the historical guild reasons.<sup>29</sup> Attorneys are officers of the court<sup>30</sup> and it is understandable that the judicial system would want to have considerable influence over the selection of its officers. The selection of attorneys to represent someone is, therefore, not a purely private matter.

It would be difficult, and perhaps inefficient, for consumers to be able to obtain solid information about the basic competence and honesty of attorneys they are considering. All Sony 42-inch plasma TVs may be essentially the same, but it would be hard to say the same thing about most groups of attorneys. In theory, at least, the public might depend upon the school graduation to assure basic quality, and there might be private testing of attorneys, but beyond that, obtaining good information

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27. *Id.* at 9-10.

28. *Id.* at 9.

29. Public efficiency and the costs to others of inadequate counsel are considered in notes 31-32 *infra* and accompanying text.

30. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002).



about the basic competence of individual attorneys would be challenging for many members of the public.<sup>31</sup>

Attorneys also have an impact on others beyond those engaging them. Opposing parties, for example, may pay costs of delay and unnecessary fees when the other party is represented by incompetent or unethical counsel. In this manner, therefore, one party can, in effect, impose on others the costs of the party having selected incompetent or inadequate attorneys.

The legitimacy of the licensing of attorneys depends primarily on protecting the public from incompetent and inadequately trained attorneys and from dishonest people who would use the status of attorney to cheat and harm others.<sup>32</sup> The test of the licensing system, therefore, ultimately relies on whether on balance it is enhancing or harming the interests of the public. The licensing process inevitably reduces the number of people who can practice as attorneys, so the legitimacy of the process must depend on an improvement in the quality and the elimination of the inadequately trained or dishonest attorney.

The current licensing of attorneys in the United States generally consists of three parts:<sup>33</sup>

1. An education requirement. Most attorneys must have completed an undergraduate degree (or at least three years of undergraduate work) and have graduated from an accredited law school.
2. A test. Almost all states require the successful completion of a test of basic legal skills and knowledge.

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31. In this way, of course, major law firms and similar employers would be in a very different position than average members of the public. The sophisticated users of legal services represent a market with substantially different information about practitioners. For many average citizens, the license represents the qualification they will rely on to seek legal advice. The degree to which more, comprehensive and reliable information and reviews will become available to the public as a result of the internet remains to be seen.

32. STEPHEN G. BREYER & RICHARD B. STEWART, *ADMINISTRATIVE LAW AND REGULATORY POLICY* 5-11 (3d ed. 1992). See *MODEL CODE OF PROF'L RESPONSIBILITY* EC 1-2 (1983) (noting that "the public should be protected from those who are not qualified to be lawyers by reason of a deficiency in education or moral"); ASS'N OF AM. LAW SCHS., *BAR EXAMINATION STUDY PROJECT* 3 (1976) (licensing is to prevent harm by incompetent practitioners).

33. See generally NAT'L CONF. OF BAR EXAMINERS AND A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, *COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS* (2007) [hereinafter, *COMPREHENSIVE GUIDE*]; Nat'l Conf. of Bar Examiners, *2005 Statistics*, *THE BAR EXAMINER*, May 2006, at 23 [hereinafter, *Statistics*].

3. Fitness. Applicants must demonstrate good character and fitness for the practice of law.

The first two of these are intended to ensure basic competence in legal skills and knowledge of the law.<sup>34</sup> The third is intended to protect the public from liars, cheats and other unscrupulous characters.<sup>35</sup>

For many years the American Bar Association has urged that states require both graduation from an ABA approved law school and passing a bar examination as the basis for licensure.<sup>36</sup> These are in some ways redundant. After all, a solid legal education will have repeated testing of the knowledge and competence of law students. Or, if a bar examination is really good, it should be able to test adequately whether someone is prepared to practice law whether or not the person has attended law school.

The redundancy in part reflects the sense that neither law school graduation nor passing a bar exam provides the necessary assurance of competence.<sup>37</sup> In truth, the bar exam tests a small part of the skills and values that the profession and public expect will be imparted in law school.<sup>38</sup> At best, for example, it only modestly tests legal research, problem solving skills or oral advocacy.<sup>39</sup> It is a single exam with all the

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34. A.B.A. COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) (the profession should "assure the public and the courts that its members are competent").

35. Aaron M. Clemens, *Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants*, 40 AKRON L. REV. 255 (2007). See Michael K. McChrystal, *A Structural Analysis of the Good Moral Character Requirement for Bar Admission*, 60 NOTRE DAME L. REV. 67 (1984) (states universally require good moral character for licensing).

36. See A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS iv (2006) [hereinafter STANDARDS]

(The Council and the ABA believe that every candidate for admission to the bar should have graduated from a law school approved by the ABA, that graduation from a law school alone should not confer the right of admission to the bar, and that every candidate for admission should be examined by public authority to determine fitness for admission).

37. *Id.*

38. STANDARDS, *supra* note 36, at 126. The ABA's standards for legal education explain that: "Bar examinations . . . encourage law graduates to study subjects not taken in law school[,] . . . to view the separate subject courses . . . as a related whole[, and to] be examined by persons other than those who taught them, a valuable experience in preparation for appearing before a completely strange judge." *Id.*

39. Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269 (2007); Katharine Rosenberry, *Organizational Barriers to Creativity in Law Schools and the Legal Profession*, 41 CAL. W. L. REV. 423

risks of single high-stakes tests.<sup>40</sup> At the same time, most states are not entirely comfortable with law schools defining by themselves who has and has not become sufficiently competent to practice law.<sup>41</sup> In some ways the bar exam is meant to be a check on law schools and what they are demanding of graduates.<sup>42</sup>

It is possible to imagine an examination system without an education requirement. In some ways California has a hint of such a system. California permits graduates from ABA accredited law schools to sit for

(2005); Lorenzo A. Trujillo, *Law School: The Relationship Between Law School and the Bar Exam: A Look at Assessment and Student Success*, 78 U. COLO. L. REV. 69 (2007).

40. There are many criticisms of the bar examination process, e.g., Andrea A. Curcio, *A Better Bar: Why and How the Existing Bar Exam Should Change*, 81 NEB. L. REV. 363 (2002); Kristin Booth Glen, *When and Where We Enter: Rethinking Admission to the Legal Profession*, 102 COLUM. L. REV. 1696 (2002); Daniel R. Hansen, Note, *Do We Need the Bar Examination? A Critical Evaluation of the Justifications for the Bar Examination and Proposed Alternatives*, 45 CASE W. RES. L. REV. 1191 (1995). For an interesting and controversial suggestion for bar passage efforts see Christian C. Day, *Law Schools Can Solve the "Bar Pass Problem"—"Do the Work!"*, 40 CAL. W. L. REV. 321 (2004).

41. Among the few exceptions, Wisconsin has a diploma privilege for the University of Wisconsin and Marquette Law schools and does not require a bar examination for graduates of those schools. Wis. Sup. Ct. R. 40.03. Specifically, this rule states:

Legal competence requirement: Diploma privilege. An applicant who has been awarded a first professional degree in law from a law school in this state that is fully, not provisionally, approved by the American Bar Association shall satisfy the legal competence requirement by presenting to the clerk certification of the board showing:

- (1) Satisfactory completion of legal studies leading to the first professional degree in law. The law school shall certify to the board satisfactory completion of not less than 84 semester credits earned by the applicant for purposes of the degree awarded.
- (2) Satisfactory completion of study in mandatory and elective subject matter areas. . . .

*Id.*

New Hampshire is also experimenting with eliminating the bar examination for some students. Leigh Jones, *Skipping over the Bar: New Hampshire Program Allows Students to Practice Before Passing the Dreaded Exam*, AMERICAN LAWYER, STUDENT EDITION, June 2006, available at <http://www.americanlawyerse.com/0806/newhampshire.html> (last visited Mar. 12, 2007).

42. STANDARDS, *supra* note 36, at 126 (bar exam "should determine that the content of the applicant's education is such that upon admission he will be able to adequately serve the public").

the bar examination.<sup>43</sup> It also permits students from California accredited law schools to take the bar exam.<sup>44</sup> Even graduates of law schools that are not California accredited, including correspondence schools and online schools, may take the California bar examination if they pass the “Baby Bar” after the first year of law school.<sup>45</sup> It is also possible to read for the law in California.<sup>46</sup>

The result of this system is to put enormous pressure on the bar exam. The consequence is that in 2005 only 46 percent of all of the test takers in California passed the bar examination.<sup>47</sup> Even among ABA schools the overall bar passage rate was only 54 percent.<sup>48</sup> It was 16 percent for non-ABA schools.<sup>49</sup> The first-time taker rate was somewhat higher, with a total first-time taker rate of 62 percent.<sup>50</sup> The state thus puts enormous reliance on a single exam that has very real limits. The California bar examination is a standard deviation more difficult (based on MBE scores) than its easiest sibling, South Carolina.<sup>51</sup>

The bar admissions system in California raises the interesting question of whether California accredited schools or unaccredited schools, whose graduates can take the bar examination, put Gresham’s Law-like pressure

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43. STATE BAR OF CAL., RULES REGULATING ADMISSION TO PRACTICE LAW IN CAL. R. VII, § 2(a) (2006) [hereinafter STATE BAR REG.].

44. *Id.* at R. VII, § 2(b)(1). California conducts its own accreditation system with standards that appear to be noticeably less rigorous than the ABA. Compare STATE BAR OF CAL., RULES REGULATING ACCREDITATION OF LAW SCHOOLS IN CALIFORNIA R. 2 [hereinafter ACCREDITATION IN CALIFORNIA] (listing twelve very generalized accreditation standards, such as “a sound educational program”), with STANDARDS, *supra* note 36, at 11-48 (listing over forty specific Standards and guidance for interpretation, such as Standard 302(a), which requires that “each student receive substantial instruction” in legal writing, analysis, reasoning, research, and problem-solving as well as substantive law and oral communication). For the official list of law schools in California, see [http://calbar.ca.gov/state/calbar/calbar\\_generic.jsp?cid=10115&id=5128#\\_cal](http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10115&id=5128#_cal) (last visited Mar. 12, 2007).

45. STATE BAR REG., *supra* note 43, at R. VII, §§ 2,4,6; R. VIII, § 1(a).

46. *Id.* at R. VII, § 3.

47. NAT’L CONF. OF BAR EXAMINERS, 2005 STATISTICS 1 (2005), [http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar\\_Admissions/2005stats.pdf](http://www.ncbex.org/fileadmin/mediafiles/downloads/Bar_Admissions/2005stats.pdf) (last visited Mar. 12, 2007).

48. *Id.* at 3.

49. *Id.*

50. *Id.* at 5.

51. *Id.* The National Conference of Bar Examiners indicates that a standard deviation on the Multistate Bar Examination is approximately 15 points. The difference between South Carolina and California is slightly more than 15 points. See COMPREHENSIVE GUIDE and *Statistics*, *supra* note 33 (presenting data on MBE performance nationally); personal correspondence with NCBE (May 19, 2007; May 21, 2007).

on the accredited schools to reduce quality.<sup>52</sup> There may, in fact, be such pressure, but it is not significant. Because the diplomas, for bar examination purposes, are equivalent for qualifying for the bar exam, Gresham's law would seem to suggest that the low quality in the schools might tend to drive out what is expected to be the higher quality education at ABA schools. Yet, for the most part this does not appear to be happening.<sup>53</sup> There may be several reasons. For one thing the diplomas of some of these schools are not really equivalent even for the examination purposes. The unaccredited school students must take the "Baby Bar"<sup>54</sup> after the first year, which is a significant bar admissions difference between the two types of schools.

Among California accredited law schools, compared with ABA schools, there are substantial admissions differences because very few states outside of California will accept California accredited schools as meeting the educational requirement for admission to practice in those states.<sup>55</sup> If, therefore, a student in his or her career will ever want to practice in

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52. Applicants to law school would likely see on-line law school as requiring less of a commitment of time and energy, at a minimum because it does not require that they be present physically or that their plans be disrupted with a rigorous class attendance schedule. Robert E. Oliphant, *Will Internet Driven Concord University Law School Revolutionize Traditional Law School Teaching?*, 27 WM. MITCHELL L. REV. 841 (2000); Andrew S. Rosen, *Concord University School of Law's On-line Law Degree Program*, 15 ST. JOHN'S J. LEGAL COMMENT. 311 (2001).

53. Applications have declined in recent years to ABA approved law schools, but there is no evidence that this is related to applicants being drawn to unaccredited schools. Rather, it appears to be related to a cyclical reduction in the number LSAT test-takers. The LSAT test administration data are reported at <http://www.lsac.org/LSAC.asp?url=lsac/tests-administered.asp> (last visited May 19, 2007). See LAW SCH. ADMISSION COUNCIL & A.B.A., A.B.A./LSAC OFFICIAL GUIDE TO A.B.A.-APPROVED LAW SCHOOLS 64-72 (2007); LAW SCH. ADMISSION COUNCIL & A.B.A., A.B.A./LSAC OFFICIAL GUIDE TO A.B.A.-APPROVED LAW SCHOOLS 64-72 (2006); LAW SCH. ADMISSION COUNCIL & A.B.A., A.B.A./LSAC OFFICIAL GUIDE TO A.B.A.-APPROVED LAW SCHOOLS 64-73 (2005).

54. STATE BAR REG., *supra* note 43, at R. VIII, § 1(a). The First Year Law Students' Examination, commonly known as the "Baby Bar," is an examination required of students who wish ultimately to take the California Bar examination and are studying at unaccredited law schools in California. *Id.* It is given after the first year of law school. *Id.* It covers the basic first-year subjects. COMM. OF BAR EXAMINERS OF THE STATE OF CAL., DESCRIPTION AND GRADING OF THE FIRST YEAR LAW STUDENTS' EXAMINATION 1, <http://calbar.ca.gov/calbar/pdfs/40sf03010.pdf>. In part it protects weak students by preventing schools from exploiting them by continuing them in law school after the first year of classes. It may also protect the public by providing an additional barrier to licensing those with weak legal skills.

55. COMPREHENSIVE GUIDE, *supra* note 33.

another state, the absence of ABA accreditation will probably preclude that. There is generally a very substantial reputational difference between most of the California accredited schools and most of the ABA schools. In addition, California accreditation does not always qualify law schools to seek, or students to obtain, certain scholarship, loan or other benefits.<sup>56</sup> Finally, the California bar examination is so difficult and the pass rate for many of the California accredited and unaccredited law schools is so low, that the bar examination itself probably operates to interfere with the operation of Gresham's Law.

This situation could, of course, change. If other states routinely accept California accreditation for admission to their bar, for example, it is possible that Gresham's law would operate to put pressure on some ABA schools to lower the quality of their programs.

The operation of a form of Gresham's Law can be seen in a very different way in the reaction of law schools to *U.S. News* rankings.<sup>57</sup> Here the nominal benefits of receiving a good ranking are essentially independent of the true intrinsic value of a law school and its programs.<sup>58</sup>

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56. Organizations that sponsor scholarships, writing contests or student aid, for example, commonly specify that the organization must be an ABA approved law school. The ABA Section of Legal Education and Admissions to the Bar and its Accreditation Committee are the bodies recognized by the U.S. Department of Education to accredit law schools. STANDARDS, *supra* note 36, at iv. If an institution does not have ABA accreditation, it would need some other DOE recognized accreditation to obtain federal student loan funds. The Department of Education summarizes this requirement for students, "The U.S. Department of Education requires that schools that participate in our federal student aid programs be accredited. You also could find that your state education agency's aid programs won't pay for your attendance at unaccredited schools." U.S. Dept. of Educ., <http://studentaid.ed.gov/PORTALSWebApp/students/english/consider.jsp?tab=choosing> (last visited May 19, 2007).

57. *U.S. News & World Report* publishes annual rankings of ABA accredited law schools based on a weighted average of twelve factors. See Robert J. Morse et al., *How We Rank*, U.S. NEWS & WORLD REP., Apr. 10, 2006, at 59. These include peer and lawyer/judge assessment scores, acceptance rates, bar passage rates, expenditures per student, and other factors. *Id.*

58. Most of the law school deans in the country have signed a letter to law school applicants criticizing the use of *U.S. News*.

The absence of any consideration of [many] factors, combined with the arbitrary weighting of numerical factors, makes ranking systems an unreliable guide to the differences among law schools that should be important to you. . . . A ranking system that exemplifies the shortcomings of all "by the numbers" schemes is the one produced annually by U.S. News & World Report. While ignoring [important variables] . . . the U.S. News rankings purport to be derived from mathematical formulae based on data common to all law schools. The 'weights' attached to the variables are arbitrary and reflect only the view of the magazine's editors.

Law School Admission Council, <http://www.lsac.org/LSAC.asp?url=lsac/deans-speak-out-rankings.asp>.

In a sense, using Mundell's formulation,<sup>59</sup> it would not be surprising to see bad practice and information tending to drive out or put pressure on good academic or information practices in the *U.S. News* process. *U.S. News* will accept good academic practice and bad academic practice (e.g., admissions practices) as the same ("they exchange for the same price").<sup>60</sup> It will even often accept good information and bad information as the same.<sup>61</sup> But, the bad practice may result in a higher rating (nominal value).<sup>62</sup>

Because the nominal value or benefit of a good rating is separated from the true or intrinsic value of a law school program, and *U.S. News* accepts good and bad practices as the same, we could expect that the *U.S. News* process would tend to drive out good practice and reward bad. In fact, educators and others complain that is exactly what happens.<sup>63</sup> Complaints are common, for example, that admissions decisions at a number of law schools are influenced by the desire to make the law school look slightly better than it is based on LSAT scores and the like.<sup>64</sup> *The New York Times* reported that several law schools engaged in questionable practices to make themselves look better.<sup>65</sup> Northwestern

59. Mundell, *supra* note 2, at 10 ("cheap money drives out dear, if they exchange for the same price").

60. Michael Sauder & Ryon Lancaster, *Do Rankings Matter? The Effects of U.S. News & World Report Rankings on the Admissions Process of Law Schools*, 40 *LAW & SOC'Y REV.* 105, 110 (2006). The authors repeat two criticisms of the rankings: "that they are methodologically inaccurate signals of . . . law school quality," and that the ranking process itself distorts "the distribution of quality among law schools . . . [thus] reshap[ing] the[ir] reputational terrain." *Id.*

61. It has been reported for some years that some law schools "fudge" the data, or outright lie about it. See *infra* note 65 and accompanying text regarding the University of Illinois, Northwestern and Indiana University. Furthermore, if a school does not provide some data, the magazine may simply estimate (make up) the data. It routinely does so, for example, for placement rates at graduation. The good (true) and the bad (made up or false) data appear the same in the magazine.

62. If a law school increases its range of LSAT scores by either fudging or changing its admissions practices to look better in *U.S. News*, it will presumably go up in the rankings. See Pamela Edwards, *The LSAT, U.S. News & World Report, and Minority Admissions: The Shell Game: Who Is Responsible for the Overuse of the LSAT in Law School Admissions?*, 80 *ST. JOHN'S L. REV.* 153 (2006).

63. See Sauder & Lancaster, *supra* note 60, at 109-10 (describing how rankings lead administrators to emphasize "'the numbers' rather than educational quality"). Deans complain, from time to time, that their schools are being penalized unfairly for honest reporting and that they are under pressure to similarly fudge their data.

64. *Id.* at 110 (listing "strategies schools have adopted to game the rankings").

65. Alex Wellen, *The \$8.78 Million Maneuver*, *N.Y. TIMES*, July 31, 2005, § 4A, at 18.

and Indiana University law schools, for example, briefly hired some of their own graduates for short internships to make its employment statistics look better and the University of Illinois incorrectly attributed the difference between the Lexis educational rate and commercial rate as a law school expenditure and a contribution to the law school.<sup>66</sup>

Deans sometimes say in private that they feel they must fudge figures or engage in other inappropriate academic behavior because other law schools are doing so and will get ahead of them. It is a sad commentary that the ABA accreditation Standards had to be changed to indicate that law schools were required to provide honest and correct data regardless of where the information was published.<sup>67</sup>

The primary focus of Gresham's Law in this article, however, is on accreditation. The existence of an education requirement means that there must be some definition of an acceptable legal education. Gresham's Law helps to explain why.

#### IV. GRESHAM'S LAW AND ACCREDITATION

The legal education requirement to sit for the bar exam is defined as requiring a specific degree.<sup>68</sup> The nominal value is a diploma from law school. The intrinsic value of the degree, of course, is the education, skills and values, and the close evaluation of candidates implied by the degree itself. In qualifying for the bar examination, therefore, it is possible to separate the nominal value of the degree from the intrinsic value of the education.

Without some definition of the education requirement, any matchbook diploma would do. Not only would there be individuals sitting for the bar exam without the benefit of legal education, but the existence of this option would put pressure on legitimate legal education to become easier, shorter and weaker. Thus, the bad diplomas would tend to put pressure on, but probably not drive out, the good diplomas. Because a bar exam would still await anyone wishing to be licensed, the matchbook

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66. *Id.*

67. STANDARDS, *supra* note 36, at Standard 509 ("A law school shall publish basic consumer information . . . [which] shall be published in a fair and accurate manner."). Interpretation 509-3 provides:

Standard 509 requires a law school fairly and accurately to report basic consumer information whenever and wherever that information is reported or published. A law school's participation in the Council-designated publication referred to in Interpretation 509-2 and its provision of fair and accurate information for that book does not excuse a school from the obligation to report fairly and accurately all basic consumer information published in other places or for other purposes.

*Id.* at 38.

68. STATE BAR REG., *supra* note 43, at R. VII, § 2(a).



degrees might not be very attractive, but institutions focused solely on getting their students through the bar examination might be sufficiently attractive to put pressure on other law schools to become more like diploma mills with a strong focus on the bar examination.

This is not to say that sitting for the bar exam is not the only value of or market for a law degree.<sup>69</sup> Presumably law firms, especially larger firms, would in any event distinguish among law students and law schools based on quality.<sup>70</sup> This is, of course, fully consistent with the technical operation of Gresham's Law where, we noted earlier, economists have recognized that it operates only if there is a market somewhere that recognizes the true intrinsic value as being higher than the nominal value of the money.<sup>71</sup> In the case of law schools, Gresham's Law predicts that there is a potential for a competition downward to see how little can be required for the degree as it relates to qualifying applicants to sit for the bar (as opposed to other values of the degree). Other "markets" for holders of the JD (*e.g.*, sophisticated law firms) certainly impact much of legal education, but do not necessarily eliminate all of the effects of Gresham's Law.<sup>72</sup>

Accreditation ensures sham degrees cannot satisfy the bar examination's education requirement. ABA accreditation has the advantage of providing a uniform, national standard by which legal education can be defined and reviewed. It avoids not only the inefficiency of each state having to do it itself, but the political pressures and problems that would inevitably arise in many states if this accreditation were purely local.<sup>73</sup>

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69. The operation of Gresham's Law is essentially related to the fact that a law degree, at least from an ABA-accredited school, qualifies the holder of the degree to sit for the bar examination, regardless of the quality of the education underlying the degree. *See supra* text following note 28.

70. The mechanisms by which law firms take account of the quality of those they interview and hire are the subject of their own problems, which, fortunately, are beyond the scope of this article.

71. *See supra* text accompanying notes 20-28.

72. Many of the other consumers of JD degrees do not rely on the basic diploma from law schools, as bar examiners do, in making decisions regarding law school graduates. Perhaps many individual consumers may often be unaware of the educational qualifications of attorneys, but law firms, businesses and the like do not view all law degrees as being equal. As noted above, this market (other than qualification to sit for the bar examination) is consistent with Gresham's Law. *Id.* The discussion of internships demonstrates that Gresham's Law can work even hidden within legal education. *See infra* notes 115-121 and accompanying text.

73. Some states, notably California, do have state accreditation as an alternative to ABA accreditation. *See, e.g.*, ACCREDITATION IN CALIFORNIA, *supra* note 44; COMPREHENSIVE

Law schools commonly put strong emphasis on the interests of their students.<sup>74</sup> They also appropriately focus on the interests of their faculty and staff, and the institutional interests of the law school and the university.<sup>75</sup> This emphasis on the education and graduation of students often includes a desire for the admission of its graduates to the profession with as little difficulty as possible, which accounts for the periodic strained relations between law schools and bar admitting authorities.<sup>76</sup> These emphases of law schools are extremely important and certainly appropriate. Schools should see their students as their reason for existing and as their primary constituents. Law schools are serving the public by providing a sound legal education to their students, but the public interest generally is not specifically given great consideration in law school decisions.<sup>77</sup>

Law schools and universities are not the only ones that emphasize protection of students. The U.S. Department of Education, for example, also focuses on protecting students and government funds used to make student loans.<sup>78</sup> It requires that essential information be available to

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GUIDE, *supra* note 33. State accredited law schools by and large are weaker and have lower bar passage rates than do nationally accredited schools.

74. Law schools generally see students as their immediate clients or customers. It is common in law schools to hear discussion of the students' interests, but less common to have the public's interests in quality legal care discussed. As a result, law schools are often somewhat more sympathetic to, or easier on, the students than the bar examiners or their law firms will be. *See generally* Robert M. Lloyd, *Hard Law Firms and Soft Law Schools*, 83 N.C.L. Rev. 667 (2005) ("American law practice, like American business, has become Harder in recent years. At the same time, American law schools have become Softer. The result is that law schools are doing a poor job of preparing students for practice"). *Id.* at 667.

75. In my experience, the public interest in its graduates is not a major factor as universities make decisions regarding their law schools. Faculty and staff understandably put institutional and even personal interests ahead of any concerns about the public interest. The external discipline of ABA accreditation, therefore, is an opportunity to inject public interest concerns into the decision making of law schools and their universities.

76. *See supra* notes 38-42 and accompanying text.

77. In my experience, formal and informal discussions among law faculty concerning bar results and the bar exam are primarily focused on the institutional interests (notably reputation) and students' interest (costs, jobs and career delay). Most of the discussion of the bar examination in articles published by law faculty focus on these same questions or the general inadequacy of the exam in testing students. *See supra* notes 38-42 and accompanying text. Criticisms of the bar exam as being inadequate truly to test law practice skills do concern the public interest, but are more often actually a concern about the failure rate on the bar exam. *Id.*

78. *See* 34 C.F.R. § 602.1-602.50 (2007).

students,<sup>79</sup> that there be student support services,<sup>80</sup> and that students receive debt counseling.<sup>81</sup>

Many accrediting bodies also put considerable emphasis on student and institutional interests, as well as general educational quality.<sup>82</sup> Regional and other general accrediting agencies, for example, commonly see student protection as a basic role of their accreditation.<sup>83</sup> This is appropriate given the obligations to their constituents and their reason for being.<sup>84</sup>

Accreditation associated closely with licensing is different. Licensing exists to protect the public interest.<sup>85</sup> The education requirement of licensing provides the public with well-educated professionals. License-related accreditation is intended to ensure that the education requirement

79. See 34 C.F.R. § 602.16(a)(1)(vii) (2007) (a DOE recognized accrediting agency must have standards related to “[r]ecruiting and admissions practices, academic calendars, catalogs, publications, grading, and advertising”). The regulations also require that accrediting agencies consider institutions’ compliance with standards related “to student achievement in relation to the institution’s mission, including, as appropriate, consideration of course completion, State licensing examination, and job placement rates.” *Id.* at (i).

80. *Id.* at (vi).

81. *Id.* at (x)

(an accrediting agency’s standards must address an institution’s “[r]ecord of compliance with . . . [its] program responsibilities under Title IV of the Act, based on the most recent student loan default rate data[,] . . . the results of financial or compliance audits, program reviews, and any other information that the Secretary may provide to the agency”).

82. JUDITH S. EATON, AN OVERVIEW OF U.S. ACCREDITATION 2 (Council for Higher Educ. Accreditation 2006).

83. *Id.* The mission statement of a major collective of accrediting agencies, the Council for Higher Education Accreditation, for example, emphasizes this: “The Council for Higher Education Accreditation will serve students and their families, colleges and universities, sponsoring bodies, governments, and employers by promoting academic quality through formal recognition of higher education accrediting bodies and will coordinate and work to advance self-regulation through accreditation.” *Id.* at 2.

84. Accrediting bodies not closely related to licensing may appropriately take into account the interests and missions of its members. In this sense it can have a narrower or more specialized set of interests it is seeking to protect. The Association of American Law Schools, for example, is an organization of law school members and its membership review process (accreditation) can appropriately take into account the interests of law schools, law professors and law students in its member schools. See *infra* notes 107-08 and accompanying text. The Department of Education is increasingly taking the view, over the objection of many accrediting agencies, that recognized agencies should be required to push accredited schools to measure the “outcomes” of their educational programs. Paul Basken, *Education Department to Push for Major Changes in Accreditation*, 53 CHRON. HIGHER EDUC., May 11, 2007, at A36.

85. See *supra* notes 29-35 and accompanying text.

of licensing, in fact, produces well-educated professionals.<sup>86</sup> To fulfill this function, the primary focus of license-related accreditation agencies must be on accrediting only those programs that produce reasonably well-qualified professionals.

These agencies should also avoid applying requirements unnecessary to this function. Such requirements may interfere with the agencies' primary mission of ensuring reasonable quality, prevent legitimate competition among education providers and unnecessarily drive up the costs of professional education.<sup>87</sup>

For legal education, if the legitimacy of the licensing of attorneys depends on protecting the public (including the courts), the main focus of license-related education standards must be the protection of the public by ensuring that law students are reasonably well trained and examined as part of the education process.<sup>88</sup>

Using the authority of the licensing process (certifying the educational program is sufficient for licensing purposes) to promote goals other than the public interest carries risks. It should be done with care for several reasons. The "mission creep" to other goals may divert critical attention and resources of the accrediting agency away from ensuring reasonably high quality professional preparation.<sup>89</sup> Even worse, it raises the possibility of a conflict of interest between the obligations to the public and obligations to others (faculty, institutions or students).<sup>90</sup>

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86. See *supra* notes 32-36.

87. There are periodic claims that accreditation, and ABA accreditation of law schools in particular, violates antitrust concepts. See Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L. Q. 1035 (2001). The ABA signed a consent decree limiting the ability of the Section of Legal Education and Admissions to the Bar to, among other things, take into account faculty salaries in the law school accreditation process. *Id.*

88. The same point, of course, applies to other professional accrediting bodies that are closely tied to licensure in their professions. For example, the American Medical Association and Association of American Medical Colleges joint Liaison Committee on Medical Education carries many of the same responsibilities as the ABA in ensuring that it operates in the best interest of the public. See LIAISON COMM. ON MEDICAL EDUC., FUNCTIONS AND STRUCTURE OF A MEDICAL SCHOOL: STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE, PART 2: STANDARDS AND EXPLANATORY ANNOTATIONS (2007), <http://www.lcme.org/functions2007jun.pdf>.

89. "Mission creep" in accreditation may result from the influence of special interests who seek to use the authority of accreditation to promote accreditation requirements more closely tied to those special interests than to the public interest. Mission creep may also result when a license-related accrediting agency fails to expressly tie its accrediting policies to the public interest. See Steven Smith, *The Best System of Accreditation in America*, 38 SYLLABUS 1 (2006).

90. If ABA accreditation were to focus too clearly on student interests, for example, it might begin to minimize its public interest obligation to ensure full and rigorous legal education. At some point such a student emphasis could harm the public

The American Bar Association, particularly its Section of Legal Education and Admissions to the Bar, has for many years promoted itself as an important part of the licensing process.<sup>91</sup> It has been very successful.<sup>92</sup> A testament to its credibility over the years is the fact that every state will accept graduation from an ABA-approved law school as meeting the graduation requirements for sitting for the bar.<sup>93</sup> In most states it is the only certification that will meet that requirement.<sup>94</sup> This success in tying its accreditation to licensing places an especially strong obligation on the ABA Section of Legal Education and Admissions to the Bar to operate the accreditation system in the interest of the public. The ABA accreditation process has intentionally become a critical part of a system that gains its legitimacy from the protection of the public interest.<sup>95</sup>

When undertaken with care, the protection of students and others may be consistent with the obligations to the public in ABA or other license-related education. The obligation to provide some protection to students, for example, arises from the ABA's recognition by the Department of Education.<sup>96</sup> Students are members of the public so they deserve that "public protection" as does the rest of society, but that relates to their role as clients or beneficiaries of the legal system generally. Licensing is not intended to provide special benefits to those preparing for the

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by being overly concerned about immediate student interests. Consider the situation in which a law school (in a state requiring ABA approval to sit for the bar exam) applies for accreditation, but its quality of instruction does not justify accreditation. The interest of students of that school, as they graduate, is to receive accreditation for the school so they can be admitted to the bar. That student interest would conflict with the public interest in having well-educated lawyers. If the ABA accreditation process were so concerned about the students that accreditation were granted to the law school despite its inadequacies, the public interest would be harmed by this concern for the students.

91. See STANDARDS, *supra* note 36, at iv.

92. COMPREHENSIVE GUIDE, *supra* note 33.

93. *Id.* at 10-16.

94. *Id.*

95. STANDARDS, *supra* note 36.

96. The DOE recognizes the Council of the Section of Legal Education and Admissions to the Bar and the Accreditation Committee as the accrediting bodies for legal education and it imposes some requirements that focus on the protection of students as consumers of legal education. The Department of Education mandate includes certain specific protections of students' and taxpayers' money. The ABA, of course, must meet the DOE requirements if it seeks to be a recognized accrediting agency. The ABA is able to meet these requirements without threatening its obligation to put the public interest first. Having DOE recognition, however, does not reduce the ABA's obligation to the public. See *supra* notes 78-81 and accompanying text.

profession.<sup>97</sup> If anything, it imposes burdens on them in the interest of the general public and the courts.<sup>98</sup>

Accreditation might also secondarily take into careful consideration a few other interests, including those of the legal profession. The bar turned over to the academy its traditional role in training the next generation of the legal profession, but it retains a clear interest in how future lawyers are educated.<sup>99</sup> Not all such secondary interests are as legitimate. The use of ABA accreditation to benefit the faculty or staff of law schools or the financial interests of universities, for example, would be difficult to justify.<sup>100</sup>

The structure of the ABA accreditation process promotes the participation of the judiciary, practicing bar and public, as well as the academy.<sup>101</sup> The Council also has a student representative.<sup>102</sup> This mix of membership is a strength in that it provides multiple perspectives focused on the preparation of lawyers. It also carries the risk that accreditation could be diverted from its primary public purpose.

Where the interests of the public and the interests of students (or others) conflict, however, an accreditation system directly tied to licensing would be obligated to first consider and protect the interests of the public. Tying the education requirement to licensing, after all, is justified on the basis that the public will be harmed by inadequately trained and tested

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97. Presumably one of the reasons for ABA accreditation is to prevent law schools from making graduation “too easy” for students, resulting in inadequate preparation for legal practice. *See supra* note 90.

98. The legal profession set up the accreditation system, but it cannot legitimately operate it to protect its own interest by, for example, reducing the number of students graduating from law schools artificially to restrain competition among lawyers.

99. *See* authorities cited *infra* note 110.

100. The use of ABA accreditation for the purpose of serving the interests of faculty would not promote the public interest, and might well indirectly harm it. That is different than when accreditation incidentally helps the faculty in pursuit of the public interest. For example, reducing the student-faculty ratio of law schools can improve the education of students and thereby serve the public interest by allowing clinical courses, better instruction in legal writing instruction, small group instruction and closer attention to individual students. *See STANDARDS, supra* note 36, Standard 402 and Interpretations 402-1 to 402-4 describing in great detail the way to calculate the student-faculty ratio and determining that a ratio of 20-1 is presumptively in compliance with the Standards. *Id.* at Interpretation 402-2(1). Reducing the student-faculty ratio may incidentally improve the professional lives of faculty by reducing student loads, enhancing the teaching environment and allowing work on their own projects. The student-public interest is a legitimate reason for the ABA rule, the faculty interest is not.

101. The Accreditation Committee and the Council both have membership of all four groups. A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, SECTION BYLAWS at Article IV (the Council) and Article VIII (the Accreditation Committee) (2006), available at <http://www.abanet.org/legaled/section/bylaws.html>.

102. *Id.*

attorneys.<sup>103</sup> Therefore, the public interests deserve the primary consideration.

The interests of the public and of students are, for the most part, consistent in the long run. Requiring that students be treated with care and respect may, for example, help them to become better, more considerate professionals.<sup>104</sup> It is easy to imagine, however, circumstances in which a conflict between public and student interests could arise in accreditation. Suppose, for example, that it would be possible to substantially reduce the costs of legal education but doing so would significantly reduce the quality of attorneys and increase the likelihood of inadequately trained lawyers. This trade-off might be acceptable for, and even good for, students, but it would be inappropriate for the licensing system, and hence accreditation tied to licensing, to accept this reform. Because there is no shortage of attorneys in the United States,<sup>105</sup> a reform that would produce attorneys faster or at lower cost, but less well prepared, would not be in the interest of the public. There is undoubtedly some public interest in having lawyers with the lowest possible debt following law school,<sup>106</sup> but that interest would certainly be overcome by the interest in well-prepared lawyers.

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103. See *infra* notes 29-36 and accompanying text.

104. Professor Larry Krieger, and others, have emphasized the destructive elements of law school and the legal profession and that law schools can help students prepare for the stresses of the legal profession. Lawrence S. Krieger, *Essay on Professionalism and Personal Satisfaction: the Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425 (2005). See Patrick J. Schiltz, *On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession*, 52 VAND. L. REV. 871 (1999). Problem solving, therapeutic jurisprudence, holistic lawyering and similar approaches may be one mechanism by which law students, lawyers and clients can avoid such stresses and enjoy more productive and healthy relationships. Susan Daicoff, *Law as a Healing Profession: The "Comprehensive Law Movement"*, 6 PEPP. DISP. RESOL. L.J. 1(2006).

105. See Jonathan Macey, *Ethics in Corporate Representation: Lawyers, Self-regulation, and the Idea of a Profession*, 74 FORDHAM L. REV. 1079, 1093 (2005); Thomas D. Morgan, *Real World Pressures on Professionalism*, 23 U. ARK. LITTLE ROCK L. REV. 409, 410 (2001).

106. The public interest in lawyers with low student debt includes the possibility that those with great debt will be unduly driven to charge clients for unnecessary service, charge higher prices or decline to engage in *pro bono* activities. A.B.A. COMM'N ON LOAN REPAYMENT AND FORGIVENESS, LIFTING THE BURDEN: LAW STUDENT DEBT AS A BARRIER TO PUBLIC SERVICE 14-28 (2003); Omar J. Arcia, *Comment, Objections, Administrative Difficulties and Alternatives to Mandatory Pro Bono Legal Services in Florida*, 22 FLA. ST. U. L. REV. 771, 796 (1995); L. Kinvin Wroth, *Access to Justice: The Problem of Law Student Debt*, 30 VT. B.J. & L. DIG. 28 (2004). It is far from clear that

In this way an accreditation system that is closely tied with licensing has different obligations than does an accreditation system responsible to a learned society, a professional teachers' group or even the Department of Education. The Association of American Law Schools (AALS), for example, should feel less constrained about promoting the interests of law schools, students or faculty, perhaps even at the expense of the public.<sup>107</sup> The legitimacy of the AALS membership (accreditation) process depends not on protecting the public, but rather on the shared values of its law school members.<sup>108</sup> Such is not the case with the ABA.<sup>109</sup>

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the level of student debt is actually related to any of these problems. See Ken Myers, *Despite Debt and Lure of Firms, Pro Bono Work Is Catching on*, 18 NAT'L L.J. A18, col.1 (Oct. 16, 1995).

107. ASS'N OF AM. LAW SCHOOLS, BYLAWS AND EXECUTIVE COMMITTEE REGULATIONS PERTAINING TO THE REQUIREMENTS OF MEMBERSHIP Bylaw § 6-1(a) (2006) [hereinafter AALS BYLAWS] (membership requirements "are intended to reflect the Association's core values and distinctive role as a membership association, while according appropriate respect for the autonomy of its member schools"), available at [http://www.aals.org/about\\_handbook\\_requirements.php#6](http://www.aals.org/about_handbook_requirements.php#6). These core values include:

- (i) a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community;
- (ii) scholarship, academic freedom, and diversity of viewpoints;
- (iii) a rigorous academic program built upon strong teaching in the context of a dynamic curriculum that is both broad and deep;
- (iv) a diverse faculty and staff hired, promoted, and retained based on meeting and supporting high standards of teaching and scholarship and in accordance with principles of non-discrimination; and
- (v) selection of students based upon intellectual ability and personal potential for success in the study and practice of law, through a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession.

*Id.* at Bylaw § 6-1(b).

108. *Id.*

109. See STANDARDS, *supra* note 36, at viii. The Preamble to the ABA Standards begins:

The Standards for Approval of Law Schools of the American Bar Association are founded primarily on the fact that law schools are the gateway to the legal profession. They are minimum requirements designed, developed, and implemented for the purpose of advancing the basic goal of providing a sound program of legal education. The graduates of approved law schools can become members of the bar in all United States jurisdictions, representing all members of the public in important interests.

*Id.*



## V. LEGITIMATE BASES FOR ACCREDITATION IN THE PUBLIC INTEREST

With the public interest as the focus of ABA accreditation, three legitimate bases for regulation of law schools (or other professional schools) can be identified.<sup>110</sup> The first is ensuring that law graduates understand the basic skills, knowledge and obligations of lawyers. Many of the ABA Standards focus exactly on this kind of regulation. For example, Standard 302 provides that a law school must require each student to receive “substantial instruction” in such topics and skills as substantive law, legal analysis and reasoning, legal research, problem solving, oral communication, writing in a legal context, and professional responsibility.<sup>111</sup> Another example, of a different character, is Standard 303, which requires that law schools “monitor students’ academic progress and achievement from the beginning of and periodically throughout their studies.”<sup>112</sup> The

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110. James P. White, *History of the Administration of the American Law School Accreditation Process*, 51 J. LEGAL EDUC. 438 (2000). For other views on the legitimacy and history of American law schools and accreditation, see 1-2 THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES (Steve Sheppard ed., 1999); ALBERT J. HARNO, LEGAL EDUCATION IN THE UNITED STATES (1953); FRANCES KAHN ZEMANS & VICTOR G. ROSENBLUM, THE MAKING OF A PUBLIC PROFESSION (1981); and ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S (1983).

111. STANDARDS, *supra* note 36, Standard 302(a). Specifically, “a law school must ensure each student receive[s] substantial instruction in” the following subject areas:

- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
- (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
- (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
- (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
- (5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.

*Id.*

112. *Id.* at Standard 303. In full, this Standard provides:

- (a) A law school shall have and adhere to sound academic standards, including clearly defined standards for good standing and graduation.
- (b) A law school shall monitor students’ academic progress and achievement from the beginning of and periodically throughout their studies.
- (c) A law school shall not continue the enrollment of a student whose inability to do satisfactory work is sufficiently manifest so that the student’s

Interpretation of this Standard requires that the scholastic achievement be “evaluated by examinations of suitable length and complexity, papers, projects, or by assessment of performances of students in the role of lawyers.”<sup>113</sup> This Standard should help protect the public by ensuring that students are tested throughout their law school careers which, presumably, should help assure the public that they are actually learning something in law school.

A second legitimate basis for accreditation in the public interest is to avoid the harmful effects of Gresham’s Law.<sup>114</sup> Accreditation should seek to prevent unproductive competition that harms the quality of legal education and the public interest. Several of the Standards do just that. An example of this is the detailed regulation of internship placements in Standard 305.<sup>115</sup> That Standard requires careful supervision of such internships, appropriate resources for teaching these internships, evaluating and training field placement supervisors, opportunities for student reflection and the like.<sup>116</sup>

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continuation in school would inculcate false hopes, constitute economic exploitation, or detrimentally affect the education of other students.

113. *Id.* at Interpretation 303-1 (“Scholastic achievement of students shall be evaluated by examinations of suitable length and complexity, papers, projects, or by assessment of performances of students in the role of lawyers.”).

114. In this sense, accreditation is appropriate to preclude good, solid educational practices from being inappropriately threatened by bad, inadequate practices.

115. See STANDARDS, *supra* note 36, at Standard 305 (permitting academic credit for study outside the classroom under certain, particularized conditions).

116. *Id.* For example, part (e) provides:

A field placement program shall include:

- (1) a clear statement of the goals and methods, and a demonstrated relationship between those goals and methods to the program in operation;
- (2) adequate instructional resources, including faculty teaching in and supervising the program who devote the requisite time and attention to satisfy program goals and are sufficiently available to students;
- (3) a clearly articulated method of evaluating each student’s academic performance involving both a faculty member and the field placement supervisor;
- (4) a method for selecting, training, evaluating, and communicating with field placement supervisors;
- (5) periodic on-site visits or their equivalent by a faculty member if the field placement program awards four or more academic credits (or equivalent) for field work in any academic term or if on-site visits or their equivalent are otherwise necessary and appropriate;
- (6) a requirement that students have successfully completed one academic year of study prior to participation in the field placement program;
- (7) opportunities for student reflection on their field placement experience, through a seminar, regularly scheduled tutorials, or other means of guided reflection. Where a student can earn four or more academic credits (or equivalent) in the program for fieldwork, the seminar, tutorial, or other means of guided reflection must be provided contemporaneously.

Before the adoption of this Standard some law schools were sending students for semesters away from the law school at poorly supervised and educationally suspect internships.<sup>117</sup> Everyone seemed to have an interest in a nearly corrupt system.<sup>118</sup> The law school was receiving tuition for which it was providing little in return.<sup>119</sup> Students were obtaining credit for little academic work and the agencies and offices (placements) were receiving free law clerks.<sup>120</sup>

Not only was this circumstance not good for the students at the schools permitting this, but it became a case of bad programs harming ("driving out") good ones. Schools not participating in these weak programs were pressured by their students and by internship placements to forgo serious supervision, to permit semesters away without academic content and to limit the reports required from on-site supervisors.<sup>121</sup> Because the credit (nominal value) was received whether or not there was any serious learning going on (intrinsic value), the solid programs were being threatened by weak programs. It was appropriate for accreditation to limit this harmful form of competition for the weakest internship programs.

A third legitimate basis for accreditation in the public interest is the indirect assurance of quality of law school education. It would be ideal if law schools and other professional schools could rely exclusively on measuring outputs. Truly effective output measures in the professions would have two parts: they would compare a school's students against absolute norms of adequate skills, knowledge, values and the like; and

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*Id.*

117. Regarding internship practices, see Peter A. Joy, *Evolution of ABA Standards Relating to Externships: Steps in the Right Direction?*, 10 CLINICAL L. REV. 681 (2004).

118. The system was "corrupt" in the sense that, as one practitioner described it to me, law schools were "taking students' tuition money with one hand and pointing them out the door with the other hand." Personal conversation with Richard Nahstoll (Former Chairman, ABA Accreditation Committee).

119. Students in unsupervised internships have almost no instruction costs to the law school.

120. The effort to wring out these abuses was the subject of considerable debate. See Joy, *supra* note 117.

121. Students from weak programs were able to achieve academic credit without as much work as those (sometimes in the same office) from strong programs. As an associate dean in those days I heard students in internships that required hard work and close supervision complain to their schools that they were being disadvantaged. Furthermore, some law office placements complained that the supervision by faculty at good programs was burdensome compared with the free-wheeling operation of an unsupervised weak program.

they would measure the relative benefit the school gives its students (value added). If truly reliable, testable measures existed, of course, there would be little need for accreditation because licensing authorities could depend directly on the output measures to assess the appropriateness of licensing any given candidate.

Output measures used in law schools have generally been bar examination results, placement information and general information about the acceptability of graduates to the bench and bar. Of these, bar exam results have been of special importance.<sup>122</sup> At the same time that there are calls for more reliance on outcome measures, ironically, the use of bar results as an outcome measure in ABA accreditation has become more controversial.

There is considerable interest within education, including legal education, in developing better output measures and those improvements have the potential for vastly changing accreditation. This sea change in accreditation would require three elements: clear definitions of required professional competencies; reliable, valid and fair assessment of those competencies; and rigorous application of the assessment to students and to law schools. Such an approach also has the promise of significantly improving the bar exam as an element of licensing. As difficult as this process appears, other professions have taken steps that suggest that there is now real promise it can succeed.<sup>123</sup>

In the absence of good output measures accreditation must depend on a combination of output and input factors. Many of the existing accreditation Standards deal with input measures. For example, the quality of students admitted to the law school,<sup>124</sup> the quality of faculty<sup>125</sup> and the structure of the curriculum<sup>126</sup> are all forms of input measures.

Accreditation is also intended to ensure that there is a system in place that can be relied upon over time to continue to produce legitimate quality education. Direct measures of what is happening in law school

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122. Standard 301(a) provides, "a law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession." Standard 501(b) ties admissions and bar success together: "A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession."

123. NAT'L ARCHITECTURAL ACCREDITING BD., NAAB PROCEDURES FOR ACCREDITATION (2006), [http://www.naab.org/usr\\_doc/2006\\_Procedures.doc](http://www.naab.org/usr_doc/2006_Procedures.doc). Regarding medical accreditation criteria, see STANDARDS FOR ACCREDITATION OF MEDICAL EDUCATION PROGRAMS LEADING TO THE M.D. DEGREE, *supra* note 88. For an excellent review of the use of assessment of outcomes in medicine, see Ronald M. Epstein, *Assessment in Medical Education*, 356 NEW ENG. J. MED. 387 (2007).

124. Standards 501-508 deal with admissions tests and admission of students.

125. Standards 401-405 deal with a variety of issues related to faculty.

126. Standards 301-307 deal with a number of issues related to the curriculum and course of study.

occur infrequently, usually only once every seven years. Part of ensuring that this quality can endure is to consider measures of a school's infrastructure, including the library,<sup>127</sup> facilities<sup>128</sup> and finances.<sup>129</sup>

A substantial number of the ABA accreditation Standards relate to the infrastructure of a school. The Standards are important to ensure that good quality is going to continue, but these Standards deserve careful and continuing review. The review should consider whether law schools are being unnecessarily burdened without improving the quality of lawyers available to the public, and whether law schools are being prevented from finding efficiencies or competing in areas that are not necessary for preparation of good attorneys.

Input measures and indirect measures that include infrastructure are legitimate concerns of accreditation given the current limitations on direct measures and outputs. The legitimacy of such measures, however, in promoting the public interest becomes more doubtful as the connection between the input or the infrastructure to the quality of the attorneys available to the public becomes more distant. Having an adequate teaching library would have a fairly direct impact on the quality of instruction for students.<sup>130</sup> Having a private office for each faculty member has a more indirect and less obvious impact and requires, therefore, greater justification.<sup>131</sup>

Not all of the current Standards are clearly legitimate in terms of directly protecting the public by assuring quality legal education, avoiding Gresham's Law or taking account of essential input measures. Everything can, of course, be connected in some indirect way to the public interest, but the legitimacy of the connection to accreditation is the issue. Some of the Standards not connected to the public interest are of little concern,

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127. See Standards 601-606 and 702.

128. See Standards 701-703.

129. A number of Standards deal with various financial aspects of the law school and resources for its programs. See, e.g., 201(a), 201(b), 210(c) and 601(b).

130. A teaching library is necessary for students to learn basic research skills, to prepare for class and to undertake writing assignments required for class and to become familiar with basic legal materials. Whether the Standards should require a research, as opposed to teaching, library is a matter of some debate. It would legitimately be part of the Standards only if law schools were required to have a research mission. See *infra* notes 146-53 and accompanying text.

131. The justification, presumably, is that private offices encourage confidential conversations with students and increase faculty efficiency. The degree to which that is true should be established more clearly if the ABA accreditation Standards are going to include them.

but others are of considerable debate.<sup>132</sup> For example, Standard 511 provides that a law school must “provide all its students, regardless of enrollment or scheduling option, with basic student services, including . . . an active career counseling service to assist students in making sound career choices and obtaining employment.”<sup>133</sup> This Standard is probably unobjectionable in that it does little harm to the public interest, but its legitimacy is at best marginally connected to the ABA’s obligation to the public interest.<sup>134</sup>

Examples of inappropriate use of accreditation to avoid the harmful effects of Gresham’s Law would focus on restraining competition where the competition is not harmful to academic quality. Some people believe that an example of such an inappropriate use are all of the Standards related to “terms of employment.”<sup>135</sup> These Standards, for example, require a tenure system for faculty,<sup>136</sup> security of employment for clinical faculty,<sup>137</sup> and other protections for librarians,<sup>138</sup> deans<sup>139</sup> and others.<sup>140</sup> This debate

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132. The matters of more serious debate currently center around “conditions and terms of employment.” See *infra* notes 135-41 and accompanying text.

133. STANDARDS, *supra* note 36, at Standard 511. This Standard says in full:

A law school shall provide all its students, regardless of enrollment or scheduling option, with basic student services, including maintenance of accurate student records, academic advising and counseling, financial aid counseling, and an active career counseling service to assist students in making sound career choices and obtaining employment. If a law school does not provide these types of student services directly, it must demonstrate that its students have reasonable access to such services from the university of which it is a part or from other sources.

*Id.*

134. It is possible that the career services office requirement serves the public interest by helping reduce the “mismatch” between students and employers that would occur without the career services office. That those offices significantly reduce such mismatches is an essential assumption for the Standard.

135. AM. LAW DEANS ASS’N, STATEMENT OF THE ALDA BOARD AT THE HEARING OF THE ABA ACCREDITATION TASK FORCE (Jan. 5, 2007).

136. Standard 405(b), for example, provides, “A law school shall have an established and announced policy with respect to academic freedom and tenure of which Appendix I herein is an example but is not obligatory.”

137. Standard 405(c) provides, in part,

A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided other full-time faculty members. A law school may require these faculty members to meet standards and obligations reasonably similar to those required of other full-time faculty members.

138. Standard 603(d) provides, “Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty position.”

139. Standard 206(c) says, “Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure.”

140. Standard 405(d) provides that,

over the terms of employment illustrates the difficulty that can arise in determining what is legitimate competition. While one person may see an important indirect mechanism to ensure that clinical instruction is of high quality, someone else will see the same regulation as inappropriately limiting the flexibility of law schools to staff their programs in a way that is most efficient and effective for that law school. The public interest is either enhanced by providing stable clinical faculty that promote good clinical education, for example, or it is harmed by the inflexibility and results in clinical programs that are not sufficiently attuned to the immediate needs of the law school programs.

The debate also reflects the difficulty in using accreditation Standards to promote universally agreed upon goals. For example, there is little question but that academic freedom is essential to any strong law school program. Successful law school instruction relies on the open and free exchange and clash of ideas. Challenging, unpopular and new ideas cannot thrive unless academic freedom exists and can be relied on within the law school. Law school constantly deals with the most controversial subjects because almost all of them have important legal aspects. Members of law school faculties will inevitably upset powerful forces in the government, the corporate world, foundations, religious groups and the press. Some of those upset with law faculty will be in a position to apply enormous pressure on universities through political coercion or threats to funding, or directly through the board of the institution. Therefore, protecting academic freedom is in the interest of the public. The question arises, however, whether tenure is necessary to protect academic freedom.<sup>141</sup> If it is, then a tenure system is in the public interest because it implements the essential value of protecting academic freedom which in the long run is necessary for acceptable law school instruction.

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A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2), and (2) safeguard academic freedom.

141. If academic freedom can, in the long run, be protected without a tenure system, then law schools might be given a range of options for protecting academic freedom. The difficulty in this area is that trying to protect academic freedom after the fact is not very helpful. Furthermore, the "chilling effect" on academic freedom from attacks on those with unpopular views makes a tenure system of particular importance where, as in law, scholarship and teaching may offend powerful interests.

## VI. INNOVATION AND THE PUBLIC INTEREST

Another difficult question arises concerning innovation and variances from the requirements of the Standards. The public is undoubtedly served by educational innovations that work. It is not served by innovations that seriously interfere with the education of students. In some respects the interest of the public in innovation in professional education is like innovation in medical treatment. Standard treatments assure a level of quality given current medical knowledge, but a new or experimental treatment carries the promise of improvement.

The ABA accreditation system allows innovation in two ways. First, many of the Standards allow considerable, and unrecognized, latitude to law schools. For example, the curricular requirements of the Standards are sufficiently general to allow a great deal of experimentation with the academic program of the law school.<sup>142</sup> It is interesting to note that despite the fact that the Standards say very little about the first year of law school, the variations among law schools in the first year curriculum are not great.

Even where the Standards are specific, however, a law school seeking to undertake an innovative program that would otherwise violate the

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142. The curricular requirements are very general, in contrast with much more detailed regulation in other areas. Rather than requiring specific courses, they set out general areas of instruction. Standard 301 requires "an educational program that prepares . . . students for admission to the bar, and effective and responsible participation in the legal profession." The Standard that deals with most of the curricular requirements is Standard 302. It provides:

- (a) A law school shall require that each student receive substantial instruction in:
  - (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
  - (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
  - (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
  - (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
  - (5) the history, goals, structure, values, rules, and responsibilities of the legal profession and its members.
- (b) A law school shall offer substantial opportunities for:
  - (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one's ability to assess his or her performance and level of competence;
  - (2) student participation in pro bono activities; and
  - (3) small group work through seminars, directed research, small classes, or collaborative work.



Standards may seek a variance under Standard 802.<sup>143</sup> That Standard provides approval of experimental programs when they are conducted in a way that is consistent with sound educational policy, good research design and ethical obligations.<sup>144</sup> This provision is relatively new and attempts to ensure that legitimate, high-quality educational experiments can proceed, while protecting the public from inadequate preparation from some graduates that could result from a failed experiment.<sup>145</sup>

Variances may also be used inappropriately in an attempt to obtain a competitive advantage in a regulated field. For example, if a school were to seek a variance that permitted its students to graduate with only four semesters of instruction, rather than six, it would have the potential for a substantial Gresham's Law-like market advantage by being able to offer the nominal value of a law school diploma without requiring the full intrinsic value of legal education. Or, if a school sought a variance

143. Standard 802 provides:

A law school proposing to offer a program of legal education a portion of which is inconsistent with a Standard may apply for a variance. If the Council finds that the proposal is nevertheless consistent with the general purposes of the Standards, the Council may grant the variance, may impose conditions, and shall impose time limits it considers appropriate. Council may terminate a variance prior to the end of the stated time limit if the school fails to comply with any conditions imposed by the Council. As a general rule, the duration of a variance should not exceed three years.

144. Interpretation 802-1 provides the following:

Variances are generally limited to proposals based on one or more of the following:

- (a) a response to extraordinary circumstances that would create extreme hardship for students or for an approved law school; or
- (b) an experimental program based on all of the following:
  - (1) good reason to believe that there is a likelihood of success;
  - (2) high quality experimental design;
  - (3) clear and measurable criteria for assessing the success of the experimental program;
  - (4) strong reason to believe that the benefits of the experiment will be greater than its risks; and
  - (5) adequately informed participation by students involved in the experiment.

STANDARDS, *supra* note 36.

145. Interpretation 802-2 sets out the information a school must provide when seeking a variance:

A school applying for a variance has the burden of demonstrating that the variance should be granted. The application should include, at a minimum, the following:

- (a) a precise statement of the variance sought;
- (b) an explanation of the bases and reasons for the variance; and
- (c) additional information needed to support the application.

from the requirement that entering students take the LSAT or similar examination, in a competitive market they might be able to claim that they were offering easier admission than any other accredited law school could. Unless there were a strong experimental reason to permit such a variance, it would be akin to spot zoning in that it would allow one law school to have an advantage unavailable to others in the area. In some circumstances this would invite the problems of Gresham's Law in which schools would seek variances to have the nominal advantage of ABA approval without the costs of the intrinsic public benefits of accreditation.<sup>146</sup>

## VII. ISSUES CONCERNING FACULTY SCHOLARSHIP AND PUBLICATION

Several of the ABA accreditation Standards seem to require that law schools have a faculty scholarship commitment. Standard 401, for example, requires that the faculty possess "a high degree of confidence, as demonstrated by its . . . scholarly research and writing."<sup>147</sup> Standard 402 is somewhat ambiguous but may require that the full-time faculty be large enough to permit opportunities for the faculty to "conduct scholarly research."<sup>148</sup> Standard 404 requires the law school to have policies

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146. For a discussion of the changes in the variance provisions of the Standards, see A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, COMMENTARY ON REVISIONS TO STANDARDS FOR APPROVAL OF LAW SCHOOLS 2005-2006 at 13-14 (2006), <http://www.abanet.org/legaled/standards/adoptedstandards2006/standardsreviewcommentary2005-06approvedchanges.pdf> (last visited May 20, 2007).

147. Standard 401 provides:

A law school shall have a faculty whose qualifications and experience are appropriate to the stated mission of the law school and to maintaining a program of legal education consistent with the requirements of Standards 301 and 302. The faculty shall possess a high degree of competence, as demonstrated by its education, experience in teaching or practice, teaching effectiveness, and scholarly research and writing.

148. Standard 402 provides:

- (a) A law school shall have a sufficient number of full-time faculty to fulfill the requirements of the Standards and meet the goals of its educational program. The number of full-time faculty necessary depends on:
- (1) the size of the student body and the opportunity for students to meet individually with and consult faculty members;
  - (2) the nature and scope of the educational program; and
  - (3) the opportunities for the faculty adequately to fulfill teaching obligations, conduct scholarly research, and participate effectively in the governance of the law school and in service to the legal profession and the public.
- (b) A full-time faculty member is one whose primary professional employment is with the law school and who devotes substantially all working time during the academic year to the responsibilities described in Standard 404(a), and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as a

regarding its faculty's "responsibilities in teaching, scholarship, [and] service. . . ."<sup>149</sup>

Law school scholarly research serves many important functions. It is the location of most of the "pure research" in law, that is, research not required by or connected to specific cases or disputes.<sup>150</sup> It provides a very wide range of thinking and creativity regarding the law, the legal system and lawyers. It sometimes results in a greater understanding of the law, provides the opportunity to try creative solutions to problems before they need to be implemented by courts and legislatures, is an opportunity to consider the legal problems that society will face in the future and is sufficiently removed from the day-to-day operation of the legal profession to allow a somewhat detached commentary on the

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scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.

149. Standard 404 provides:

- (a) A law school shall establish policies with respect to a full-time faculty member's responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school. The policies need not seek uniformity among faculty members, but should address:
  - (1) Faculty teaching responsibilities, including carrying a fair share of the law school's course offerings, preparing for classes, being available for student consultation, participating in academic advising, and creating an atmosphere in which students and faculty may voice opinions and exchange ideas;
  - (2) Research and scholarship, and integrity in the conduct of scholarship, including appropriate use of student research assistants, acknowledgment of the contributions of others, and responsibility of faculty members to keep abreast of developments in their specialties;
  - (3) Obligations to the law school and university community, including participation in the governance of the law school;
  - (4) Obligations to the profession, including working with the practicing bar and judiciary to improve the profession; and
  - (5) Obligations to the public, including participation in pro bono activities.

150. See Robert P. Schuwerk, *The Law Professor as Fiduciary: What Duties Do We Owe to Our Students?*, 45 S. TEX. L. REV. 753 (2004)

("because we generally do not conduct our scholarly work for clients, we are not restricted in our work, as are practicing members of the bar, by professional obligations to select and to advocate legal positions designed to advance our client's interests to the fullest extent possible within the bounds of the law.").

profession as well as the law.<sup>151</sup> These benefits, of course, accrue to society and the profession more than to individual law students.

Modern scholarly publication has been criticized by thoughtful judges as being unrelated to the real needs of the law, written only for other law professors and essentially irrelevant.<sup>152</sup> My conversations with excellent lawyers and judges, the very members of the practicing profession we would hope would be consumers of some legal scholarship, cause concern that too little scholarship is of immediate value to them in improving the law.<sup>153</sup> Despite these worrisome criticisms, however, for this article I assume that in the long run at least legal scholarship has important public utility.<sup>154</sup> If that assumption is not true, then the remainder of this section is unnecessary; having an ABA license-related accreditation requirement related to research would be very hard to justify.

It is less clear what law students receive from their schools' research missions. Some believe that they receive better teaching, although that is a matter of dispute. The studies that have been done that attempt to correlate quality of teaching and level of faculty research activity have not consistently demonstrated such a correlation.<sup>155</sup> It has not been demonstrated very well, therefore, that research in fact improves teaching.

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151. Philip F. Postlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 158 (2000) (suggesting publication serves the academy, the student body, the general public, and the profession).

152. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 42-43 (1992). For a discussion of the issues raised by Judge Edwards see *Symposium: Legal Education*, 91 MICH. L. REV. 91 (1992).

153. Schuwerk, *supra* note 150, at 763 (reviewing the response to Judge Edwards' article).

154. That may be a somewhat unwarranted assumption, of course. The citations by the Supreme Court are small and probably declining. Louis J. Sirico, Jr. & Jeffery B. Margulies, *The Citing of Law Reviews by the Supreme Court: An Empirical Study*, 34 UCLA L. REV. 131, 134 (1986) (noting low level of citations to law review articles). Follow ups on the article found a continuing trend. Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L.J. 1009, 1010 (2000) ("we find a continuing decline in number of times the Court cited legal periodicals."); Louis J. Sirico, Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051 (1991) (noting again the low percentage of law review citations).

155. Professor Benjamin Barton recently conducted a study comparing five research measures with law faculty teaching evaluations. He concluded, "none of these five measures of research productivity correlate with teaching evaluations." Benjamin Barton, *Is There a Correlation Between Scholarly Productivity, Scholarly Influence and Teaching Effectiveness in American Law Schools? An Empirical Study* 16 (1st Ann. Conf. on Empirical Legal Studies, July 1, 2006), available at <http://ssrn.com/abstract=913421>.

Professor Barton noted that his conclusions are consistent with fifty years of studies that have been done that correlate quality of teaching generally and level of research. Three studies were meta-analysis or collections of other studies. "Overall, these

Students may also benefit from the new ideas that might be implemented while they are practicing and from the general improvement in the law and legal profession that result from excellent legal research.<sup>156</sup> It is fair to say, however, that most law students would not voluntarily choose to pay for law school research missions.<sup>157</sup> This may be different for students in some elite or near-elite law schools where the reputation related to research activities may be sufficient to improve the employment prospects of students. For the majority of law students, such benefits are far from obvious.

The question arises of whether accreditation that focuses on the public interest (licensing) legitimately can require law schools to have faculties engaged in scholarship and publication.<sup>158</sup> The answer in part depends on the operation of Gresham's Law.

This is not an idle question because the research mission of most law schools is quite expensive. It results in substantial reductions in the teaching loads of faculty, libraries with resources many times what would be required for a simple teaching mission, and a variety of support services for research. It also probably results in faculty salaries that are higher than they would be if the school were focusing on teaching alone.<sup>159</sup> The salaries for groups of faculty without research

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three overviews establish that there is either no correlation or a slight positive correlation between research productivity and teaching." *Id.* at 2. Similarly, two studies looking at law school teaching reached somewhat inconsistent results, but at best did not find any strong correlation between teaching quality and research productivity. *Id.* at 3.

156. Schuwerk, *supra* note 150, at 753.

157. *But see* David L. Gregory, *The Assault on Scholarship*, 32 WM. & MARY L. REV. 993, 999 (1991) (an advantage to students of faculty writing is that professors will not be able to "foster critical analytical skills [in students if they do not write and thereby allow their] own skills [to] atrophy").

158. This is, of course, a different question than whether the AALS can legitimately demand such a commitment to scholarly activities because its legitimacy comes from the shared values that include scholarship. *See supra* note 108.

159. It is impossible to know exactly what a market for teaching-only faculty would be. The lower salaries currently paid to most legal writing instructors may suggest what teaching-only faculty would be paid, although there is at least some suggestion that these salaries reflect other factors. *See* Jan M. Levine & Kathryn M. Stanchi, *Women, Writing & Wages: Breaking the Last Taboo*, 7 WM. & MARY J. WOMEN & L. 551 (2001); Kristin B. Gerdy, *A Snapshot of Legal Research and Writing Programs through the Lens of the 2002 LWI and ALWD Survey*, 9 LEGAL WRITING 227 (2003). If large numbers of schools looked for teaching-only faculty, there would possibly be better information about teaching "stars" who could command substantial salaries based on their teaching excellence. In the absence of schools seeking these non-publishing teachers, or if good information about teaching were not available, then faculty salaries for pure teachers

obligations, just teaching, are often considerably lower than faculty with research obligations.<sup>160</sup>

Law schools are unusual among graduate and professional schools in that the vast majority of research and scholarship in law schools is funded by tuition.<sup>161</sup> In medical schools, science and engineering and many social science disciplines, the majority of research is funded by outside sources, grants and contracts. Some private funds may be donated specifically for research, but those funds seldom cover the cost of research. In state-supported law schools, it is possible that the taxpayers are supporting the research mission through the tax subsidy to the law school. The declining state support for public law schools in most states suggests that even in public law schools, a substantial portion of the funding for faculty research comes from tuition payments.<sup>162</sup>

The tuition that is used to cover legal research is, for most students, the equivalent of an involuntary fee that they must pay in order to obtain a law degree and law instruction. It is not obvious that students are the ones who should be paying the cost of legal scholarship. They are

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might be lower than the current range of faculty salaries driven to a considerable extent by publication expectation.

160. I estimate the substantial reduction in costs from these factors could include: possible reduction in full-time faculty by up to 40% (to provide the same number of courses taught by full-time faculty: one extra course in fall and spring semesters per faculty instead of a research expectation, and a "summer course" instead of "summer research grants," assuming that sabbatical and other reduced loads would not change, but that there would be some increase in governance responsibilities); possible 25% reduction in per-faculty compensation, although this is speculative (*see supra* note 159); faculty staff support service reduction of perhaps 30% (resulting from the reduced number of faculty and the reduced pull on the staff for research purposes); reduction in library expenses of perhaps 25% (a significant reduction of library collection expenditures, staff support for research and space as the library provides teaching resources only, and does not try to have a faculty research collection); and a small (possibly 10%) reduction in general administrative support. These estimates are based in a general way on the law school reports of expenditures reported in A.B.A. SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, FISCAL TAKE OFFS 2006 (2007) (the ABA distributes to law schools, on a confidential basis, data that are taken from the Annual Questionnaire of the ABA that details the sources of support).

161. The funding for research in law schools comes from a variety of sources. There are a few grants or donors who specify a research purpose for their donations. Other donors provide money without specifying its use, and those funds may also go for research (although, presumably, they could also be used for instruction, scholarships or the like). In other cases there are indirect student tuition sources, including university "research grants" that come from general student tuition.

162. At least two public law schools, Virginia and Michigan, have gone completely without state subvention. Denis Binder, *The Changing Paradigm in Public Legal Education*, 8 LOY. J. PUB. INT. L. 1, 2-15 (2006). Even where there is some state support, the proportion of law school expenses coming from tax support is declining. *See* John A. Sebert, *The Cost and Financing of Legal Education*, 52 J. LEGAL EDUC. 516 (2002).

generally borrowing the money to do this and they are the least able of all those in the profession to pay for it.<sup>163</sup> At the same time, they are the currently available source of funds for much of this activity. It would, however, be possible for some law schools to escape this fee for their students by declining to have a research mission, if that were permitted by the accreditation Standards.

The argument for an ABA license-related research requirement rests on several assumptions. First, the assumption is made that research will serve the public interest by being the source of “pure” research in law. The second assumption is that it is appropriate for entrants to the legal profession to bear the burden of that expense in the cost of their legal education. Third, the assumption is that the benefit to the public is less than the increase in costs to students. The argument against an ABA research requirement is that one or more of these assumptions fails. If, for example, law school research efforts serve the public interest only very marginally at great cost to students, then there would not be a good argument for licensing-related accreditation requiring research.

Because scholarly activities are expensive it is likely that without an accreditation requirement, a number of accredited schools would no longer expect to have a significant scholarly or publication mission. If that were to happen, they could focus on teaching and presumably could offer instruction at a significantly reduced cost.<sup>164</sup> Once some schools started doing that it would be reasonable to expect that it would put pressure on a large number of schools that are not elite or near-elite. Because students at schools both with and without research missions will receive the same JD degree, the bad practice (no research mission) could begin to drive out the good practice (schools with a research mission).<sup>165</sup>

Accreditation Standards can prevent this operation of Gresham’s Law from occurring by requiring that all schools have a research mission. If the tuition students pay for faculty research is in effect a fee, then the accreditation Standards might be used to ensure that all students pay

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163. *Id.*

164. The high, and increasing, cost of legal education is the cause of some concern among experts. See Sebert, *supra* note 163.

165. Here the credibility provided by AALS membership/accreditation may be important to ameliorate the no-research programs driving out research programs. Similarly, universities with a general commitment to research may insist that their law schools continue with the research mission even in the face of competition from non-research schools.

at least some of this fee by requiring that all law schools engage in significant levels of faculty research and publication.<sup>166</sup> The question is whether it is legitimate for a license-related accreditation system to do so.

Legal education is fortunate to have two well-established accreditation processes. In addition to the ABA approval process, the Association of American Law Schools Membership Requirements are a form of accreditation.<sup>167</sup> Promoting scholarly publication is one of the core values of the AALS.<sup>168</sup> Whatever the legitimacy of the ABA having a research requirement, the AALS as a membership organization that is a scholarly society clearly should have such a requirement. One approach would be to eliminate all scholarly research requirements from the ABA Standards and rely on the AALS to promote scholarly research in law schools. Assuming the AALS would rigorously enforce this core value, it would provide a substantial incentive for law schools to maintain a research mission. Such an option might reduce the pressure of Gresham's Law noted above. Realistically, however, the AALS might be subject to pressure from some of its member schools to reduce its insistence of faculty scholarship if they were facing significant competition from non-AALS schools who abandoned anything other than a thin pretense of a research mission.

For the ABA to impose this research fee on students by means of accreditation is practically difficult. While such a Standard might prevent Gresham's Law from driving out or limiting research missions in many law schools, it is not clear that it would be fair to do so or even successful. For one thing it would be hard to enforce a research Standard. Indeed, the current Standards are ambiguous at best in describing the obligation of accredited law schools to undertake faculty research.<sup>169</sup> It is hard to imagine removing the ABA accreditation of a law school because it engaged in inadequate faculty research. If the ABA, as opposed to the

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166. Even if ABA accreditation were to require that all ABA approved law schools have a research mission, the resulting involuntary fee on law students would not be evenly distributed. Some schools would have an intensive, and expensive, mission, while other law schools might have a minimal, and much less expensive, mission. At least in theory, students could choose to attend a less expensive school with minimal research, but they would not be able to attend an ABA law school with no research mission.

167. See AALS BYLAWS, *supra* note 107.

168. The AALS "core values" include "scholarship" and "a faculty composed primarily of full-time teachers/scholars who [are] engaged in the creation . . . of knowledge about law, legal processes, and legal systems and institutions." *Id.*

169. See Standards 401, 402 and 404, *supra* notes 147-49.



AALS,<sup>170</sup> wishes to establish research obligations for law schools, it should clearly justify either the educational component of such a requirement or why the accreditation system can legitimately be used to impose a research fee on existing students.

### VIII. CONCLUSION

It is perhaps an article of faith that well-educated lawyers improve society and serve the public better than badly educated lawyers. The educational requirement in most states that ties ABA accreditation to licensing is intended to help ensure that there are well-educated lawyers. The close connection of ABA accreditation and licensing, however, means that it has a special obligation to work in the public interest to improve legal education first and foremost. The interests of students and law schools may have a role in accreditation, but not at the expense of the public interest. Efforts to reduce the costs of legal education, for example, that also reduce quality are not in the interests of the public.

The ABA accreditation process has improved quality through adopting and implementing three kinds of Standards. Some Standards deal directly with the educational process; some do so indirectly by requiring effective systems to promote continued quality; and some limit the pernicious effects of Gresham's Law.

In the absence of an accreditation system "any diploma" would do and, in terms of qualifying to sit for the bar exam, the pressure would be for "bad practice" to drive out "good education." While the effect of Gresham's Law can be seen in legal education, for example, in the response to *U.S. News*, accreditation has successfully reduced or eliminated some of the destructive downward spiraling that might have existed.

The different places of the ABA and AALS systems of accreditation deserve consideration. Although the two organizations have traditionally had similar requirements for accreditation, perhaps legal education is outgrowing the need for this duplication. One option is for the ABA to eliminate its Standards that do not fairly clearly promote the public interest, and insist on very strong enforcement of those Standards that do so. This, then, would leave to the AALS enforcing requirements with less clear connections to the public interest, but directly related to its obligations to its law school members, students and faculty.

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170. The AALS more clearly identifies faculty research as an element in its accreditation (membership) system and makes it a "core value." See *supra* note 168 and accompanying text.

The AALS has adopted “core values” that speak directly to many of these interests. For example, the AALS focuses on faculty governance, scholarly research, non-discrimination and diversity, and tenure and academic freedom. Not all ABA law schools are members of the AALS, of course, so AALS requirements cannot substitute for ABA Standards that genuinely protect the public. Such an arrangement has some risk of subjecting the AALS to the effects of Gresham’s Law. Because all ABA schools (whether or not members of the AALS) would give diplomas qualifying their graduates to take the bar examination, and because AALS requirements would cost additional money, some good (AALS) degrees threatened by the bad (non-AALS) degrees and the AALS might be under pressure to reduce its membership requirements. Such pressure now is not significant because there are not dramatic differences in the requirements of the two organizations.

The challenge to the process remains to focus rigorously on the public interest in considering Standards that ensure high quality legal education but permit reasonable levels of flexibility and take advantage of new technology. The Standards also must promote quality and encourage competition among law schools, avoid the problems of Gresham’s Law and encourage efficiency and rigor in the educational process.

# **Third Panel: Sociology**

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